

BEST PRACTICES IN WIND ENERGY OPTIONS, EASEMENTS, AND LEASES

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SECTION 1—POLITICAL/SOCIAL ATTITUDES

Concern about global climate change and continued uncertainty about the future costs and liabilities of natural gas and coal facilities has helped spur the current political and social attitudes towards the use of renewable energy sources. State and local governments are competing to attract wind industry developments to their community to create jobs and improve the tax base, not to mention to further the “green” movement.

The Federal Production Tax Credit enables utilities, wind energy developers and manufacturers to invest billions of dollars each year in equipment and facilities associated with the generation of electricity from renewable energy resources such as wind, geothermal, biomass and hydropower. The current value of the credit is 2 cents/kilowatt-hour (kWh) of electricity produced. The credit applies to electricity produced by a qualified wind facility placed in service after December 31, 1992 and before January 1, 2009 as the credit is due to expire without further extension on December 31, 2008. It applies only to applicable utility-scale wind turbines, not smaller turbines used to power individual homes or businesses.

States have adopted Renewable Portfolio Standards (RPS) to both encourage and require the use of renewable energy in their states. In 2007, Illinois adopted one of the more aggressive RPS in the country, requiring 75% of all renewable energy to be wind power renewable energy, if available. Illinois is currently 8th in the United States among wind generating capacity states.

The Illinois Power Agency Act provides that each utility’s total supply to serve eligible retail customers must at a minimum meet the following standards for use of cost effective renewable energy:

06/01/08	2%
06/01/09	4%
06/01/10	5%
06/01/11	6%
06/01/12	7%
06/01/13	8%
06/01/14	9%
06/01/15	10%

This minimum percentage is required to increase by 1.5% each year thereafter until it has reached 25% by 06/01/2025. There is no carve out for community wind projects.

The 20% wind energy by 2030 scenario promoted by the United State Department of Energy should add to the growth we’re experiencing in the industry. To implement this scenario,

new wind power installations would increase to more than 16,000 megawatts (MW) per year by 2018, and continue at that rate through 2030. Forty six states would experience significant wind power development in the 20% wind scenario.

The U.S. wind industry reached the 20,000 megawatt installed capacity milestone this summer, achieving in two years what had previously taken more than two decades, according to AWEA. The installed capacity was 10,000 MW just two years ago, 1,000 MW in 1985, 2,000 MW installed by 1999 and 5,000 MW by 2003. Its first 10,000 MW was installed by mid-2006. Installation of wind turbines in the last quarter of 2007 alone (2,930 MW) surpassed the total for all of 2006 (2,454 MW). Wind power, located in 34 states, now provides just over 1.5% of the nation's electricity supply and will generate an estimated 48 billion kWh (kilowatt hour) this year.

The current generating capacity in the nation produces enough electricity to serve 3.5 million homes. The 20,000 MW of wind power installed in the United States can generate as much electricity every year as 28.7 million tons of coal or 90 million barrels of oil. Wind generation currently displaces 34 million tons of carbon dioxide annually, equivalent to taking 5.8 million vehicles off the road according to the AWEA.

As the U.S. wind industry has matured and installations have increased, so too has the average size of installed wind projects. Projects installed in 2007 averaged nearly 120 MW, roughly double that seen in the 2004-05 period and nearly quadruple that seen in the 1998-99 period.

In Illinois, construction usually begins around April 15th (thaw date) and takes approximately 6-8 months to complete. The general maintenance schedule is six months with wind turbines being taken out of service for approximately one day for routine maintenance and three days for more involved maintenance.

In Mendota, Illinois, an analysis of a wind farm that has been operational since 2003 concluded that there was no measurable difference in the home values between the target and control areas. This study utilized 69 residential and farmland sales transactions in the target and control areas. In addition, the report indicates that residential development is continuing in close proximity to the 63-turbine wind farm with the Lee County Board recently approving a 100-unit subdivision near the wind farm. Sales in the subdivision are proceeding with homes within 3,000 feet of the wind farm selling for \$530,000 to \$540,000.

In 2007, the Illinois legislature passed a new law providing for uniform tax assessments for commercial wind turbines and associated equipment for the 2007-2011 tax assessment years. Wind energy devices larger than 500 kW (kilowatt) and producing power for commercial sale will be valued at \$360,000.00/MW of capacity, annually adjusted for inflation according to the U.S. Consumer Price Index. This is known as the trended real property cost basis. The assessed value is depreciated over 25 years but depreciation may not reduce the value below 30% of the trended real property cost basis. A separate tax bill is sent to the turbine owner, not the landowner, for the taxes associated with the wind turbine and its associated equipment.

SECTION 2—COMMON QUESTIONS FOR DEVELOPERS

The purpose of wind energy option, easement, and lease agreements is to allow the developer to test the land for feasibility of a wind energy development; to allow for the construction, operation, and management of a wind energy development on the land; and, to allow for the transmission of electricity generated by the wind energy development.

1. Developers' industry reputation, size, and financial net worth.
2. How much wind energy are they currently (or have previously) developed, for how long, and comparable developments?
3. What land use rights are being relinquished and what land activities are allowed to continue?
4. Compensation for option, easement, and lease rights including amount, method, and duration. Ensure that the compensation is adequate today and in the future based upon expected increased energy costs and technological improvements.
5. What tax consequences are there to the land owner based upon the method of compensation?
6. Determine the firmness of the developers' plans to develop to ensure the developer is not "tying up" the land (use of short term option).
7. If compensation is based on percentage of revenue, what information will be provided to the land owner to audit the developer's revenue numbers, how will the information be provided and where can it be inspected?
8. Can a developer sell or transfer its rights with or without land owner consent?
9. What are the liability, insurance and indemnity requirements?
10. Developer termination rights and future payments.
11. Landowner termination rights and exercise procedures.
12. If termination is voluntary or involuntary, what are the decommissioning and clean-up timing and costs?
13. What are the setback requirements and fees to neighboring landowners?
14. What if any compensation is provided for restrictions in the ability to provide aerial spray applications both for the wind farm owner and their neighbors?
15. If aerial spray applications is an issue, can the development be designed with the towers placed in a linear pattern rather than a disordered, clustered pattern.

SECTION 3—COMMON WIND ENERGY OPTION TERMS AND CONDITIONS

A wind energy option agreement is an agreement between the developer and landowner which allows the developer either exclusive (preferred) or non-exclusive rights to test the area for the feasibility of a wind energy development and then those same rights for the construction, maintenance and operation of the development. The key elements of a wind energy option agreement include:

1. A legal description of the property involved to define the number of acres leased.
2. A complete listing of the terms and conditions for the option.
3. A granting of land use rights sufficient to allow the developer the ability to study the feasibility of a wind farm development.
4. Duration up to five years (Attach easement and lease to the option agreement). (Require dismantling of test wind turbines within three years of installation per Illinois law).
5. Procedure for exercising the option.

6. Restoration of the land to its original condition after testing and finding of non-feasibility.
7. Fixed or escalating fee per year.
8. Signing bonus for execution of easement/lease and/or exercise of option.
9. Landowner access to wind data collected by developer during feasibility study.
10. Allow for location of meteorological towers, soil samples, weather balloons as well as environmental, noise, and wildlife studies.

SECTION 4—WIND ENERGY EASEMENT TERMS AND CONDITIONS

Wind energy easement agreements are generally concerned with wind turbine placement, placement of associated equipment such as transformers, switch gears, underground cables, and foundation, as well as access roads. An easement provides the holder with a limited use interest in the land. Wind energy development easements are provided to the developer to allow the construction of a wind energy development as well as access to the development and the transmission grid for maintenance, repair, replacement, and removal of the wind turbine and associated equipment as well as to the transmission facility and electronic electrical and telecommunication transmission lines. Sample terms and conditions include:

1. Duration: usually 20 years but no longer than 30 years, with no provision for automatic renewal. The easement should be tied to the project life span. Any options for a renewal should provide notice, election, and price adjustment terms.
2. Non-severability of wind rights from surface rights (do not sever the wind rights from the land so that the benefits stay connected with the land).
3. Compensation: lump sum versus periodic payments.
4. Neighbor easement: permission from neighboring landowner to set wind turbines inside of minimum setback and inside generally accepted minimum set back requirements (wind turbine wake/consumption is generally eight to 11 rotor diameters downwind and one to two rotor diameters laterally).
5. Require the easement holder to both record the easement and file evidence of termination upon expiration and/or termination of the easement.
6. A statement of the easement holder's responsibilities for restoring the land to its original condition upon expiration and/or termination of the easement.
7. Additional easements associated with wind energy development leases include: wind non-obstruction easement; overhang/encroachment easement (this is provided by the neighbor if there are no minimum setback requirements); and, noise easement (governing the amount of noise and its radius).

SECTION 5—WIND ENERGY LEASE TERMS AND CONDITIONS

A lease is a conveyance of land for less than the landowners total ownership interest. It creates a landlord-tenant relationship between the lessor and the lessee and provides the tenant exclusive use of the land less any retained land use rights by the land owner.

Common wind energy lease agreement terms and conditions include:

1. A legal description of the acreage involved in the development (limited to that reasonably necessary for operation of the development. If more land is being used than is reasonably necessary for the operation of the development, the

compensation should so reflect and be based in part on total acreage being leased).

2. Payment terms:
 - a. Compensation during the preliminary, construction, and operation phases.
 - b. A provision establishing the length of time the land can be subject to the terms of the lease without construction of the development beginning (compensation during this period is generally lower if agricultural activities can be performed on the land and greater if the use of the land is curtailed).
3. Establish the number of turbines that will be placed on the land for operation of the development.
4. Establish the payment terms during operation of the development (fixed, fixed with royalty (set minimum payment) and/or percentage of revenue. If the wind energy lease compensation is based upon a percentage of revenue, define the minimum size of the turbines being utilized in the development and define the revenue as “all gross receipts from the sale of electric generated by wind turbines located on the land.”
5. Request access to the developer’s wind power agreement with the utility in an effort to determine the rates the utility is going to pay the developer for the electricity being generated by the development—this should be used to establish revenue lease terms.
6. Define landowner’s access to power production information including what information will be provided, where it will be provided (local production should be required) and how it will be provided.
7. Determine whether the developer is going to allow telecommunication towers on the wind turbines—if so, demand greater compensation.
8. Provide for a percentage of the revenue generated from tax credits to the developer or by the sale of renewable energy credits as they are economic benefits to the developer beyond the mere sale of electricity.
9. Establish a commencement date for the beginning of all payment phases. (The landowner should assess the impact on any conservation contracts it has and require the developer to reimburse it for any penalties or reimbursements the landowner suffers or is required to pay as a member of a conservation reserve program. The 2002 Farm Bill allowed land to be removed from the CRP without penalty subject to the approval of the USDA. It is not clear if the same is true under the 2008 Farm Bill. General understanding is that you can build a wind turbine on five acres of CRP land without penalty but CRP land used for access roads will be penalized).
10. Consult a tax expert to determine the tax consequences for payments to be received by the land owner.
11. Setbacks: no greater than five times the rotor diameter from the property lines without the neighbor’s written permission or in the alternative obtain a neighbor easement/lease to provide for such permission. As an alternative, the landowners can enter into a resource based compensation model where the real estate landowner and all adjoining landowners in the wind pool are compensated. This model eliminates the need for mandatory setbacks and compensates all providing wind resources. It also provides the developer with flexibility in siting wind turbines. The downside is that it is more difficult to negotiate with increased landowners. In the alternative, setbacks can be set as follows: 1000 feet from any primary structure measured from the point of the primary structure foundation

closest to the center of the wind turbine's foundation, but in no case closer than 1.10 times the wind turbine's tower height; 1.10 times the tower height from public roads, third party transmission lines and communication towers; and, 1.10 times the tower height from adjacent property lines.

12. Turbine height—maximum height not to exceed 450 feet.

SECTION 6—COMMON DEVELOPER WISHES

Preliminary Stage: meteorological towers, soil samples, weather balloons, environmental, noise and wildlife studies.

Construction Phase: installation of foundation, concrete pads, footings, wind turbine, guy wires (should be discouraged as it creates more aviary problems than the turbine rotors themselves), supports, anchors, fences, a maintenance building, a storage facility, transformers, towers, transmission lines (should be buried), a switching facility for transmission connection, as well as private access roads. The landowner should reject any type of catchall phraseology as far as the developer's land use rights are concerned.

The developer should require exclusive lease rights but the land owner should be compensated for this exclusivity.

Do not limit the size of wind turbine capability beyond 1.5 MW as it reduces available suppliers.

A decommissioning formula that reduces the decommissioning and cleanup costs by the salvage value of the wind turbine and related equipment.

SECTION 7—COMMON LAND OWNER WISHES

The landowner should attempt to obtain a catchall phrase for its land use rights such as "any rights non-explicitly granted to the developer remain with the landowner". In the absence of a catchall phrase, the following relevant land use rights should be specifically identified—grazing, crop harvesting, farm/agricultural activities, construction improvements essential to farming, hunting and/or other unique operations on the land that can be exercised without the consent of the developer or that the consent cannot be unreasonably withheld.

1. Require public disclosure of energy production from the wind turbines to a central state agency if there are production based payments (this will assist the landowner auditing the developers' production records, reduce the competition by allowing for public knowledge of wind energy production, allows for ready access to an understanding of the economic contributions of wind turbines to the industry as well as the general public.
2. Require public filing of lease documents and disclosure of its terms (do not allow a no gag clause). Also reduces competition among landowners as all information is a matter of public knowledge.
3. Require the developer to maintain a fund to cover the costs of decommissioning and site cleanup.
4. Require the developer to carry commercial liability insurance with limits of \$1 million per person/\$2 million in the aggregate; a \$5 million umbrella policy; contractual liability coverage to ensure the developers' indemnity obligations and

- require the developer to name the land owner as an additional insured on all of these policies.
5. Require the developer to provide an indemnity agreement indemnifying the land owner for any injury or claims caused by the developers exercise of rights granted in the lease or easement (require self insurance or a bond to cover this indemnity obligation if the developer does not obtain contractual liability coverage).
 6. The landowner should require that the land be restored to its original condition following the expiration or termination of the wind energy development lease.
 7. Roads generally will not exceed 30-35 feet in width during construction. After construction, roads to be restored to a 16-18 feet right-of-way. Farm land not part of the new permanent roads to be restored to original condition. The crown of the roads will be kept to a minimum, but in any event will not exceed 6" to 1'. Access roads to run parallel to the farming method where possible and developer will ensure there is an adequate crossing point for landowner's agricultural vehicles over any new roads.
 8. Decommissioning plan: trigger provisions, financial assurance (performance bond preferable over Letter of Credit), and provision making it binding upon successors, assigns or heirs, estimate of decommissioning costs certified by a professional engineer.
 9. Landowner will be permitted to plant crops up to within five feet of the edge of the wind turbine foundations, roads and other permanent project facilities.
 10. Developer will not remove topsoil from the land and will replace removed topsoil to the location from which it was removed, unless it was removed from the permanent facilities area. Top soil will not be spread over landowner's farming areas.
 11. Landowner is free to spray to control weeds up to the edge of the development's permanent facilities.
 12. Landowner to be compensated for restrictions in the ability to apply aerial spray applications.
 13. Developer will pay for any damage to growing crops caused by its development and construction activities based upon the following formula: county average (or landowner average, whichever is greater) yield in bushels per acre for most recently harvested year x the number of acres damaged x the average price as determined by the Chicago Board of Trade's per bushel of crop during the preceding December or April, whichever month is closer to the date of damage. Added to this figure is the landowner's average planting and growing expenses per acre for the most recent crop year x the number of acres damaged. This same formula shall be used for future crops damaged during development.
 14. A most favored nation clause which provides that if another landowner gets a better deal from the developer, the landowner with the most favored nation clause gets the better deal.

SECTION 8—COMMON DEVELOPER DUTIES

1. Keep the land free of mechanics' liens and/or immediately remove and contest any such liens at no cost to the landowner or provide indemnity to the landowner and/or provision of a bond.
2. Comply with all federal, state, and local laws applicable to the development's operation.
3. Obtain and comply with all permit requirements at no cost to the landowner.

4. Ensure EPA compliance with hazardous substances and provide indemnity to the land owner.
5. Prepare a plat for the wind turbine location and access roads and record the plat so the county assessor can issue a property identification number for each turbine and issue the tax bill to the wind turbine owner.
6. Developer to provide landowner with a site map that shows the “as built” location of underground lines on the land.

SECTION 9—COMMON LAND OWNER DUTIES

1. Provide the developer quiet enjoyment of the land if the developer is not in default of any terms of the lease.
2. Prohibit the landowner from conducting any activity which interferes with or decreases wind turbine output.
3. Prohibit the landowner from taking actions which would interfere with wind speed and/or direction.
4. Require the landowner to comply with EPA hazardous substance requirements.
5. Obtain subordination agreements with existing lien holders (require it to be performed at no cost to the landowner).
6. Do not allow the developer to provide for early pay off due to tax consequences.
7. Be on the lookout for utility grants or transfer grants (generally they cannot be unreasonably withheld and notice is required).
8. Landowner to give notice to Developer before installing or repairing drainage tiles or performing any other underground work near the underground lines.

SECTION 10—CONDEMNATION/DEFAULT AFFECTS

1. Feasibility of relocation.
2. Developers’ options for termination.
3. Landowners’ options for termination.
4. Landowner obtains all condemnation payments except removal/relocation expenses as well as loss of use and/or value.
5. Developer default: developer’s failure to make a payment after written notice (usually ten day notice required); developer’s failure to perform a term of the lease agreement (usually a 30-day notice is required with 180 days to cure and/or diligent pursuit of curing).
6. Liquidations/bankruptcy filings.

SECTION 11—DEVELOPER VOLUNTARY TERMINATION

1. Landowner to keep all payments to date.
2. Establish a wind energy development termination fee.
3. Require the developer to file a record of the termination of the lease or easement (if an involuntary termination, allow for the filing of an affidavit by the landowner of the developer’s: 1. default; 2. notice of default; 3. failure to cure; and 4. provide for costs including attorneys’ fees and expenses if court action is required).
4. The decommissioning and removal of the wind turbines and provide for the decommissioning and cleanup within 90 to 180 days of decommissioning at a certain above and below grade depth (minimum should be 48”). Also provide a

liquidated damages clause if decommissioning and cleanup does not occur versus a penalty clause which is unenforceable in Illinois.

SECTION 12—ADDITIONAL MISCELLANEOUS PROVISIONS

Notice requirements, amendment requirements, choice of law provision, waiver provisions, attorneys' fees, and suspension of performance provision. Avoid confidentially provisions, additional-document provisions, mandatory arbitration, or conversion of interest of tax credits.

SECTION 13—COMMON WIND ENERGY DEVELOPMENT COMMERCIAL PACKAGE ISSUES

1. Fixed leases in the late 1990's: \$2,000.00 per wind turbine per year for 650 to 750 kW turbines was common with the highest compensation being \$10,000.00.
2. In 2003, the Mendota Hills project in Illinois developed by Navitas Energy with the power purchaser being ComEd and a project size of 50.4 MW with 63,800 kW Gamesa turbines. The compensation was \$1,800.00 to \$2,000.00 per wind turbine per year or \$2,250.00 to \$2,500.00 per MW per year, or whichever was greater.
3. In 2005, the Crescent Ridge project in Illinois developed by Illinois Wind Energy again with ComEd being the power purchaser had a project size of 54.5 MW with 33, 1650 kW Vestas. Each turbine payment was \$5,000.00 with the per MW payment being \$3,030.00 per year. Notes indicate that the payment was \$5,000.00 per turbine per year as a flat rate or a percentage of revenue estimated at \$6,200.00 per wind turbine per year, which ever is greater.
4. In Knox County, Illinois, Invenergy is paying landowners in the Pilot Knob development \$6,000.00 per wind turbine per year with an inflation escalator of 2% annually. This is a 300 MW project.
5. The obvious trends are that landowners are getting more per wind turbine per year for newer projects than the older projects and the amount per wind turbine is greater as wind turbine size has increased (greater than 1500 kW).
6. Factors influencing the compensation level include: 1. Regional—the energy prices being paid to developers is obviously one factor relevant to the compensation package. (In April of 2008, the renewable power purchase for Northern Illinois by ComEd had a price per MW per hour of wind energy credit of \$35.72 where as power providers were paying \$18.35 in Iowa, Wisconsin, Indiana, Michigan, Missouri, and Kentucky and paying \$7.34 elsewhere. Additionally, in Illinois, 75% of all renewable energy must be wind power renewable energy. Therefore, Illinois landowners should be demanding a high price for there options, easements, and leases). Also, costs are higher where land is scarce. Restrictions on the ability to apply aerial spray applications to the Wind Farm development due to its disordered, clustered design.
7. Wind resources, the higher production the greater the revenue.
8. Access to transmission lines, the better the access the more the land owner can command.
9. Land use values: the more value that is given up the greater the price. The price is reduced if the landowner is capable of having agricultural, recreational or other productive activities on its land.
10. Turbine size/price of energy/political policies: production tax credit, renewable profile standards, or other mandates.

11. Business philosophy of the developer.
12. Competition or alternatives available to the developer.
13. Community reception to the development.
14. Extensive landowner knowledge of his rights.

SECTION 14—TYPES OF WIND ENERGY DEVELOPMENT COMPENSATION PACKAGES

1. One-time lump sum payment (avoid this type of payment).
2. A fixed payment in scheduled intervals (fixed amount per wind turbine per year with an escalator clause).
3. Royalty payments based upon gross revenue (percentage per year with a minimum payment). If the wind energy lease compensation is based upon a percentage of revenue, define the minimum size of the turbines being utilized in the development and define the revenue as “all gross receipts from the sale of electric generated by wind turbines located on the land.”
4. Combination of all of the above with “whichever is greater” language included.
5. Average Illinois payment is \$3000.00 per MW of production with 2% escalator clause per year.

For more information regarding wind energy, please contact Joseph F. Spitzzeri at 312.984.6683 or Nicholas R. Lykins at 312.984.0321.

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