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**VIA E-mail: [pdowning@co.albany.wy.us](mailto:pdowning@co.albany.wy.us)**

Tim Chesnut, Chairman  
Pat Gabriel  
Jerry Kennedy  
Albany County Board of Commissioners  
525 Grand Ave.  
Suite 202  
Laramie, WY 82070

RE: Albany County Draft Wind Regulations

Dear Albany County Commissioners:

This law firm thanks the Albany County Board of Commissioners for the opportunity to present supplemental comments on Albany County's Draft Wind Regulations on behalf of its client PacifiCorp Energy ("PacifiCorp"). As the Commission is aware, PacifiCorp has obtained state and local permits for and commenced construction of the High Plains Wind Energy Project to be located near McFadden, Wyoming. In addition, PacifiCorp has five other wind projects under construction, the Seven Mile Hill and Seven Mile Hill II projects in Carbon County and the Glenrock, Rolling Hills, and Glenrock III projects in Converse County. As a company, PacifiCorp has made a strong commitment to the development of renewable energy. The development of a reasonable and effective regulatory scheme for this growing industry is of particular importance to PacifiCorp. While PacifiCorp recognizes that Albany County has an interest in developing regulations to protect the public health and welfare of its county, it is very important that in the development of its regulations, it not duplicate the efforts of other state and federal agencies. Subjecting the nascent wind industry in Wyoming to a dual regulatory scheme will not improve the level of protection for Albany County, and will be burdensome for the industry.

The draft regulations contain a number of requirements regarding environmental and wildlife protection, cultural resource protection, siting and other requirements that are already regulated by the Department of Environmental Quality, the Industrial Siting

Council, the Game & Fish Department and the Public Service Commission. Our review of the current state of the law, discussed below suggests that Albany County lacks authority for portions of the proposed draft.

The authority of the Planning and Zoning Commission is a legislatively delegated power pursuant to W.S. § 18-5-201 *et seq.* for the purpose of promoting the health, safety, and general welfare of Albany County. The power emanates under the Constitution from the police powers reserved to the states. However, such power is not unlimited. *See Schoeller v. Board of County Comm'rs*, 568 P.2d 869 (Wyo. 1977). A County (and its Zoning Commission) has only those sovereign powers granted by the legislature and it may not impose conditions unrelated to the use of the land. 3 ANDERSON, AMERICAN LAW OF ZONING, § 15.31, p. 161.

When the legislature has retained a police power, and the county action conflicts with that power, it is not a matter of preemption of state over local power but rather the exercise by the county of a power it has not been granted. *K N Energy, Inc. v. City of Casper*, 755 P.2d 207 (Wyo. 1988). As noted by the Wyoming Supreme Court:

The general grant of power to a municipality to adopt zoning laws in the interest of public welfare does not have the effect of permitting the local legislative body to override such state law and policy.<sup>1</sup>

*Vandehel Developers v. Public Service Com'n*, 790 P.2d 1282, 1287 (Wyo. 1990).

In *River Springs Ltd. Liability Co. v. Bd. of County Comm'rs of Teton County, Wyo.*, the Wyoming Supreme Court was asked to determine whether the Environmental Quality Act preempts local authority to prohibit mineral extraction. 899 P.2d 1329 (Wyo. 1995). The Court held that in adopting the EQA, the Wyoming legislature explicitly granted authority to prohibit and regulate mining activities to the Department of Environmental Quality. "The authority of Teton County is limited by the authority granted to DEQ by the language of EQA." *Id.* 1335-36.

In adopting the Industrial Development and Siting Act, the Wyoming legislature explicitly and specifically granted the authority to the Industrial Siting Council to protect Wyoming's social and economic fabric of the communities affected by industrial development. *Industrial Siting Council v. Chicago & N.W. Transp. Co.*, 660 P. 2d 776 (Wyo. 1983). The Industrial Development and Siting Act was enacted during a period of electric shortage to assist electric companies in providing reliable sources of electric

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<sup>1</sup> The Wyoming Supreme Court has held that this precept applies not only to municipalities but to counties as well. *Vandehel Developers*, 790 P.2d at 1286.

power to fill projected demand. Van Balen, *Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act – Advance or Retreat?*, XI LAND & WATER L. REV. 27, 28 (1976). The Act serves to provide an all encompassing procedure, at the conclusion of which, the Industrial Siting Council “may issue or deny a permit, preempting the jurisdiction of all regulatory agencies which might otherwise have licensing or approval authority over any aspect of the proposed project, and also binding upon all other interested parties.” *Id.* at 30. The Wyoming legislature intended to reserve the police power to examine the environmental, social and economic impacts of industrial development to the state.

County authority is further limited by the Public Utilities Act. In this respect, the Wyoming Supreme Court held:

State-wide regulation and supervision of public utilities is the subject of Title 37 of Wyoming Statutes 1977. “The public service commission of Wyoming,” created by § 37-2-101, W.S.1977, has “general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act.” Section 37-2-112, W.S.1977. \*  
\* \* The scope of the authority granted to the PSC demonstrates a legislative intent that the police power of the state, to the extent that it relates to public utilities, shall be exercised by the PSC and to preserve none of that power for municipalities.  
\* \* \*

The power of the municipality to enact a zoning ordinance must yield to the superior force of the state statutes which impose upon the public utility company the duty of rendering safe and adequate service.

*Vandehei*, 790 P.2d at 1286.

The Court outlined the problem with subjecting public utilities to control by different regulatory entities:

If each county were to pronounce its own regulation and control over electric wires, pipelines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the Public Utility Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities.

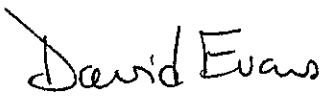
*Id.* (quoting *County of Chester v. Philadelphia Electric Co.*, 218 A.2d 331, 333 (Pa. 1966).) Thus the state has the exclusive responsibility of regulating public utilities.

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PacifiCorp's wind projects in Wyoming, to date, have been subject to regulation by the Wyoming Department of Environmental Quality, the Industrial Siting Council through the Wyoming Environmental Quality Act, (W.S. §§ 35-11-101, *et seq.*) Industrial Development and Siting Act (W.S. §§ 35-12-101 *et seq.*) and the Public Utilities Act (W.S. §§ 37-1-101 through 37-17-105). These statutes prohibit the County from regulating in the same areas. PacifiCorp appreciates that other entities may not be subject to the industrial siting process and that the proposed regulations need to be applicable to both.

In conclusion, PacifiCorp respectfully requests consideration of its comments. Additional comments related to specific regulations are set forth below, with proposed additions in blue bold and caps and proposed deletions struck.

Sincerely,

  
David Evans *by [initials]*

DE/lh  
Cc Via E-mail: James Schermetzler  
Doug Bryant