No. 98,487

IN THE SUPREME COURT OF THE STATE OF KANSAS

ROGER ZIMMERMAN and ANGELINA ZIMMERMAN, HARRIS ZIMMERMAN and VIRGINIA ZIMMERMAN, GLEN EBERLE, BILL UNRUH and LINDA UNRUH, ROBERT GOSS and JANET GOSS, KENNETH ANDERSON and COLLEEN ANDERSON, and WILSON VALLEY, L.L.C.
Plaintiff/Appellants,

and

A.B. HUDSON and LARRY FRENCH,
Plaintiff-Intervenors/Appellants/Cross-Appellees

v.

BOARD OF COUNTY COMMISSIONERS OF WABAUNSEE COUNTY, KANSAS
Defendant-Appellee/Cross-Appellant,

BRIEF OF *AMICUS CURIAE* THE WIND COALITION

Appeal from the District Court of Wabaunsee County
Honorable Michael A. Ireland, Judge
Case No. 04 CV 31

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INTEREST OF THE *AMICUS CURIAE*

The Wind Coalition ("Coalition") is a not-for-profit corporation that promotes the development of wind power as a clean, reliable, and renewable source of energy. It consists of more than 40 industry members—many of which operate in Kansas—including companies that develop, construct, and operate wind energy projects, manufacturers of component parts, and non-profit organizations such as the American Wind Energy Association, Environmental Defense Fund, Public Citizen, and Texas Renewable Energy Industries Association. The Coalition maintains a website that describes its membership, its activities, legislative, regulatory, and business developments in the wind energy field, and facts about the history and technology of wind energy. *See* www.windcoalition.org.

The following questions are addressed by the Coalition in this brief:

1. Whether Wabaunsee County's ("County") ban on commercial wind energy projects violates the Commerce Clause *per se* because it discriminatorily impacts interstate commerce in wind-generated power;

2. Whether the County's ban violates the Commerce Clause because it imposes a significant burden on interstate commerce in wind-generated power that is excessive in relation to the County's goals, which could be promoted through more closely tailored regulation with a lesser adverse impact on interstate commerce; and

3. Whether the County's ban takes private property without just compensation because Kansas law recognizes a property interest in wind flow over private land, and the ban totally destroyed that interest, thereby effecting a taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Coalition's views on these issues merit this Court's attention because the Coalition has unique knowledge and experience concerning the commercial development of wind power as a clean alternative energy source in the south-central wind corridor of the United States (including Kansas), and the interstate transmission of energy produced by wind in this region.

Of particular relevance to the Commerce Clause issues before this Court, the Coalition is actively involved in the Southwest Power Pool ("SPP"). SPP is a Regional Transmission Organization mandated by the Federal Energy Regulatory Commission—an agency with jurisdiction over transmission and sale of electricity only when it occurs in interstate commerce—to ensure reliable supplies of power through a robust regional transmission infrastructure. The SPP administers more than 47,000 miles of interconnected transmission lines throughout Kansas and all or part of Arkansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, and Texas, operating the electric grid to ensure that power gets to the more than five million customers of SPP's members. *See* http://www.spp.org/publications/SPP_Fast_Facts.pdf; http://www.ferc.gov/about/ferc-does.asp.

The Coalition describes in this brief how national and state goals and mandates require interstate transmission of energy produced from renewable resources; how the SPP's regional power grid and its ongoing grid enhancement and expansion projects facilitate interstate transmission of wind energy produced in Kansas; and how cost-allocation formulas for these projects mean that local bans on commercial wind energy impact energy markets and utility prices paid by consumers throughout the multi-state region. The Coalition believes that these facts are necessary for this Court's analysis of

the County's blanket ban on all commercial development of this important resource. In addition, the Coalition's familiarity with the contractual arrangements surrounding wind energy development will assist the Court in considering appellants' takings claims.

INTRODUCTION

A central tenet of national energy, economic, and environmental policy is that the United States and private industry has invested, and will continue to invest, in clean, renewable energy in order to reduce dependence upon energy imported from abroad, reduce greenhouse gas emissions, and create domestic jobs (among other goals). *See* http://www.whitehouse.gov/issues/energy-and-environment. Key components of that policy include the development of wind energy in those parts of the country with adequate, reliable wind speeds, and the expansion and improvement of the power grid that carries electricity across the country, such as the regional transmission grid operated by the Southwest Power Pool, described above.

Already, "U.S. wind energy installations produce enough electricity on a typical day to power the equivalent of more than 6.5 million homes." http://www.windpoweringamerica.gov. The U.S. Department of Energy's "Wind Powering America" initiative "is a commitment to dramatically increase the use of wind energy"—an initiative that "will establish new sources of income for American farmers, Native Americans, and other rural landowners, and meet the growing demand for clean sources of electricity." *Id.* A Department report concludes that it is feasible, with investment in wind turbine technology and the smart transmission grid, that "wind [will] provid[e] 20% of U.S. electricity by 2030." U.S. Dep't of Energy, *20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply* 1 (July 2008) ("*20% Wind Energy*"), available at http://www.20percentwind.org/20p.aspx?page=Report.

Indeed, meeting the national goal of a 17% reduction in U.S. carbon emissions by 2020—reiterated this month in international climate talks in Copenhagen—can only practicably be achieved by increasing the proportion of U.S. energy produced using wind and other renewable resources. Federal grants and tax credits for renewable energy developers have been created to help the United States meet its renewable energy goals.

The investment necessary to enhance wind power's place in the Nation's portfolio of energy sources is underway. The Federal American Recovery and Reinvestment Act of 2009 provided for more than $80 billion in clean energy investments, including $11 billion for a bigger and better electric transmission grid that will move renewable energy from the rural places it is produced to the cities where it is mostly used. http://www.whitehouse.gov/issues/energy-and-environment. More than $1.6 billion in public and private funds has already been committed to demonstration projects to enhance the grid. *See* http://www.energy.gov/news2009/8305.htm. Investment is also being made in turbine technology. For example, the U.S. Department of Energy recently announced an investment in a new wind energy test facility that will enhance the performance, durability, and reliability of utility-scale wind turbines. http://www.energy.gov/news2009/8303.htm. As Energy Secretary Chu stated in announcing that project, "We are at the beginning of a new Industrial Revolution when it comes to clean energy"—a revolution in which "[w]ind power holds tremendous potential." *Id.*

Kansas and its neighbors in the south-central United States hold some of the keys to unlock the potential for wind energy to increase U.S. energy security, create new domestic jobs, improve and diversify farm income, and reduce carbon emissions. Wind power is classified in a range from class 1 (the lowest) to class 7 (the highest), with areas

designated class 3 or above being suitable for most wind turbine applications. http://rredc.nrel.gov/wind/pubs/atlas/chp1.html. The National Renewable Energy Laboratory's Wind Energy Resource Atlas reports that a "substantial portion of the South Central region has class 3 or higher annual average wind power," with the "most extensive area of wind resource" encompassing "most of Kansas, Oklahoma, and northwestern Texas, where a large fraction of the land area is well exposed to power-producing winds." http://rredc.nrel.gov/wind/pubs/atlas/chp3.html. Parts of eastern Kansas, including parts of Wabaunsee County, have been assigned class 4 or higher. *Id.*

Not surprisingly, given that Kansas is *third* among all states "for wind energy potential, as measured by annual energy potential in the billions of kWhs" (American Wind Energy Association, Wind Energy Fact Sheet), the citizens of Kansas, through their elected representatives, have adopted a state policy to encourage wind energy projects and to promote the export of Kansas wind energy to other states. See Brief of Appellants pp. 4-6 (Jan. 28, 2009) (citing sources). The State's Renewable Energy Standards Act of 2009, K.S.A. 66-1256 through 66-1262, codifies the State's goal to generate 10 percent of power from renewable sources by 2011, 15 percent by 2015, and 20 percent by 2020. Rulemaking proceedings (in which the Wind Coalition is an active participant) are ongoing before the Kansas Corporation Commission to implement these goals. Even before passage of the Act, Kansas in 2008 added the fourth most wind capacity of any state, more than doubling its capacity. *American Wind Energy Association Annual Wind Industry Report: 2008*, at pp. 8-9, available at http://www.awea.org/publications/reports/AWEA-Annual-Wind-Report-2009.pdf.

Kansas is part of the interstate transmission grid, administered by the Southwest Power Pool, through which electric power generated by wind is transported to consumers throughout the SPP's eight member States and beyond. The SPP's proposed "Priority Projects," totaling some $1.3 billion, would improve and upgrade access to the grid throughout its entire service region. These projects include a major new transmission line through Kansas that will assist the State in meeting its Renewable Energy Standard. *See* http://www.spp.org. Planned new transmission lines, in multiple States, will also accommodate the exportation of energy generated by wind out of the south-central region to load centers to the east and north. *See* http://tinyurl.com/yjta6s5 (Governor Parkinson observes that the "Kansas wind industry is one of the fastest growing in the nation" and SPP's transmission plans "will allow power to flow more efficiently and reliably across the state and region").

The SPP has worked diligently to develop a cost allocation methodology for a balanced portfolio of projects throughout its member States to provide affordable, reliable energy to consumers. *See* http://www.spp.org/section.asp?pageID=120. As a result of this formula, wind energy produced in Kansas and placed in the SPP grid may be used across multiple states, and also impacts the power markets and utility prices paid by consumers region-wide. As more energy is produced in Kansas by wind, the State will furnish power and influence markets across the country.

Wabaunsee County's action in indiscriminately taking all land in the County out of commercial wind energy production, while permitting turbines for on-site power production, discriminates against interstate commerce in power across the regional transmission grid and beyond and also imposes a substantial burden on interstate

commerce that the County has failed to justify. The ban therefore violates the Commerce Clause, which protects interstate commerce in wind-generated power from local interference. In addition, Kansas law recognizes a property right in wind project leases. The intervenors' leasehold interest in wind rights was economically destroyed by the County's zoning change, triggering a compensable taking under the Fifth Amendment.

ARGUMENT

I. WABAUNSEE COUNTY'S BLANKET BAN ON COMMERCIAL WIND ENERGY PROJECTS VIOLATES THE COMMERCE CLAUSE.

Government action violates the Commerce Clause when it "'discriminates against interstate commerce,'" for example by penalizing "producers [depending on] whether they supply the intrastate or interstate market," *or* when it imposes a "'burden [on interstate commerce that] is clearly excessive in relation to the putative local benefits.'" *Northwest Pipeline v. Kansas Corp. Comm'n*, 489 U.S. 493, 523, 525-526 (1989). Wabaunsee County's ban on commercial wind energy fails each of these tests.

A. Wabaunsee County's Blanket Ban On Commercial Wind Energy Unconstitutionally Discriminates Against Interstate Commerce.

The commercial production of electric power from wind indisputably implicates interstate commerce. *See Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests"). Indeed, "it is difficult to conceive of a more basic element of interstate commerce than electric energy." *FERC v. Mississippi*, 456 U.S. 742, 757 (1982). Once power produced by wind turbines enters the transmission grid, the energy instantly energizes the grid, which as described above connects to the seven other states

served by the Southwest Power Pool and beyond. Therefore, electricity by its very nature becomes interstate commerce when connected to the grid. As the United States Supreme Court has observed, it "immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. FERC*, 535 U.S. 1, 7 (2002).

The County bans participation in this important area of interstate commerce. Its zoning regulations provide that "Commercial wind energy conversion systems" are "specifically prohibited" and that "No application for such a use shall be considered." Articles 31-105(30), 31-112. By contrast, the County allows small wind energy systems, permitting one per 20+ acre parcel, subject to height, setback, and density restrictions. Article 31-109. A permitted system must be rated below 100 kilowatts, not exceed 120 feet in height, and be *"intended solely to reduce on-site consumption of purchased utility power."* Articles 1-104(210), 31-109(i)(f) (emphasis added).

Production of wind power energy for supply to the interstate transmission grid is thus flatly prohibited, while production for on-site power is permitted. Regardless whether that distinction is "valid" under K.S.A. 12-753(a), as this Court held (Op. at 40), it violates the Commerce Clause because it "'discriminates against interstate commerce'" by zoning out "producers [who] supply" the "interstate market" while allowing production for local consumption. *Northwest Pipeline*, 489 U.S. at 523. *See also, e.g.*, *Oregon Waste Sys. v. Dep't of Env'tl Quality*, 511 U.S. 93, 99 (1994) ("virtually *per se* invalid" discrimination occurs when there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"; striking down surcharge on out-of-state waste—a form of regulation less burdensome to interstate commerce than Wabaunsee County's outright ban on commercial wind energy projects).

As leading constitutional scholars explain, "States may not create a local economic advantage by restraining the entry of home products into the national market." 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 11.9 (4th ed. 2007).

Kentucky Power Co. v. Huelsmann, 352 F. Supp. 2d 777 (E.D. Ky. 2005), held analogous discrimination to be unconstitutional. Kentucky required utilities to curb service to out-of-state customers before in-state customers in the event of disruption to the power supply. Ky. Rev. Stat. § 278.214 (2004). The court held that this law violated the Commerce Clause because it "discriminates against similarly situated out-of-state interests" by giving "Kentucky residents a preferred right of access to transmission service in the event of a temporary scarcity of that service." 352 F. Supp. 2d at 786-787. Zoning regulations that discriminate among those who are similarly situated with regard to their desire to harness wind energy to produce power, according to whether they intend to supply the interstate market or their own needs, just as clearly violate the Commerce Clause. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

The Constitution prohibits a state from hoarding its resources to the detriment of consumers in other states, whether that is achieved by regulating the receipt of power (as in *Huelsmann*) or its production (as here). As the Supreme Court explained in *New England Power*, 455 U.S. at 338-340, in striking down prohibitions on exporting energy out of state, the Commerce Clause "*precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom*" (emphasis added). That is the effect of Wabaunsee County's discriminatory ban on commercial wind generation while allowing turbines for on-site consumption, and it should meet the same fate.

B. The County's Blanket Ban On Commercial Wind Energy Unconstitutionally Burdens Interstate Commerce.

Even if Wabaunsee County's ban were not *per se* unconstitutional because it blatantly discriminates against interstate commerce, it would still fail the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The "burden imposed" on commerce by the ban "is clearly excessive in relation to" the "putative local benefits," which "could be promoted as well with a lesser impact on interstate activities." *Id.* at 142.

The County's ban on commercial wind energy significantly burdens interstate commerce. The burden imposed on interstate commerce by the County's ban on commercial wind energy projects is that it *entirely eliminates the County as a source of wind-generated energy flowing into channels of interstate commerce*. That burden is substantial. Wabaunsee County encompasses land that is well suited to wind energy development both because of the strength and reliability of the wind flow and because of ready access to thousands of miles of interstate transmission lines connecting Kansas to the seven other States of the SPP and beyond. See pp. 4-5, *supra*. The contributions to the interstate power market of the plaintiff landowners' wind rights, of the intervenors' wind project leases, and of all other future wind-energy projects in this prime part of the south-central wind corridor, will be completely lost as a result of the County's refusal to consider any zoning applications for commercial wind projects.

The County's goals could be promoted with less impact on interstate commerce. Although this Court has found the County's goals in banning wind turbines to be "reasonable," the question under *Pike's* balancing test is not reasonableness but whether those goals could be achieved with a lesser burden on interstate commerce. 397 U.S. at 142. It is difficult to credit a goal of "maintaining the rural character of the County" (Op.

at 33) when wind turbines leave the land available for grazing and cultivation, the landowner's farming operations are uninterrupted and financially healthier, wind turbines are the *only* energy projects barred from the County (neither coal-fired or nuclear generation plants are prohibited), and oil and gas operations and telecommunications towers dot the landscape. But even accepting the County's articulated goals at face value, it does not appear that the County considered whether alternatives to a total ban on commercial wind energy could adequately further its goals.

Without question, those goals could be served with less impact on commerce. Wabaunsee County spans 791 square miles, encompassing seven incorporated communities, five unincorporated towns and villages, and thirteen townships. *See* http://www.wabaunsee.kansasgov.com. Given the County's size and the variety of its communities, a total ban on commercial wind energy is not a constitutionally appropriate way in which to balance aesthetic goals with the interstate supply of wind energy. The County has a responsibility under the Commerce Clause to devise a more tailored zoning plan that allows wind energy development while also serving the County's goals. *Site-specific* requirements could certainly achieve those goals, without entirely removing the County's vast wind energy potential from commercial markets, as other communities' zoning codes recognize. *E.g.*, http://www.michigan.gov/documents/dleg/WindEnergySampleZoning_236105_7.pdf; http://www.seda-cog.org/tioga/lib/tioga/planning/wef_guidelines.pdf. Indeed, the intervenors explain (Supp. Br. 23) that much of the land at issue is not Tallgrass Prairie and is already developed for oil, gas, farming, or ranching, such that current aesthetics would not be negatively affected by wind development.

II. WABAUNSEE COUNTY'S BLANKET BAN ON COMMERCIAL WIND ENERGY PROJECTS UNCONSTITUTIONALLY TAKES PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

There are "two discrete categories of regulatory action" where inquiry into the public interests advanced by a regulation is not necessary to find a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). One of those categories is when a property owner is "called upon to sacrifice *all* economically beneficial uses in the name of the common good" by "leav[ing] his property economically idle." *Id.* at 1019.

Determining whether all economically beneficial use of property has been eliminated requires identifying the relevant parcel against which the loss is measured. The County incorrectly contends that the relevant parcel here includes the farmland underlying the wind rights at issue, so that other uses for that land must be considered. Case law, discussed below, shows that where wind rights have been severed from the surface estate and are the only property interest held, as is the case with intervenors here, the relevant parcel is the wind rights, not the land. Because the County's prohibition on commercial wind energy systems eliminates all economically beneficial uses of intervenors' leases, a categorical taking proscribed by *Lucas* occurred.

A. Intervenors' Wind Rights Are Independent Property Interests Recognized By Kansas Law.

"[I]nterests that qualify for protection as 'property'" protected by the Takings Clause are defined by "existing rules or understandings that stem from an independent source such as state law." *Id.* at 1030. In Kansas, as elsewhere, lease agreements and easements create independent property interests subject to a takings analysis. *See City of Manhattan v. Kent*, 228 Kan. 513, 516, 618 P.2d 1180 (1980) ("A lessee is an owner of the property and is entitled to just compensation if his leasehold is damaged from the

exercise of eminent domain"); *Eisenring v. Kansas Turnpike Auth.*, 183 Kan. 774, 780, 332 P.2d 539 (1958) (lessee of sand rights entitled to just compensation); accord 2 NICHOLS ON EMINENT DOMAIN § 5.06, at 5-97 to 101 (3d ed. 1989) (leases are constitutionally protected); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) ("condemnations of easements are takings").

Kansas has taken the extra step of facilitating the severance of property interests from the fee estate, by lease or easement, when wind energy is involved. *See* K.S.A. 58-2272 (specifying information necessary to convey wind rights). A court that carefully analyzed the issue also recognized that wind rights may be severed from the fee estate to create an independent property interest. *See Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 58 Cal. App. 4th 883, 888-895 (1997) ("the right to generate electricity from windmills harnessing the wind, and the right to sell the power so generated," are "distinct property rights" that may be "conveyed separately from the fee"; "abrogat[ing]" those rights would trigger a taking). K.S.A. 58-2272 and *Contra Costa* show that the intervenors acquired wind rights separate from the fee estate.

B. Intervenors' Severed Wind Rights Are The Relevant Parcel For Takings Analysis And Were Destroyed By The County.

Severance of intervenors' wind rights from the fee estate transformed those rights into independent property interests for purposes of analyzing whether the County's zoning ban took intervenors' property. The U.S. Supreme Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127-128 (1978), recognized that where property rights are severed from the surface estate, the severed property constitutes the relevant parcel for takings purposes. And it made clear that government action that makes it "commercially impracticable" to use the severed property interest—because it has

"nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land"—effects "a 'taking' without just compensation." *Id.*

Severed property interests, analogous to the wind rights here, are routinely treated as independent of the fee estate for takings analysis. *See*, *e.g.*, *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir. 1991) (mineral estate); *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (same); *Armstrong v. United States*, 364 U.S. 40 (1960) (complete destruction of liens a "taking"); *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Commrs.*, 875 N.E.2d 59, 67 (Ohio 2007) ("A mineral estate may be considered the relevant parcel for a compensable regulatory taking if the mineral estate was purchased separately from the other interests in the real property"). For example, in *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 889 (5th Cir. 2004), the Fifth Circuit held that a city ordinance that banned quarrying and blasting within city limits was a categorical taking of plaintiff's lease to mine limestone. The plaintiff's lease was the "relevant parcel for the purposes of its takings claim" because (as here) it was "the only estate in which [plaintiff] has an interest." *Id.* When the City rendered that lease useless by making mining impossible, a taking occurred.

As these authorities show, the correct takings analysis here is a simple one. The intervenors' leases to erect turbines for the sole purpose of converting wind to energy were the sum total of intervenors' property interests. When Wabaunsee County zoned out all commercial wind projects it utterly destroyed the economic utility of those leases. That was a categorical taking, without just compensation, barred by *Lucas*.

This Court ordered the parties to address the relevance of *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205 (D. Kan. 1992). That decision contradicts the purpose of the

Takings Clause. It conflated oil and gas rights held by plaintiff with surface rights held by another owner into a single parcel, thereby counting economic uses to which plaintiff had no entitlement in determining whether plaintiff retained economically viable property. The Fifth Amendment's purpose is to prevent government "from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). That focus on protecting *individual* property owners makes it irrelevant that uses of property remain to someone *other* than the takings victim. *Mid Gulf*'s mistaken approach should not be followed.

Because intervenors' leases for the operation of commercial wind turbines are the relevant parcel and the County has prohibited the only economically beneficial activity permitted by those leases, a categorical taking requiring compensation has occurred.

CONCLUSION

This Court should reverse, because neither the Commerce nor Takings Clauses of the U.S. Constitution permit the County's ban on renewable wind energy.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two (2) true and correct copies of the above and foregoing *Amicus Curiae* Brief of the Wind Coalition were mailed, postage prepaid and properly addressed, on this 18th day of December, 2009, to the following:

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