

Renewable Energy

Fueling and Feeding America Through Renewable Resources

A Landowner's Guide to Commercial Wind Energy Contracts

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Introduction

One of the most important components of wind energy production is the contract between the landowner and the developer, commonly referred to as a lease. Wind energy leases are long-term contracts which will be in effect for as many as 80 years. It is essential that landowners understand these contracts and ensure that their property rights are protected.

Wind energy contracts are complex documents which, if properly developed, cover a broad range of property issues. This publication will provide landowners with information to consider when evaluating and negotiating a contract. However, it should not be considered a substitute for having a lease reviewed by an attorney experienced in land use contracts.

Lease vs. Easement

Most wind contracts contain lease and easement provisions, though they may not refer to them by those terms. It is important to understand the basic concepts associated with these two aspects of the contract.

A lease is a contract which provides the lessee (the wind energy company and/or developer) with exclusive possession of the land for a specified period of time. The lessee will have continuous access to the property and will be able to perform all functions on that property to utilize it for the specified purpose. In essence, in signing a lease, the lessor (the landowner) hands over that property for a certain period of time and for agreed upon compensation.



A lease is a contract providing the lessee with exclusive possession of land for a specified period of time. An easement allows a party to utilize property for a specific purpose or purposes while the landowner retains all other property rights.

An easement is less comprehensive and permits a party to use land for a limited purpose while the landowner retains all other rights. For example, a developer may request an access easement to perform maintenance work on buried electrical lines running through a field while the landowner retains the right to farm that land.

In general, a wind contract will contain a lease for the land on which the turbine and access

roads are sited, which will be property reserved for exclusive use by the wind company. It also will include easements for transmission lines and for the right to capture the energy from the wind blowing across the property owner's land.

The Wind Contract

It is important to take the necessary time to review a contract. While the developer may push for a quick signing, the landowner should be certain to understand the provisions of the contract and determine whether they are acceptable. Due diligence is important. An attorney representing the landowner should thoroughly review and explain the contract. A wind farm contract is a complicated document, often 30 pages in length or more. It is important to understand what it contains and the potential impacts before signing.

A wind energy contract generally consists of three sections: the option agreement, operating option, and option to extend. By signing a contract, one agrees to the provisions contained in all three sections.

Wind energy contracts are complex documents requiring the landowner to agree to certain property uses for an extended period of time. Landowners always should have the contracts reviewed by an attorney experienced in property and contract law.

The option agreement – also called a development option or lease option

This aspect of the contract involves the concept of wind rights, wherein the developer asks the landowner to grant the company exclusive rights to use or capture the wind resources associated with the property for a given duration of time. This will be accompanied by a fairly modest payment, usually on a per-acre basis. The option agreement does not guarantee that a wind farm may be built, only that the company is considering it. The landowner may receive modest payments for a few years and find that the project has been canceled.

Option agreements can be constructed in various ways. Some may be for a specified period of time, such as five, seven or even 10 years. Others may be for as little as a single year, but the developer retains the option to renew it for multiple years. From the wind company's perspective, option agreements provide an opportunity to bring enough contiguous land under contract to demonstrate to manage-

ment and potential funders and investors that a viable wind farm may be constructed.

It is essential that the landowner understand the commitments that may be required by the option agreement. In signing the agreement, is the landowner also agreeing to allow turbines to be constructed on the property? How much input does the property owner have regarding turbine placement, access roads and power lines? What restrictions will be placed on landowners if a farmer would like to construct, for example, a tall grain leg or vertical grain dryer? Are these restrictions in place during the option period or do they take effect only during the operating period, once the decision has been made to build a wind farm?

Operating option – also called an extended option, lease option or lease

This section of the contract addresses the production phase of the project. Included in this section will be provisions for constructing wind turbines, access roads, and underground and aboveground transmission lines. Restrictions on landowner use of the property also will be included, as well as payment terms during the operating period.

Operating options are long-term agreements. They generally are for a period of 20-30 years.

Extension option – also called an option to extend

Many contracts include a provision allowing the wind developer to automatically renew the contract for an additional operating period (20-30 years).

How Does a Contract Impact Property Rights?

Under a wind contract, some property rights will be relinquished. What restrictions on the use of property will the contract include?

New construction: Some contracts require wind company approval for all new construction, while others have height restrictions. Many contracts state that a residential dwelling may not be constructed within a specified distance of a turbine.

Aerial pesticide applications: Many contracts include specific wind turbine "turn off" provisions to allow for aerial applications.

Access road construction: "At-grade" access roads can make farm operations much simpler.

Decommissioning: What will happen in the future when the wind farm may become obsolete or is no longer eco-

Some property rights will be relinquished when a wind energy contract is signed. Landowners should make sure their farm operations and personal uses of land are not negatively affected before they sign.

nomical to operate? Are there provisions for the removal of wind turbines and other improvements?

Property taxes: In Indiana, land upon which the wind turbines and access roads are located will be taxed as industrial rather than agricultural property. Who is responsible for this increased cost?

Indemnification and insurance: Does the contract indemnify the landowner from all possible liabilities associated with wind energy operations? Insurance provisions covering the wind company's facilities and activities should be described in sufficient detail so the landowner or his or her representative can assess that the landowner is sufficiently protected. Landowners should be protected in case the wind farm violates local zoning laws and ordinances.

Compensation for damages: During the construction phase property may incur substantial damage. Heavy equipment will be used to build turbines, underground electrical lines may be installed on the property, and access roads may be constructed. What provisions are there for reimbursement of crop damage? What about land damage – particularly compaction? What provisions address broken or cut field tile? What if the wind farm results in changes in government farm program eligibility?

Siting of turbines: How much input will the landowner have regarding turbine location? Some contracts commit the landowner to siting a turbine on their property completely at the developer's discretion and without any input. Others allow the landowner some flexibility in siting, where others state that the option, while reserving the wind rights of the property (and allowing transmission lines on the property), do not commit him or her to having a turbine. In many cases developers are more flexible in siting access roads than turbines.

Wind farm management: Wind energy contracts will contain provisions allowing the wind company to engage in any activity it deems necessary for the operation of the wind farm. This includes maintenance on all structures related to wind energy development, such as towers, turbines, blades, utility lines, drainage structures, meteorological test towers (if present), etcetera. For example, a contract could permit moving a crane onto cropland to remove a blade assembly or disturb soil, to expose an underground utility line for repairs.

Other issues: There are many other issues which may be included in the contract. Can the landowner use the access road to park equipment for limited periods, such as grain trucks during harvest? Who is responsible for weed control on the access road? How will the wind contract impact potential future sales of some or all of the property? Are all farming activities protected? What of future development or non-agricultural uses?

Payment Terms

Turbine payments may be structured in several ways. It is important that the landowner receive compensation for the use of land, as well as an opportunity to share in the profits attained from the capture of wind for energy generation.

Fixed payments: The landowner receives a set annual payment, rated on either a per-turbine or per-megawatt basis.

Royalty or revenue-based payments: The landowner receives a percentage of the income derived from the energy production of the turbine.

Combination payments: The landowner receives a fixed annual payment plus a percentage of the revenue.

Landowners should be certain that provisions for payment adjustments, commonly termed an escalator clause, are included in the contract. Some contracts have tied these to the Consumer Price Index or other measures.

There are many other areas where a landowner may receive compensation. These include payment for access roads, underground or aboveground power lines, and wind rights payments for the land under contract. Many companies include a one-time payment delivered when turbine construction begins. Some landowners also may have a meteorological test tower, substation, and/or an operations and maintenance yard on their property. A landowner may receive annual payments even though a turbine is not sited on his or her property.

Tips for Negotiating a Contract

When a wind development company initially approaches local landowners they already will have invested considerable time and expense in assessing the suitability of the area for a wind farm. They will have evaluated wind resources, access to transmission, local zoning and other ordinances, and assessed how receptive the community will be to a wind farm. They also will have a contract in hand. In many cases it is beneficial for landowners to negotiate terms rather than accepting the initial contract. A wind development contract may commit a landowner to a 30-year relationship, or even longer. It is well worth taking the time to thoroughly investigate the matter.

Many landowners have found it helpful to work together when negotiating the contract. This can be in an informal manner; however, some landowners formally organize and hire an attorney to represent them as a group in negotiations with a developer. The formation of a steering committee or board of directors to represent and speak for the landowners may be useful.

Other landowners market their property to various developers as a group and, through an interview and investigation process, agree to work with the developer they feel best fits their needs.

It is the landowner's responsibility to conduct due diligence when considering whether to sign a wind energy contract. Prior to negotiating and signing a contract it might be helpful to:

- Visit operating wind farms and meet with participating farmers and landowners. If possible, this should be done for a wind farm developed and/or operated by the same company with which a farmer is considering entering into a contract.
- Acquire and review existing wind energy contracts – preferably from the Midwest – since they will address similar issues and concerns.
- Talk to local officials and become familiar with zoning and other local ordinances.
- Consider the implications signing a wind energy contract might have for heirs, particularly in cases of partible inheritance.

It is important to verify that the developer has what is commonly termed a “most favored nation” clause in the contract. This means that all landowners will receive the same contract as everyone else. This type of clause helps reduce conflicts among neighboring landowners, even when contracts are not negotiated as a group.

Conclusion

The wind energy contract or lease is a long-term commitment which will help define the relationship between the landowner and the wind company for many years. It is essential that all provisions in it be reviewed carefully by the landowner and an attorney experienced with property rights and land contracts. A wind development can, and should, be profitable for both the landowner and the wind company. A properly designed contract will help ensure that this takes place.

Sources

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