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**A TALE OF TWO USES: LANDOWNER  
PERSPECTIVES ON WIND LEASING AND  
TRANSMISSION EASEMENTS**

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## **A TALE OF TWO USES: LANDOWNER PERSPECTIVES ON WIND LEASING AND TRANSMISSION EASEMENTS**

Wind is powerful. As a force of nature recognized for centuries, wind has the ability to shape the trees and the earth. It can influence decisions regarding the siting and construction of buildings, and possesses the ability to determine one's plans for an afternoon or affect one's travel. Wind can also serve as a fuel source to power our homes, businesses, and potentially our vehicles. However, in order to harness the power of the wind, and to transmit the generation to those that need it, land is necessary. Coming to an agreement on how such land will be utilized is the main topic here.

This paper attempts to provide some key points on wind power, leases and transmission easements from a landowner's view. After first discussing the basics of wind energy, the paper provides a discussion of development issues faced by companies attempting to construct and/or operate wind projects in Section II. Section III addresses wind leasing from a landowner's perspective and the issues to cover in a negotiation on the subject. Finally, Section IV recounts transmission concerns (including an overview of the Competitive Renewable Energy Zone ("CREZ") proceedings before the Public Utility Commission of Texas ("PUCT") and condemnation proceedings), again from the landowner's standpoint.<sup>1</sup>

### **I. BACKGROUND**

Although utilized on a local and smaller scale for centuries, wind power on a commercial scale is a relatively new phenomenon. In 1931, the first utility-scale wind development for the purposes of generating electricity was erected in Russia.<sup>2</sup> The capacity of that turbine was approximately 100 kW.<sup>3</sup> Put in context, 10,000 kWh is enough energy to power one home for a year.<sup>4</sup> Today's turbines bring much more to the table. Turbine specifications vary among producers, but for the purpose of having a general example, this paper reviews General Electric models. Onshore models range in nameplate capacity from 1.5 to nearly 3 megawatts (MW), and up to 4 MW for offshore turbines.<sup>5</sup> They are generally erected to a height of eighty meters, and the rotors can stretch out to approximately 328 feet in diameter for onshore models, and nearly 365 feet in diameter for offshore models.<sup>6</sup> Despite their great size, modern technology has advanced in such a manner as to allow the "cut in" speed (the speed the wind must blow in order for the turbine to turn fast enough to create electricity) to be approximately 3.5 m/s.<sup>7</sup>

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<sup>1</sup> The musical references found in some of the subsection headings of this paper are to break any monotony the reader may be experiencing. An unintended consequence, however, may be that the song will be stuck in the reader's head for the duration of the day.

<sup>2</sup> <http://telosnet.com/wind/20th.html>.

<sup>3</sup> *Id.*

<sup>4</sup> American Wind Energy Association, Wind Energy Basics, [http://awea.org/faq/wwt\\_basics.html](http://awea.org/faq/wwt_basics.html).

<sup>5</sup> See [http://www.gepower.com/prod\\_serv/products/wind\\_turbines/en/downloads/ge\\_25mw\\_brochure.pdf](http://www.gepower.com/prod_serv/products/wind_turbines/en/downloads/ge_25mw_brochure.pdf) and [http://www.gepower.com/prod\\_serv/products/wind\\_turbines/en/downloads/ge\\_36\\_brochure\\_new.pdf](http://www.gepower.com/prod_serv/products/wind_turbines/en/downloads/ge_36_brochure_new.pdf) (last visited January 25, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

The first installed wind farm in the United States was installed at Crotched Mountain, New Hampshire in December, 1980.<sup>8</sup> That wind farm boasted a full capacity of approximately 600 kW. Since that time, wind power has migrated to many additional states, including Texas. In 2000, California led the nation in installed and operating wind projects with a hefty 1,646 MW installed state-wide.<sup>9</sup> At that time, Texas had 181 MW installed.<sup>10</sup> In the span of six years, Texas became the leader in the nation, and continues to be so today, with over 8,000 MW installed.<sup>11</sup> In fact, the Roscoe Wind Farm located in Nolan, Mitchell, and Scurry Counties, Texas, is currently the largest wind project in the world, with a capacity of 781.5 MW.<sup>12</sup> Further, Texas has plans to remain on top: public disclosures demonstrate that over 49,000 MW are in the pipeline to installation and operation.<sup>13</sup> With this quantity of power potentially available, one can see why wind developers flocked to the state. The question is, then, how do wind developers make money from wind power?

Generally, there are two ways that a wind project sells its power. First, and preferential to most developers, is via a power purchase agreement (“PPA”), usually with an electric utility as the purchaser of the generation. The PPA usually spans many years (i.e., 50) and calls for the utility to purchase the output from a wind farm at a set rate, which usually increases regularly (for instance, every three or five years). This is the preferred method for developers since it almost ensures that the project will sell its capacity, so long as the turbines and related equipment continue to function and the transmission lines are not oversubscribed (more on this later).

The second way a wind project sells its power is via the merchant market. In Texas, the merchant market, and ultimately the electric grid, is run by the Electric Reliability Council of Texas (“ERCOT”). The ERCOT grid is operated as an independent grid wholly situated within the borders of Texas, and therefore is under the jurisdiction of the PUCT. An explanation of the functionality and nuances of the ERCOT grid is certainly outside the scope of this paper. However, summarily, generators of electricity provide information to ERCOT on a day-ahead schedule which contain the amounts of power that project is available to produce on the following day. ERCOT gathers that information from all generators and enters the data into a computer program referred to as the Security Constrained Economic Dispatch (“SCED”). At the same time, potential purchasers of power for that same period (the next day) put in bids to ERCOT to purchase power. While there are additional factors that are involved in the program’s output that affect the price of the electricity, including transmission line capacities and congestion, SCED ultimately matches an amount of power requested with an amount of power supplied, and selects the generator that will cost the least to the purchaser. In sum, SCED chooses the cheapest power on the market to supply the potential purchaser, and then moves on to the next calculation. This extremely brief and simplistic review of the merchant market demonstrates why the preferred method is the PPA. The reality of the power generation world,

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<sup>8</sup> [http://www.windpoweringamerica.gov/ne\\_history\\_windfarms.asp](http://www.windpoweringamerica.gov/ne_history_windfarms.asp) (last updated October 9, 2008).

<sup>9</sup> <http://www.window.state.tx.us/specialrpt/energy/renewable/wind.php> (last visited January 25, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> ERCOT Technical Advisory Committee, Renewable Technologies Working Group, *Texas Renewables Integration Plan Quarterly Update for the 3-Month Period Ending May 31, 2009*, p. 1 (June 2009). The document can be found on the PUCT website ([www.puc.state.tx.us](http://www.puc.state.tx.us)) through the P.U.C. Interchange, Docket No. 34577, Document No. 180.

<sup>12</sup> <http://eoncna.com/contentProjectsRoscoe.html> (last visited January 25, 2010).

<sup>13</sup> *Texas Renewables Integration Plan Quarterly Update*, p. 2.

however, demonstrates that the merchant market is a viable option for a generator, although not as stable in the long term.

The money received from the sale of the power is not the only income that can be received by a developer. Beginning in 1992, the federal government has provided incentives for the installation and operation of wind projects, in particular what is known as the Production Tax Credit (“PTC”).<sup>14</sup> The PTC is an amount that is paid by the federal government to the operator of the project for producing wind power. Currently, the PTC is equal to approximately 2.1 cents per kWh.<sup>15</sup> A developer has the right to earn the PTC for ten years following approval. The implications this has on a wind plant’s ability to compete on a merchant market are significant.

It is obvious that a generator’s main goal is to have the turbines spinning and electricity being produced. Yet, the PTC provides additional incentive to keep the project producing electricity, so much so that the bids that are put into SCED can, and in the West Zone of ERCOT sometimes do, result in a *negative* bid being placed for consideration. Put another way, because the developer will be accruing \$0.21 per MW generated, they are able to essentially *pay* the purchaser to take the generated power and still manage to make some money in the end. It is certainly not the ideal market for a generator, but in light of the huge amounts of congestion from the West Zone (where the wind is) to the North and East Zones (where load is), and the resulting affect on the price, wind generators will take it. It remains clear that how the power will be sold is of great importance to the developer, but as Section II below discusses, it is not the company’s sole concern.

## II. DEVELOPER CONSIDERATIONS

In Section III, this paper addresses the facets of a wind lease, and does so primarily from the perspective of an attorney representing a landowner in the course of such a negotiation. However, even in the event one is counseling a landowner, it is important that the practitioner be cognizant and familiar with at least some aspects of where the developer stands on the issues and therefore how that party will be influenced in the negotiation context. Moreover, if the practitioner represents a developer, this section can provide at the very least a starting point for discussions with the client. Please note that this section does not cover all considerations of a developer. Instead, this section will generally address the process involved in building the wind project, and provides some references to learn more about the specifics.

The most important two ideals to keep in mind when representing a developer are (1) the developer is in the business of making money, and (2) the chances are very good, almost a lock, that the project will be financed by a third party. The developer’s tactics, goals, and decisions will all be highly influenced by these realities, and counsel should understand them.

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<sup>14</sup> <http://www.awea.org/policy/ptc.html> (last visited January 25, 2010).

<sup>15</sup> *Id.*

## **A. Should I Stay or Should I Go?**

How a wind project comes into existence is a relatively extensive process, despite the fact that the timeline from start to finish is often no more than three years. What follows is an extremely simplified and generalized description of the process undertaken by a developer, and should be considered as such. The first step, ultimately, is finding a site. Developers perform research, either in house or via a third-party, to determine areas they believe may be sufficient to locate a wind project. The developer then approaches landowners in the area to obtain access to the properties at issue in order to begin an assessment phase. The vehicle for this access, as described in greater detail below in Section III.A, can vary from a simple access or meteorological (“MET”) tower agreement to an option to lease the property. Which vehicle is utilized can determine the “what” and “when” of this period of development. Some developers will first construct and operate a MET tower to gather data about the wind resource. If the wind is considered sufficient (a determination which can depend on the technology the developer plans to install, the financial aspects of the company and the project, and other factors), the company will generally then move to conduct land surveys, environmental assessments, and transmission studies (if not previously performed).

The results from the assessments performed will be analyzed and a recommendation based on these findings is made. Concurrent with the timing of the studies, a developer may also be gathering information and possibly pitching the idea of a project and its output to potential purchasers of the generated electricity, and negotiating the terms of a PPA. Additionally, the company may be discussing financing options in house as well as with potential investors or mortgagees. The entirety of this information is compiled, considered, and analyzed, and a “go/no go” decision is made. If all of these hurdles are leapt over, the construction can begin. Some months later, barring interruptions due to weather, the economy, or other unforeseen issues, the project is up and ready to produce power, sell that power, and begin a revenue stream.

## **B. Tell Me More**

Again, the description above is overly simplistic, and omits some aspects of the process, but it provides a starting point to understanding the developer’s perspective. Addressing the extent of a wind company’s considerations during this course of action, the roadblocks along the way, and how best to deal with the nuances of putting a project together is outside the scope of this paper. However, below find some references that address some of the various aspects a developer’s counsel should be familiar with:

1. Brent Stahl, *Land: Survey and Title Issues*, presented at Wind Energy Institute 2008, Austin, Texas, February 2008;
2. Ben Cowan, *Environmental Siting and Permitting Considerations for Wind Energy Facilities*, presentation at Wind Energy Institute 2008, Austin, Texas, February 2008; and Gregory S. Friend, *Think You’re Done? Hardly. A Primer on Environmental Concerns Applicable during the Construction and Operations Phase of a Wind Project*, presented at Wind Energy Institute 2008, Austin, Texas, February 2008; and

3. Shannon H. Ratliff, II, *County Tax Abatements and School District Limitations on Appraised Value: Recent Attorney General Opinions and Legislative Outlook*, presented at Wind Energy Institute 2009, Austin, Texas, January 2009.

This is far from a comprehensive list. Nonetheless, these resources provide helpful discussions and viewpoints, and should serve as a basis for further inquiry into the various issues a developer must consider during the course of assembling a wind project. With these various aspects of development in mind, a discussion regarding the nuts and bolts of the wind lease from a landowner's perspective is in order.

### **III. THE WIND LEASE**

Arguably, the foundation of the wind project is the wind lease. Obviously, without rights to the surface acreage, developers would have no place to site the turbines and other related equipment necessary for a wind project. However, it should be noted that the collective terms of the leases in the project may affect the financing that is secured, and can influence the economic viability of the farm. From the landowner's perspective, the wind lease is the end-all-be-all of their interaction with the developer, and must be approached from that position. This could be the last opportunity to determine how the relationship is governed for the extent of the lease.

#### **A. Let's Get It Started**

This part of the relationship between the developer and landowner can take a few different forms, depending on the expectations and general practices of the developer. The relationship can be governed by an access agreement (as an independent document or as part of an easement/lease), an option to lease, or may just be found in a lease as a development term. While these different mechanisms exist, they all ultimately cover the same time period and do so for the same reasons: the agreement spans a 3 to 7 year period following execution, and prior to any construction or installation of wind equipment, during which the developer has the exclusive right to assess the subject property, including title, environmental, transmission, and wind studies. In an instance where the defined development period is within the parameters of a lease (whether an option or a specified development term), the length of the term may be cut short by the inclusion of a provision in the lease document that automatically begins the initial term (which includes the construction period) upon the commencement of construction on the property. In other words, when dirt is first moved on the property in furtherance of constructing the facilities, the lease moves into its next phase, generally without any action required on the part of the landowner or developer to so indicate this change.

The most basic and ultimately important items to discuss and consider at this stage are the payments to be made by the developer to the landowner. The basis for these payments are (1) access to the property to conduct surveying and studies, and (2) to possibly install and maintain a MET tower for the purposes of wind and weather measurements. One must recognize that if the land is such that a MET tower is installed on or near to the property, a negative easement is likely also included. Specifically, the developer will most often include in the terms of this early agreement that the landowner may not perform any activities or make any use of the property that would restrict the free flow of the wind in the area of the MET tower. Therefore,

the payments to the landowner ought to be on a per acre basis, since although it is possible that the installation of a MET tower will utilize a relatively small amount of land, and access must be secured to construct, maintain, and collect data from the station, the related negative easement also places a burden on the property, and the compensation for that right to the developer should be recognized.

If preferred, the landowner may also require that existing roadways be utilized for access and travel on or across the property. In the event existing roadways are not available up to the MET tower site, a payment for the construction of a roadway is also common, with consequent duties of the developer in the agreement to maintain the roadway. It is incumbent upon the landowner to ensure that language covering these points be included in the agreement, especially where the contract is not an option or a development term arrangement. Moreover, as discussed in greater detail below, if the arrangement is in the form of an independent agreement, further issues must be addressed in the document, including indemnity, default, removal procedures and standards, and other relevant provisions, many of which that would be found within the language of the easement/lease portion of a larger agreement.

As for the term of the access period, the amount of time the landowner wishes to allow his land to be burdened must be considered. The length of the term is not standardized across all leases, and often varies based on transmission constraints. For example, development periods found in agreements for the Texas Panhandle range from five to seven years, mostly based on the reality of little existing transmission in the region. Section IV describes the CREZ process and the consequent construction of transmission lines to, among other places, the Panhandle. Pursuant to the latest plan, transmission to the Panhandle will be energized, at the earliest, in 2013.<sup>16</sup> Consequently, a developer with plans in the Texas Panhandle will request a longer period of time up front so that they are not bound to either extend the existing or negotiate another access easement (in the event the agreement is a stand-alone type), or to begin construction of the project (in order to satisfy the terms of the lease in the event the arrangement is one of an option or development term) before a way to get the power out is ready. The normal construction period for a wind project is much shorter than the period of time it takes to construct a high voltage transmission line.

Conversely, access agreements and leases in the southern part of Texas generally contain a three-year term since transmission and capacity is more readily available in that area. The bottom line is that the landowner must be aware of what the common time frame is for an access period in his area. A landowner will not want to tie up his land unnecessarily, but it is also in the landowner's best interest to not require the period to be too short, as that could lead to a cancellation of the project due to time constraints.

The last item specific to the opening stage of a wind project and the developer's activities on the landowner's property is the gathered data. As previously mentioned, the developer uses this initial period to assess the property to determine the feasibility of the installation and operation of a wind facility at this location. The feasibility decision is usually based upon (1) what the MET data "tells" the developer, (2) whether any environmental concerns are present on

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<sup>16</sup> See *ERCOT's Analysis and Sequencing Recommendation*, filed in P.U.C. Docket No. 36802, Interchange Document No. 35, filed May 29, 2009.

the land, (3) the ownership and extent of the property that is discovered as a result of surveying, and (4) what options exist related to transmission. The owner must ensure that the agreement regarding access to the property requires the developer to turn over the data from the MET tower, the results of the survey, and any findings from the environmental assessments. This disclosure of information is often tied to the cancellation or expiration of the development period (i.e., the developer determines a project is not feasible, whether as a result of the aforementioned studies and analyses, or simply because the project will not be economically viable). It is imperative that the landowner have this information following the departure of the developer as the results and data will provide a good starting point for another developer that wishes to pursue a project in the area, and may also assist the landowner in “shopping” the property.

Assuming the feasibility studies determine that a project is viable, and the terms of the access agreement or easement/lease have not been breached or expired, the project will move to its next stage: construction.

## **B. Building A Mystery**

Unlike the development period, the construction, operations, and removal phases of the wind farm are all generally found in the same document; specifically, depending on the preferred method used by the developer, a lease or easement agreement. Moreover, in most leases the construction period is not specified for the purposes of outlining the commitments on the part of the developer or landowner. Instead, most leases move into the initial term. However, for the purposes of addressing each physical phase of a project, this paper refers to the construction period as an independent portion of the life of a lease agreement.

During the construction phase, the developer will be installing roadways, turbines, substations, operations and maintenance (“O&M”) buildings, and transmission lines (including collection, telephone, and other communication lines). This stage can last from six to twelve months. While the project is not yet satisfying its ultimate goal (producing electricity), this stage commences the commitments between the parties that will last for the term of the lease, anywhere from 30 to 50 years or more total. The main provisions applicable during this stage are those involving existing uses/no interference, payments, default, indemnification, environmental issues, taxes, and confidentiality. This section addresses those concerns related to the first three.

### **1. Existing Uses/No Interference**

Besides the Gross Revenues provisions of a lease, which are discussed in more detail below in Section C.2, the existing uses/no interference clauses tend to cause the most concern for a landowner. The lease often contains a statement listing the rights of the developer to the lands, including what activities it may conduct. These usually include rights to (1) access the property, (2) an easement for the free flow of the wind over the property, (3) an easement to install transmission lines (including power lines, fiber optic or other telecommunications lines, and sometimes closed circuit television lines), and (4) to conduct studies and surveys to determine the extent of the rights related to the land.

On the other side of this coin is the existing uses clause, which generally (it can vary between companies) states that the landowner possesses the rights to utilize the property in the

manner it had been used previously, so long as that activity does not interfere with the rights granted to the developer pursuant to the lease. This clause is also usually followed by a no interference clause, which reiterates that while the landowner has the rights to existing uses of the property, those uses cannot interfere with the rights granted to the developer in the lease. At this point, caution should be used to ensure that the “no interference” clause does not overly restrict the landowner’s uses. While it is acknowledged that in order for the easements granted to the developer to be worth anything the landowner must be restricted from interrupting the free flow of wind across the property or “holding the project hostage” by continuing to do as she pleases with the property, a reasonableness standard should be applied so that the developer cannot completely restrict the landowner from doing *anything* on the property during the construction period or on into the subsequent phases of the project. Counsel should consider including in this provision that no “unreasonable” or “significant” interference may occur by the landowner. Of course, this likely would require defining those terms in the agreement, but the terms could be drafted in a manner that provides that the claimed interference must have a negative commercial affect on the project in order for the landowner to be restricted in his use. In any case, the landowner’s and developer’s respective goals should be kept in mind during the drafting of this provision.

Therefore, prior to beginning the negotiation of a lease, an attorney ought to discuss with his client the specifics of (1) what activities are currently occurring on the property, and (2) what the landowner’s plans for using the surface into the future. Additionally, the landowner should explain whether there are current lessees on the property of any sort, including oil and gas exploration companies, grazing lessees, easements across the property in favor of non-owners, farming lessees, and persons with rights to hunt the property. It is also quite common for a grazing, farming, or hunting lease to be unwritten, so that must also be taken into account.

The particulars of these common existing uses must be assessed and drafted accordingly. For instance, developers usually require rules addressing hunting during times when their employees or contractors are present on the property. Typically, and obviously, a developer’s main concern is the safety of its agents and employees, and consequently the developer’s lease will provide not only for standards related to the hunting activities themselves (i.e., distance restrictions related to hunting near construction sites or types of firearms allowed), but also may require that hunters with access to the property sign a waiver placing responsibility for problems on the hunter and indemnifying the developer and landowner against hunting-related liabilities. The landowner, while keeping in mind the aforementioned safety goals, should ensure that these provisions are not so restrictive as to completely deny the right to hunt, and in the event that they do, proper compensation should be provided to make the landowner whole for this lost revenue. Provision should be made for a reimbursement of lost hunting income by allowing proof of such loss, either in the form of a written lease, a deposit slip, or an affidavit, and should account for the amounts typically received for hunting on the property.

Farming and grazing can and should also provide for reimbursements for lost income related to the developer’s use of the property that result in the landowner’s inability to fully utilize his property for these purposes. Again, the lease should specify an amount to be given based on the market value or going rate in the area for such activities, and should be designed to

provide for prorated amounts in the event a partial portion of income is lost due to the activities of the developer.

How the lease addresses oil and gas leases also requires particular attention and is usually split into two instances: existing leases, and future ones. For existing leases, the oil and gas exploration activities will have priority over the wind lease because exploitation of the mineral estate is a dominant right to the usage of the surface estate, thereby entitling the mineral lessee to all reasonable use of the surface to produce the minerals.<sup>17</sup> The extent to which the lease addresses existing oil and gas arrangements is limited to a recognition that such leases exist. For future leasing opportunities, the wind lease/easement will often include a provision requiring the landowner, in the course of negotiations, to request that the oil and gas operator include in its lease a provision acknowledging the existence of the wind lease and to subordinate the mineral lease. Ultimately, this request to the oil and gas entity will be to include language reflective of the accommodation doctrine. The accommodation doctrine, in its simplest form, requires the mineral lessee to use alternative methods of producing the minerals if a “reasonable alternative” exists to perform such production, one which permits the surface owner to continue to use the surface in the manner intended.<sup>18</sup> This doctrine is based on “due regard” for the surface lessee’s rights to use the surface.<sup>19</sup> Summarily, the mineral owner must determine whether alternatives exist to produce the minerals (by directional drilling, for example), and if such alternatives are reasonable, the mineral owner must use those alternative means.

For the purposes of the wind project, this issue is one where, as a practical matter, these potential conflicts between the exploration company and the wind developer are often worked out “on the ground” between the parties. However, counsel ought to consider including in the applicable wind lease provision that the landowner will use its “best efforts” to secure such language from the oil and gas lessee, as opposed to being required to do so, which could possibly result in the landowner being subject to a default under the wind lease in the event he is unable to convince the mineral lessee to add such terms.

The existing use/no interference portion of a wind lease must be carefully scrutinized and negotiated in order to ensure that the landowner’s continuing needs are met in conjunction with providing enough authority to the potential surface lessee to develop the property for its intended purpose. By understanding the landowner’s current and planned future uses of the property, counsel should be able to achieve the right balance to allow negotiations to go forward.

## **2. Payments**

Despite the fact that the project has no ability to produce electricity at this point, the landowner should ensure that she continues to be paid for the use of the land, and further receive compensation for the surface damages attributable to the installation of this equipment. Consequently, the lease should specify that per acre payments continue, possibly at a higher monetary rate than during the development period, and that installation fees are paid within a set amount of time following the commencement of construction or the individual completion of each item. Payments for turbines can be based upon the full tower (i.e., \$5,000 or \$10,000 per

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<sup>17</sup> *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex.1980); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex.1971).

<sup>18</sup> *Getty Oil Co.* at 622.

<sup>19</sup> *Id.*

turbine) or upon the megawatt rating of the turbine installed (i.e., \$3,500 per megawatt). Roadways and transmission lines are generally compensated on the basis of the length of the installation (usually per rod). Substations and O&M buildings ought to trigger one-time payments based on the amount of acreage used (the default acreage amount for both is often three acres), with a provision for additional monies due in the event the facility utilizes more than the defined acreage. Additionally, if the reimbursements for grazing, hunting, farming, or other specified issues are applicable to the landowner's property, payments likely will begin at this initial stage.

Additional potential payments at issue during this phase include those related to overhang and laydown areas. Regarding the former, it is an instance where turbines installed on an adjacent property not owned by the landowner overhang the owner's land. In this situation, a provision should be provided in the agreement stating that a certain fee should be provided to the landowner for any such overhang on a yearly basis. Some developers do not provide for these payments, and some will provide them only so long as the landowner does not have any turbines installed elsewhere on her property. A payment for a "laydown area" is a result of the developer using the property for the purposes of storing equipment and/or staging construction from that location. Since the developer is using that portion of the land to the exclusion of the landowner, and conceptually is causing surface damages to the land that is not otherwise compensated for in the lease, a fee should be provided. The fee is usually on a yearly basis, and would be prorated for partial years.

Finally, while not occurring during the construction phase, the issue of repowering can logically be considered here. Repowering is the process by which a developer upgrades the technology on the project, usually the turbines. A developer may decide that newer classes of turbines with greater generating capacity are a good fit for the project based on its past performance. The lease will provide the developer the right to repower, and the landowner should ensure he is compensated for the repowering efforts according to the previous terms of the lease, (i.e. payments for turbine installations, whether on a tower or per megawatt basis). In short, any surface damage-related payments should apply in the event of repowering.

In the context of our review the overall process involved in a project, the respective portions of the land have been cleared, the facilities have been constructed, and electricity is now ready to be produced from the wind streaming across the area. The relationship between developer and landowner now transitions to one of operator/payor and payee, and while some of the general terms of the agreement have already been effective, such as default provisions, indemnity issues, and tax considerations, to name a few, they become particularly applicable in this next stage.

### **C. The Long and Winding Road**

This section focuses on what will be referred to as the "operations period," which is the bulk of the term during which a project will be functioning. The landowner counsel, during negotiations and drafting, must focus on the various provisions of the lease with the mindset that they could all be "in play" during this phase, and should consider them accordingly. This section will not cover every provision at issue during the operations period, but will address those of greater interest to a landowner.

## 1. Term

Many leases are broken down into separate operations terms, generally referred to as an “initial term” and one or more “extended terms.” The initial term is usually effective upon the commencement of construction, and lasts for a set number of years. During this time, the concepts and provisions found in the wind lease are effective. In the event the lease agreement makes provision for extended or additional periods, how leases deal with the transition from initial to additional terms can vary. Some developers prefer the term to automatically extend into the additional periods with nothing required other than notice to the landowner that the lease is continuing. Conversely, some leases state that upon the approach of the expiration of the initial term, the developer, should it have interest in continuing to utilize the project to generate electricity, will approach the landowner to discuss continuing the relationship between the parties. From the landowner’s perspective, this latter scenario remains the preferable one. However, the provisions of this potential extension period must, logically, be negotiated and agreed to many years (think 25) prior to the actual occurrence. Therefore, specifying in the lease the standards to adhere to during that period must be performed at this stage of the negotiation.

The first item to address is timing, including the deadline by which the developer must approach the landowner, as well as the deadline for agreeing to an extension. These deadlines will be affected by the number and content of the topics that must be discussed among the parties, but generally the contract can present a start date for contact between the parties for nine months to a year prior to expiration of the original term. The participants ought to also discuss the financial ramifications of an extended term. As referenced in subsection 2 below, the landowner ought to require some sort of increased amount for regular payments over time, and this will apply to an extended term as well. Alternatively, the owner may want to include language in the lease to request that negotiations occur *following* the expiration of the initial term in order to ensure that market rates are paid to the landowner. This provision must also specify that the negotiated amount will be no less than the royalty rates or dollar amounts currently paid at the end of the initial term. In sum, the landowner may want to attempt to renegotiate for better payments following the first term, but she should ensure her payments do not end up lower than they were at the period’s end.

Landowner counsel must also inquire whether the term as laid out in the lease applies to all aspects of the wind project, including the transmission easement. On occasion, the lease term will apply to the presence of equipment, operations on the property, and access to the property, but will not apply to the transmission lines present on the property. The developer may want to secure a perpetual easement in the agreement so that, even if the project on this property does not operate for an extended period of time, or if the specific property the easement burdens does not ultimately have turbines installed and that land is released, they still have the right and ability to transmit energy from elsewhere in the project or from other projects in the area. The terms for payment of the transmission lines should therefore reflect the landowner’s opinion on essentially selling that strip of land, since the perpetual easement will operate in that manner. This is not to say that a landowner should not agree to this provision, but instead that she should be aware of the specifics of the term and negotiate accordingly. Perhaps the most efficient way to deal with this issue is to request that the term of the transmission easement be coterminous with the remainder of the lease provisions.

The author believes it is of utmost importance to impress upon the landowner the extent of their commitment by executing a wind lease. The landowner *must* be aware that, in many cases, this is literally a life-long commitment, and he must be certain this is acceptable. Landowner counsel must stress viewing the “big picture” to her client before the landowner enters into such an agreement that, as explained below, does not provide many opportunities for the landowner to cancel or terminate the lease. Not only must the term be strongly analyzed, but the payments due in return for the usage of the property require careful consideration and the landowner must remain comfortable with those terms.

## **2. Payments**

Perhaps the most complicated portion of a lease relates to the payments to be made by the operator to the landowner as a result of the sale of electricity from the project and other payments received by the operator related to its usage of the property as part of the wind farm. Generally, the operator calculates payments to the landowner based upon a formula that considers the amounts received by the operator from the sale of electricity. The royalty rates may vary from company to company, area to area, and the type of arrangement to sell the power (PPA vs. merchant market, as explained in Section II above). Moreover, different combinations of payments may be available.

The most common form of payment is the royalty. At the heart of a royalty is the concept of gross revenues. While there is no standard language across the industry, gross revenues are generally defined as the proceeds received by the developer for (1) the sale of electricity generated on the land, and (2) the sale of credits related to the production of energy on the property. These credits can include renewable energy credits, greenhouse credits, or pollution credits, but usually does not include revenues from the federal production tax credits or investment tax credits.

It is imperative that the landowner pay particular attention to this definition and related provisions for they can have a great impact on payments. For starters, the landowner must ensure that *any* funds attributable to agreements, contracts, or other arrangements related to the sale of electricity produced on the property are accounted to the landowner. For example, payments received by the operator from a purchaser in lieu of continuing on under the terms of a PPA should be distributed to the landowners, since had the contract not been cancelled or bought out, production from the land would have continued and earned additional revenues pursuant to the lease. Additionally, any funds received as a result of actions by the developer/operator against a purchaser (including failure to pay for power delivered) should also be distributed to the landowners.

Gross revenues are utilized to calculate the royalty paid to landowners. The negotiation surrounding the values for royalties is largely based on the market value of the time, the area, and the amount of land involved. One important point, however, is that a lease commonly provides for an incremental increase in the royalty value as the term continues, i.e. a certain percentage for the first ten years, an increased percentage for the next ten, etc. The incremental increases should be applied to any recurring or continuing payment the landowner is eligible for, including the per acre payments, the per megawatt installed amounts, per turbine amounts, annual dues from locating substations and/or O&M buildings, and others. At the *very* least, the

landowner should insist on an increase matching the Consumer Price Index. Landowners whose payments do not increase over time are landowners that lose potential income.

The lease will also likely contain a minimum royalty provision, which provides for a certain floor amount that a landowner will receive on an annual basis. A minimum royalty is generally reflective of a certain payment per megawatt installed on the property, or the total number of towers on the site, or a per acre payment, or even the highest of these values compared to each other. The minimum royalty payment is usually calculated by totaling the amount of royalties a landowner received over the course of a year (or shorter period if the developer so desires), and in the event the total is less than the amount specified in the lease as the minimum royalty, the operator agrees to pay the difference. Developers vary on how a minimum royalty is constructed, with some companies providing a minimum royalty only to landowners that have turbines installed on the property, while others provide a per acre payment that serves as the minimum payment to be received for any landowner regardless of the presence of turbines.

A landowner should specify that the minimum royalty should increase on a regular basis so as to adjust for inflationary increases, but also increases in the price for which power generated on the property is sold. As a practical matter, the minimum royalty or payment is what the landowner must be comfortable with in order to enter into the lease. Most landowners would be happy with the royalty payments in the event electricity prices are high, the wind is blowing often, and disruptions are at a minimum. However, the chances are at least even that a landowner will receive the minimum royalty at some point over the life of the lease. Since the payments to the landowner will go no lower than the minimum royalty, if he or she remain satisfied with accepting the minimum royalty in exchange for allowing the developer to utilize the property to generate electricity, the remaining monetary terms are relatively less complex to discuss and negotiate.

As a practical matter, landowners that are not satisfied with receiving “just” the minimum royalty, or simply want to have turbines on their property, may provide some resistance about entering into a lease with a developer. Often this resistance manifests itself in demands by the landowner to guarantee the installation of turbines on the property or she will not participate in the project. In the event this particular landowner holds a large amount of land, the developer may consider such a request. Where the landowner controls a significantly smaller portion of land, the developer often informs the owner that the project can and will be built around the objecting property. However, another solution for the small landowner is becoming more common: the community royalty.

The community royalty, or a pooling provision present in the wind lease, while not particularly prevalent in Texas, is becoming more widely implemented in agreements in other parts of the country. At its core, the community royalty provides a royalty to all landowners that are a part of the project regardless of whether a turbine is installed on the property, albeit at different rates than those with turbines present on their lands. This sort of provision has a long history in the oil and gas world, where landowners that enter into an oil and gas lease, but which do not have an interest in the property where the well is located, are compensated on the production of the minerals based on the proportion of their acreage to the whole area in the

proration unit. Conceptually, this exists because a proration unit encompasses the land area that a well will drain, and if an owner's land is within that perimeter, their minerals are being produced, and therefore they should be entitled to their pro rata share of the proceeds from the sale of that hydrocarbon.

In the wind arena, as explained previously, the lands adjacent to and within a certain distance of the project's turbines are important because their rights to perform activities that could interfere with the flow of wind across their property towards the turbine are restricted. Therefore, similar to the mineral lease, these "buffer" properties assist in the production of electricity by the turbine located nearby, and the landowners should be compensated accordingly. Similar to the oil and gas lease, the lessor on a wind lease should be paid based on his proportion of land to the total land area encompassing the project. For example, the applicable provision could provide that a percentage of the Gross Revenues (as discussed previously) produced by the entire project would be multiplied by the ratio of acres contributed by the landowner as compared to the total project area. The percentage of Gross Revenues involved in this calculation is generally one or two percent.

In practice, the excitement level on the part of a landowner to this type of provision will ultimately depend on the amount of acreage owned. Community royalty provisions are well received by smaller landowners with a slim chance to get a turbine installed on their land, where large landowners may not be particularly eager to share royalty revenues that would otherwise be theirs. An additional benefit of the community royalty is that it may assist a developer in cultivating relationships within the project boundary as well as in the overall area.

### **3. Default**

A default under the wind lease can take many forms, but in its simplest sense, the default is the failure on the part of one of the parties to satisfy its covenants outlined in the lease. How the default is dealt with within the confines of the agreement is where some confusion and some considerable disagreement can arise. Landowner counsel should be certain that the default provision is as protective of the landowner as possible, and practical in its application, which is not always an easy task.

The first step is defining the procedures for an opportunity to cure a default. Generally, the lease should supply a set period of time within which the defaulting party may cure the default following notice from the non-defaulting party to the defaulting party describing the alleged default. In the event the defaulting party fails to cure within the defined time period, the lease should provide for some sort of remedy to the non-defaulting party. At this point the respective opinions regarding the proper remedy often diverge. Generally, a developer will desire to have the default remedies limited to any recourse at law that would be available to the non-defaulting party, short of the ability of that party to rescind or cancel the lease. The landowner often will seek to have the remedy provision supply the right to rescind or cancel based on the belief that such a remedy would assist in deterring a failure to cure. Another aspect of this issue is that some developers prefer to split defaults into monetary and non-monetary categories, and set out different time periods to cure each, with more time afforded to cure non-monetary defaults. This is a result of a simple fact throughout leases: the developer is not in favor of including a provision that results in a termination of the lease, perhaps with the

exception of an uncured monetary default. The reasoning is plain in that the investment of time and money put into the project by the developer should not be forfeited due to a non-monetary default. This point is understandable, and ultimately debatable.

For example, for the most part it makes sense that the lease should not be terminated for something along the lines of a failure to provide notice. On the other hand, it is arguable that a developer's failure to follow the environmental covenants or provide insurance for the project should result in a termination if it goes uncured. Nonetheless, the only movement that a developer will likely make on this issue is to allow a monetary default to cause termination, if it goes uncured, but even that will not return the property to the owner. Why? As mentioned above, there is a great likelihood that a wind project will be financed, often by a mortgage. The mortgaging provisions common in leases generally will state that in the event of a monetary default on the part of the lessee, the mortgagee retains the right to "step into the shoes" of the developer and pay the monies owed. The bottom line remains, however, that it is nearly impossible to obtain agreement from the developer to have defaults under the lease to cause a termination of that agreement. Therefore, landowner's counsel must accept this probable outcome and ensure that the remedies provided for defaults are sufficient and effective, short of termination.

#### **4. Taxes**

Based on the existence of expensive new equipment on the property, the property taxes attributable to that parcel will most likely increase. Therefore, the lease must address this increase in taxes and procedurally how to ensure they are timely paid. Typically, a lease will address this issue by providing that the developer/operator will pay all taxes attributable to its use of the property or the equipment present on the land. Moreover, the developer may choose to cover any increases in tax liability as a result of a reclassification of the property or the loss of any exemption the owner had prior to the presence of the project. If the proposed lease does not contain these provisions, they must be included.

However, the landowner will also want the lease to address the procedure by which the operator pays the taxes. Now that the tax liability will be apportioned, a provision can be drafted that outlines which party will first pay their share to the other within a set amount of time after receipt of the tax bill. Since the landowner is usually the party that will receive the tax bill, the clause may provide a time period in which the owner must forward the information onto the developer, and an additional time period within which the developer must review and remit the taxes back to the landowner in enough time for the landowner to send the payments to the tax assessor's office. Another avenue to travel may be checking with the tax assessor's office to determine whether they will apportion the taxes according to which party is responsible for them (i.e., wind farm equipment, leasehold, and other related taxes are on a separate bill from the "normal" property taxes of the landowner). The tax provisions of the lease ought also to address that if one party fails to pay its tax liability that the other, if capable, may pay on the other party's behalf and later recoup the money via the next pay period (by adding or subtracting from the payment due).

There is little question that the taxes assessed to a parcel of land that becomes involved in a wind project have a good chance of increasing, but so long as the provisions addressing this

issue are carefully reviewed and drafted, both parties should be satisfied with the result. The failure to address the situation is what will cause problems.

## **5. Confidentiality**

The wind industry tends to be particularly concerned regarding keeping ongoing plans and potential project sites to themselves. The reasons for this vary, and usually relate to preventing competitors from discovering the developer's plans. Scenarios can be envisioned where a competitor with this information could lease up lands within a proposed project in order to either restrict the project from going forward or to "ransom" the project, consequently driving up the developer's costs to secure the lands, or could simply follow the coattails of established developers, find upwind locations, and locate a project that could interfere with the wind flow over the developer's property if the developer does not secure a sufficient boundary of land around the project. Whatever the reason, wind leases contain confidentiality clauses preventing the landowner from disclosing the financial or other specific terms for the life of the lease. However, the landowner should ensure that some reasonable exceptions exist within the language of this provision, including allowed disclosure (subject to informing the person that they, too, are bound by confidentiality) to attorneys, immediate family members, accountants, and existing and prospective lessees of the property.

## **6. Most Favored Nations**

A most favored nations clause in a lease specifies that if payment (and possibly other) terms of the lease with the landowner are exceeded by the developer's lease with another landowner within the project boundary or some other areal determination, that the original landowner's terms will be increased to match those of the new lessee. On its face, a most favored nations clause is attractive to a landowner because it provides a "second chance" to one who has perhaps not agreed to the best terms she could obtain. However, a problem arises when one inquires how this clause is triggered.

The reader should assume it is a landowner and a neighbor in the same potential project gets better terms. How would one know? The other landowner is bound by the same confidentiality agreement, so she cannot disclose the terms of her agreement. The memorandum that is filed in the property records for the county does not contain information that describes the financial terms of the deal either. So, without modifications to the most favored nations clause, the only party that knows the terms of these two leases is the developer, who may not be eager to disclose that it owes more money on a regular basis.

One method to resolve this potential issue is to modify the confidentiality agreement so that landowners within the same project may inform each other of the terms of their agreements. Of course, one person may not always be willing to disclose their personal finances, despite the fact that disclosing the information will ultimately do them no harm. Another method is to have the lease provide the right to review the developer's records on the issue, though developers may be hesitant to provide such information without the other landowners' consent, which may not be given even if the developer is in favor of such a clause. Most leases do contain a clause about auditing the financial records of the operator for up to two times per year, but this is likely limited to the review of the auditing landowner's information, not that of other project participants. Overall, the ability of a landowner to have access to the information that would disclose greater terms for a neighbor is limited. If it comes to light that another party did receive

better terms and the developer did not honor the provisions of the lease, an action for breach would occur, but that is after the fact and obviously would have costs and time associated with its enforcement.

Furthermore, the developer may be in favor of including a most favored nations clause because it provides that party the ability, following the execution of initial leases in the project, to “toe the line” to keep costs down by refusing to increase lease terms because were they to increase payments for one landowner, all landowners would have to receive the same payments, and then the project may become economically unviable. This is not to intimate that this statement is not true, because in most instances it likely is. The bottom line is that the most favored nations clause may or may not be of real benefit to the landowner, and that depends upon the developer, the confidentiality provisions, and the timing involved.

#### **D. Break It Down Again (or I Started Something I Couldn't Finish)**

Following the termination of a lease, whether by default, release, or the expiration of the term, the equipment installed on the property will need to be removed. Consequently, the lease should contain a clause addressing the timing and standards of removal. Typical removal standards address replacing the land back to the original condition it was in upon execution of the lease, or as close thereto as possible. In this vein, the clause could cover the depth of removal of underground equipment (turbine foundations, roadways, and underground power lines), grading requirements, reseeding, options to remove roadways, and other items.

An additional post-operations issue that ought to be addressed is the inclusion of a removal bond. The removal bond serves the purpose of providing money for the removal of the equipment utilized for the operation of the wind project (turbines, substations, O&M buildings, roadways, electricity lines and other cables) in the event that the operator encounters financial problems and is unable to fund removal. While the specifics of the removal bond are negotiable, the landowner should ensure that (1) the bond is sufficiently funded to be able to pay for the removal of all equipment and (2) the amount of the bond is either reassessed every few years or, in the event the clause provides a fixed amount, increased on a regular basis to reflect the current costs of removal.

Finally, following cessation of operations, the lease document should specify that a release will be executed and filed with the deed records where the Memorandum of Lease is filed so as to “clear the title.” The landowner will likely ask that the costs associated with this execution and filing be borne by the developer/lessee.

Based on the foregoing discussion, it is clear that a landowner and counsel must invest a great deal of time reviewing agreement terms and considering the short- and long-term ramifications of entering into a wind lease. To be certain, no real “short-cuts” exist. Nonetheless, entering into the transaction possessing knowledge of what to expect can pay dividends in the end.

#### IV. THE TRANSMISSION EASEMENT

Obviously, the power generated by the wind project must be used somewhere. The main question, however, is how to get it to those that want it. Besides locating geographic areas that have sufficient amounts of wind, and the economy's affect on financing options, transmission is currently the most limiting factor to wide scale development of this renewable resource. Generally, wind with sufficient velocity to create energy via turbines is located in the more remote areas of the country; areas that do not have great power needs, and therefore areas that do not have the transmission capacity necessary to carry utility scale wind power. In Texas, it is most windy in the western part of the state and in the Panhandle, with some areas of viable wind capacities along the Gulf coast, while load is primarily in the eastern half of the state.

It would seem that a relatively simple solution would be to just build more transmission lines from wind to load. It would SEEM that way; the reality is much different. Many thorny issues related to transmission lines exist, and a few of those are very difficult to resolve.

##### A. Transmission

First, transmission is expensive. As a conservative *estimate*, the cost for constructing high capacity transmission lines, capable of transmitting electricity the great distances that often exist between the wind generation and load, lies between \$750,000 and \$1,500,000 per mile.<sup>20</sup> One should note this does not include the costs of substations, autotransformers, or similar equipment necessary to operate the lines. Moreover, some areas, like plains or flatlands, are considerably less onerous to construct transmission upon than rocky or hilly terrain. With increased difficulty comes increased effort, and consequently, increased cost. Furthermore, despite common misconceptions to the contrary, the transmission line costs are not paid solely by the transmission service provider ("TSP"). Most often the TSP recoups some, if not all, of the monies spent by "uplifting" the costs of building transmission lines to the electricity ratepayers. Therefore, justifying the costs of building transmission lines is more difficult for a transmission company than first imagined.

Second, people own most of the properties which a transmission line must span, and may just live there! In a transmission service provider's perfect world, all of the lines would simply be placed on an already-secured easement from point A to point B. In the real world, part of the task of building transmission is obtaining easements, whether by agreement or via eminent domain proceedings. When one considers, especially in the case of wind power, the length of the transmission lines that are required to provide wind power to load in Texas, one would be hard-pressed to believe that most, if not all, of the rights-of-way will not be secured by agreement between the company and the landowner, but will instead involve proceedings involving eminent domain. Additionally, the company will likely also be required to secure a Certificate of Convenience and Necessity ("CCN") from the PUCT, which provides another opportunity for a landowner to protest the path chosen by the transmission company. To put it plainly, the first time one gazes upon a 345kV or higher voltage transmission line, one can

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<sup>20</sup> See Rebuttal Testimony of Michael J. Lee, Infrastructure and Reliability Division, Public Utility Commission of Texas, November 14, 2008, Exhibit ML-R-Z (via PUCT Interchange (<http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/login/pgLogin.asp>), P.U.C. Docket No. 35665, Interchange Document No. 911).

understand why a landowner might not be agreeable to allowing placement of the lines on his lands. Nonetheless, there exist many instances where a landowner is satisfied with the payment and terms offered by the transmission company, and thereby decreases the amount of heartburn involved in the construction process.

Third, it takes a long time. The time to complete a transmission line, including the CCN process, negotiating and securing easements (if an agreement with the landowners is possible), going through the eminent domain process (if an agreement with the landowners is NOT possible, and assuming the entity is a utility), construction, and energizing the line, can be on the order of two to five years. Moreover, that does not take into account any additional time necessary for curing any potential problems identified by an environmental or other siting assessment.

Based on these factors alone, it is quite easy to comprehend that simply deciding a transmission line would be useful in a certain location and building that line is not an easy process for a transmission company. It further explains why some companies and engineers often consider higher capacity lines to do the job, i.e. 765kV transmission lines, or direct current (DC) lines, as these lines have the potential to decrease the quantity of lines that have to be built to carry the larger amounts of energy from generation to load, and also decrease the amount of work performed by the company, including securing fewer easements.

Overall, the previously-listed issues account for at least some of the practical considerations involved in constructing a transmission line. From a business perspective, there is another facet to the discussion above related to the costs of the line: specifically, what has consistently been referred to as the “chicken and egg” issue. The chicken and egg problem consists of the two main parties involved in bringing wind-generated electricity to the consumer: the developer/generator, and the transmission service provider. Imagine a developer that believes that Andrews County is a prime location for a large capacity wind farm. One of the main considerations prior to leasing up large tracts of land and beginning surveys, environmental assessments, and financing discussions would entail the very basic analysis of “how can we get our power to those that would use it?” In other words, is there sufficient transmission capacity between Andrews County and load, say Dallas? After an engineering review, it is discovered that the capacity of any nearby existing lines is inadequate for such a large amount of power to be taken. So the developer contacts the TSP with rights to build and operate the transmission lines in the general area, and inquire whether it is willing to either (1) build an expensive and time consuming new line between the project and load, or (2) upgrade its existing lines to accommodate the new generation.

Now imagine the transmission provider. A developer has inquired whether it will upgrade its existing lines or build new lines so that the developer can get its power out. The first consideration is likely to be “how is this going to be paid for?” The second thought is probably “how can we be sure the developer is going to build its project?” Therein lays the dilemma. The developer is likely not going to take serious action on putting together and constructing a \$500 million dollar project without the transmission to get the electricity to the consumers, and the transmission provider is hesitant to spend the money to build a line when there is no assurance that the project will ever be built. As a general business practice, a transmission provider is not

going to be interested in possibly owning a line to nowhere. Consequently, the chicken and egg issue threatened to severely restrict the development of wind resources in Texas. It stepped the Texas Legislature to provide some guidance.

## **B. Can't Get There From Here**

In 1999, the Texas Legislature enacted Senate Bill 7, which set up one of the nation's first Renewable Portfolio Standards ("RPS"). The RPS requires companies that sell electricity to retail customers to have at least a certain percentage of the total amount of electricity it sells be renewable energy, including solar, geothermal, biomass, hydroelectric, and wind. Texas' first RPS required electricity providers to generate 2,000 MW of their electricity from renewable resources.<sup>21</sup> In 2005, the Legislature revisited the RPS via Senate Bill 20 and increased the goals to 5,880 MW by 2015, and 10,000 MW by 2025.<sup>22</sup> As of May 31, 2009, Texas had 8,135 MW of new wind generation in operation, with "new" referring to those installed after September 1, 1999.<sup>23</sup> Texas is currently expected to surpass 10,000 MW of *wind* installation in 2011.<sup>24</sup> To support the RPS, Senate Bill 20 also conferred upon the PUCT the authority to require an electric utility or transmission service provider to construct or enlarge transmission facilities in order to meet the RPS goals.<sup>25</sup>

Finally, Senate Bill 20 created the CREZ process. The law requires that the PUCT consult with the appropriate electricity organizations and councils under its jurisdiction, and thereafter "designate competitive renewable energy zones throughout the state in areas in which renewable energy resources and suitable land areas are sufficient to develop generating capacity from renewable energy technologies."<sup>26</sup> Moreover, the bill ordered the PUCT to "develop a plan to construct transmission capacity necessary to deliver to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in the competitive renewable energy zones."<sup>27</sup>

In short, the Legislature directed the PUCT to identify zones where there was sufficient evidence of renewable power generation capacity in the state, and then order transmission companies to build the lines to get the renewable power to load. Chicken and egg problem solved; for the most part. The PUCT adopted Section 25.174 of its Substantive Rules (16 TAC § 25.174), also referred to as the "CREZ Rule," to specify the manner by which Senate Bill 20 would be enacted. In December 2006, ERCOT presented to the PUCT its *Analysis of Transmission Alternatives for Competitive Renewable Energy Zones in Texas*, which outlined areas determined to possess the best wind resources in Texas, and proposed initial transmission grid modifications that would assist in transmitting the renewable power to load.<sup>28</sup>

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<sup>21</sup> Texas State Energy Conservation Office, *Texas Renewable Portfolio Standard*, [www.seco.cpa.state.tx.us//re\\_rps-portfolio.htm](http://www.seco.cpa.state.tx.us//re_rps-portfolio.htm) (last visited January 25, 2010).

<sup>22</sup> Public Utility Regulatory Act, Tex. Utilities Code Ann. (Vernon Supp. 2008) §39.904 (PURA).

<sup>23</sup> *Texas Renewables Integration Plan Quarterly Update*, p. 1.

<sup>24</sup> *Id.*, p. 2.

<sup>25</sup> PURA, §39.904(g)(2).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> ERCOT System Planning, *Analysis of Transmission Alternatives for Competitive Renewable Energy Zones in Texas* (December 2006).

In January 2007, the PUCT opened Docket No. 33672 (“CREZ Docket”). Many parties intervened into the docket and requested party status, ranging from developers to transmission service providers to utilities. After two years, the PUCT issued an Interim Order in the CREZ Docket, and designated five CREZs: McCamey, Central West, Central, Panhandle A, and Panhandle B. Following an assessment by ERCOT of transmission alternatives to provide power from these regions to customers, the PUCT issued a final Order on Rehearing delineating the CREZ Transmission Plan, which ordered 18,456 MW of transmission capacity constructed.<sup>29</sup> Following the completion of the CREZ Docket, the PUCT determined which TSPs will be responsible for constructing and operating the various lines making up the CREZ Transmission Plan.<sup>30</sup>

Following the final order in the CREZ Docket, the PUCT initiated Docket No. 35665. This docket considered the qualifications of various TSPs that wished to be considered to construct the new transmission lines. The PUCT selected established TSPs as well as some newly-formed TSPs to handle the construction.<sup>31</sup> The final “main” docket in the process was Docket No. 34577, referred to as the dispatch priority docket. While originally intended to provide priority of generation dispatch to those wind developers that participated in the CREZ Docket, the PUCT did not provide any sort of priority to wind developers on this issue, preferring to allow SCED to dispatch wind generation normally.<sup>32</sup> The order on dispatch priority further stated that the originally proposed collateral requirements for wind generators to assist in constructing the transmission lines were not necessary for lines serving the Central, McCamey, and Central West CREZs since those zones had already demonstrated sufficient financial commitment to developing projects in those areas. An additional docket was opened to determine whether the financial commitment for the Panhandle CREZs is sufficient.<sup>33</sup> While a final order has not been issued in the docket at the time of this writing, all indications are that both Panhandle CREZs will be found to have sufficient financial commitment.

The process next moved to a sequencing phase, intended to sequence the applications for a CCN by the TSPs selected in Docket No. 35665. In Docket No. 33672, the PUCT separated the proposed CREZ transmission lines into eleven (11) “priority” lines and twenty-three (23) “subsequent” lines.<sup>34</sup> The priority sequencing docket, Docket No. 36801, and the subsequent sequencing docket, Docket No. 36802, set deadlines by which the selected TSPs must have applications for CCNs filed at the Commission, with dates ranging from September 16, 2009 to July 26, 2010.

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<sup>29</sup> *Order on Rehearing*, P.U.C. Docket No. 33672, p. 2.

<sup>30</sup> *Order on Rehearing*, P.U.C. Docket No. 35665, Attachments A and B.

<sup>31</sup> It should be noted that on January 15, 2010, the Travis County District Court, 200<sup>th</sup> Judicial District, ordered that the final Order on Rehearing in Docket No. 35665 be reversed and remanded to the PUCT. A remand docket has been established, but it is uncertain how this decision will affect ongoing CCN application dockets at the PUCT.

<sup>32</sup> See generally *Final Order*, P.U.C. Docket No. 34577.

<sup>33</sup> P.U.C. Docket No. 37567.

<sup>34</sup> *Order on Rehearing*, P.U.C. Docket No. 33672, p. 12.

### C. Condemnation

It is at this point that landowner involvement ultimately commences. The CCN process, in its simplest form, is a proceeding that results in a determination of the routing of the proposed transmission line at issue. An applicant must demonstrate that the proposed line satisfies the provisions of PURA § 37.056 and Texas Administrative Code §25.101. Among other issues, the PUCT generally takes into consideration the following factors in deciding whether to grant a CCN: (1) the adequacy of existing service; (2) the need for additional service; (3) the effect of granting the certificate on the applicant and any utility serving the proximate area; (4) community values; (5) recreational and park areas; (6) historical and aesthetic values; (7) environmental integrity; (8) probable improvement of service and lowering of cost to consumers in the area if the CCN is granted; and (9) the effect of granting the CCN on the ability of the state to meet the RPS.<sup>35</sup> However, for policy reasons, TSPs applying for CREZ transmission line CCNs are exempt from addressing the factors of need, adequacy, effects on utilities in the area, or the effects on service and costs as listed in PURA § 37.056(c)(1)-(3) and (4)(E).<sup>36</sup> To begin the process, a CCN applicant is required to provide various forms of notification to the public, including specific mailings to landowners within 500 feet of the centerline of any proposed line that is submitted in the application.<sup>37</sup> If interested, the landowner is provided an opportunity to intervene into the case to assert reasons and argument on why a certain line should not be chosen by the TSP and ultimately the PUCT.<sup>38</sup> Following discovery inquiries and a hearing on the merits, a final location for the line is selected and the TSP moves forward with securing control of the locations along the approved route.

Site control of the proposed transmission line easement is usually accomplished by what is referred to as either “condemnation” or “eminent domain.” For the purposes of this paper, “condemnation” shall be the preferred term. Condemnation is, in essence, the lawful taking of private property by a governmental agency or other entity with the proper authority. The authority is limited by requirements that (1) the condemnor provide just compensation in return for the taking of the private property,<sup>39</sup> (2) the taking be for public, and not private, purposes,<sup>40</sup> (3) the taking include only those properties or rights that are necessary,<sup>41</sup> and (4) due process be met.<sup>42</sup> Pursuant to § 181.004 of the Texas Utilities Code, TSPs are one of the non-governmental entities that possess eminent domain authority, and therefore sometimes utilize that power to gain site control over property along the propose route of a transmission line. The power is “sometimes” utilized because, as discussed below, the usage of the power is necessary only in the event that the TSP and landowner are unable to forge an agreement regarding an easement.

The condemnation process is governed by Chapter 21 of the Texas Property Code, and generally consists of three “phases.” The first phase is an attempt made by the potential condemnor, in this case a TSP, to negotiate an agreement with the landowner for the purchase of

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<sup>35</sup> PURA § 37.056.

<sup>36</sup> PURA § 39.203(e).

<sup>37</sup> Tex. Admin. Code § 22.52.

<sup>38</sup> Tex. Admin. Code § 22.103 – 104.

<sup>39</sup> Tex. Const. art. 1 § 17.

<sup>40</sup> *Id.*

<sup>41</sup> *Housing Auth. v. Higginbotham*, 143 S.W.2d 79, 87-88 (Tex. 1940).

<sup>42</sup> Tex. Const. art. 1 § 19.

the easement needed for the transmission line route. A landowner must be cognizant of the various issues involved in this negotiation, and this phase is oftentimes similar, if not identical, to the landowner being approached by a party, whether TSP or otherwise, to discuss a private easement. Section D below describes in more detail the various issues involved and the considerations necessary by a landowner for this process. However, it should be noted that there exists no requirement or guarantee, regardless of the situation, that the potential purchaser offer market value for the easement. This is particularly relevant in the context of the pre-condemnation offer, as the Texas Supreme Court has held that in order to satisfy the statutory requirement of attempting to negotiate the “damages” due for taking the property, the offer does not need to reflect market value.<sup>43</sup> Specifically, the Court was “persuaded that the dollar amount of the offer generally should not be scrutinized,” and that the statutory scheme “does not contemplate such an examination.”<sup>44</sup>

The first phase of the process consists of the negotiation for the acquisition of the right-of-way or easement. Newly-enacted legislation presents two additional requirements. First, not later than seven days prior to the condemnor’s “final offer,” it must provide a landowner’s bill of rights statement in compliance with Texas Government Code § 402.031.<sup>45</sup> Second, if the condemnor is a private entity with eminent domain authority, it must provide the landowner’s bill of rights “before or at the same time as the entity first represents in any manner to the landowner that the entity possesses eminent domain authority.”<sup>46</sup> In the event that the parties are unable to come to an agreement on the damages or compensation for the easement, the second phase of the condemnation process is initiated by filing a petition in a county court where the land is located (or if the county has no county courts, a district court).<sup>47</sup> The pleading by the filing party must (1) describe the property to be condemned; (2) state the purpose for which the entity intends to use the property; (3) state, if known, the name of the owner of the property; (4) state that the entity and property owner were unable to agree on compensation or damages for the property; and (5) state that the entity provided the landowner’s bill of rights.<sup>48</sup> Next, a panel of special commissioners, consisting of “three disinterested freeholders who reside in the county” is appointed by the presiding judge to assess the value of the land at a hearing and enter a decision reflecting their determination.<sup>49</sup> Should either party object to the findings of the commissioners, a filing is made and the matter is tried in the same manner as if a normal civil action to delineate damages for the condemnation of the property.<sup>50</sup> Obviously, a landowner must be aware of the entirety of this process, but since the second and third phases can be avoided by coming to an agreement in the first phase, the latter deserves the most attention at this point.

As referenced earlier, the negotiation with a proposed easement grantee addresses ultimately the same issues regardless of whether the exchange is the result of a private inquiry into a landowner’s property or is done so in the context of the first phase of the condemnation process. While it is true that, in the latter situation, the leverage a TSP may be able to assert is

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<sup>43</sup> *Hubenak v. San Jacinto Gas Trans. Co.*, 141 S.W.3d 172 (Tex. 2004).

<sup>44</sup> *Id.*

<sup>45</sup> Tex. Prop. Code Ann. §21.0112(a) (Vernon’s Supp. 2009).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, §21.012.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, § 21.014, .015.

<sup>50</sup> *Id.*, § 21.018.

greater, and the likelihood of lengthy negotiations is less, this does not affect the issues to consider from the landowner's perspective. Before reviewing these and other points, we must first establish some background.

Generally, an easement is a liberty, privilege, or advantage without profit granted to a person, either personally or by virtue of the person's ownership of a specified parcel of land, to use another parcel of land for a limited purpose.<sup>51</sup> An easement does not convey title to property, but rather is a nonpossessory interest in real property that is not revocable at will, and which gives the holder of the easement the right to use another's land for a specific purpose.<sup>52</sup> Two types of easements exist at law. First, an easement appurtenant is one in which the benefits are for a specific parcel (the dominant estate), irrespective of the identity of the owner.<sup>53</sup> Such an easement attaches to and is said to "run with" the property. Second, an easement that benefits the holder without regard to whether the holder owns an adjoining or nearby parcel is called an easement in gross because it does not belong (appertain) to any particular parcel of land. An easement in gross is not assignable or transferable unless there is an express assignment provision in the instrument creating the easement.<sup>54</sup> This is different from an easement appurtenant, where the easement is assumed to transfer with any assignment of the dominant estate or the owner's rights in the property. More often than not, the transmission easements sought to be entered into for electrical lines are easements in gross.

At first glance it is apparent that the basic terms of a transmission easement are similar to the terms of a standard wind lease. It should be noted that many wind leases include easements for transmission lines that are necessary to the project, and those terms and considerations can be approached in the same manner as a "stand-alone" transmission easement. However, the subject of this section is specifically geared towards the negotiation of a transmission easement that is not tied to the subject land being part of a wind development (although some aspects could be utilized in that context).

## **D. What's Going On?**

### **1. Easement Parameters**

Generally, the first order of business will be determining what the stated purpose of the easement will be, and what parameters the grant of the easement will include. Generally, the purpose of the easement will include constructing, installing, maintaining, using, replacing, relocating, reconstructing and removing the line, whether underground or above ground, and usually includes distribution, transmission and communications lines. However, the proposed easement may also include the right to the proposed lessee or condemnor to place electric transformers, substations, switches, interconnection facilities, and telecommunications equipment (which can entail closed-circuit television, internet, etc.), to name a few. A landowner must determine what they are interested in having on their land. When a landowner is first approached regarding the prospect of granting a transmission easement, the owner may

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<sup>51</sup> *Hubert v. Davis*, 170 S.W.3d 706, 710 (Tex. App. – Tyler 2005, no pet.).

<sup>52</sup> *Id.*; *Marcus Cable Associates, LLP v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002).

<sup>53</sup> *Machala v. Weems*, 56 S.W.3d 748, 754 (Tex. App. – Texarkana 2001, no pet.).

<sup>54</sup> *Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 546 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, pet. denied); *Farmer's Marine Copper Works v. Galveston*, 757 S.W.2d 148, 151 (Tex. App. – Houston [1<sup>st</sup> Dist. 1988, no writ).

envision only a route over the specified property that will house wires, poles, and an access road. The installation of a substation or perhaps interconnection facilities (depending on how those facilities are defined) may be a much greater amount of burden on the property than originally anticipated.

Similarly, the equipment the landowner may have originally anticipated would be included in the agreement (poles, lines, etc.) should also be assessed and specified. What types of lines (i.e., 69kV, 345kV, etc.) are proposed? Other items must also be considered at this point, including the easement's width and height. Is there interest in setting a ceiling or maximum height? Will the company use wooden or concrete spun poles, and consequently, what sorts of foundations will be constructed and how deep? What sort of access easement is necessary? Is the access easement found in the proposed instrument? Will the easement be exclusive or will it provide for joint use? Moreover, will only electricity transmission lines be present, or telecommunications or direct cable lines? If the latter is present, what are the anticipated uses for those wires? One must also keep in mind and attempt to address an instance where circumstances change and a larger line (if possible) is needed to be strung. Is this something the parties are willing to discuss? These are but a few of the important questions that should be considered and addressed in the easement instrument, and which not only affect the value of the easement but the longevity of the easement and its affect on the subject property.

An additional consideration most likely present in the negotiation of a private easement that can avoid confusion and misunderstandings during the construction phase of the transmission lines is to agree to a site plan meeting prior to any activities on the property (besides surveys and environmental assessments, if requested to be performed). The parties can utilize this meeting to discuss the proposed activities on the subject property and raise any issues about locations, processes, and the like. A map of some kind may also be particularly helpful in this context, and the instrument should specify a date that is a reasonable time prior to the scheduled site plan meeting so the parties can review it. The provision should also address the fact that the grantee will reasonably consider any changes or suggestions proposed by the grantor for better utilization of the property, but the grantee is not bound to adhere to them.

## **2. Term/Length**

One aspect of the negotiation of a transmission easement is consideration of the term of the easement. Landowners can be almost certain to expect the proposed lessee or condemnor to desire that the easement be perpetual. One would assume that at the very least a potential lessee would require a significantly long duration for the easement. Landowners **MUST** take account of the fact that this decision not only impacts their future utilization of the subject property, but the future owners of that property, whether they are heirs, successors, or assigns. The landowner may wish to discuss the possibility of defining a time at which point the easement will lapse or no longer be effective. A possible example of such a provision may be to request that the easement be specifically utilized to construct and operate electric transmission lines tied to a particular wind project or a series of projects by a particular developer, or mandate that only wind power or renewable power may be transmitted on the lines. A termination provision, which is further discussed below, can include "triggers" related to these different subjects.

From the landowner's perspective, it may also be prudent to approach the negotiation of the electric transmission easement in a manner similar to a normal sale of land. Officially the transmission lines are installed on an easement, but if a landowner is unsuccessful in negotiating

a trigger, a definite number of years, or some other specific term to the instrument, or it is defined as perpetual in nature, then the transaction bringing about the exchange of rights must be negotiated in the context of a sale. In other words, one should not be negotiating with the idea that this is an easement and that someday the property burdened by this agreement will be reverted. Instead, the terms and conditions must reflect the possibility that the potential condemnor or lessee is doing the equivalent of purchasing the surface rights of that land.

### **3. Termination**

In the event the transmission easement has a term that will expire or will terminate upon the occurrence of a specified occurrence, care should be taken in determining what sorts of activities will trigger the termination, and what responsibilities the parties have following this trigger. For example, a logical way to determine a trigger for termination for, say, an access easement would be to determine whether the roadway is utilized, or in what manner it is used. A transmission easement that houses electrical lines is somewhat more difficult to assess, since the landowner really does not have any way of knowing whether electricity is continuing to flow through the line.

This presents a somewhat thorny issue related to notice, specifically in the private easement situation. From a lessee's perspective, the lessor is generally required to provide notice that if, within the time period specified in the easement agreement (90 days, 6 months, one year), the lessee does not "cure" any nonuse of the easement, the agreement will expire. Most termination provisions in other contexts require notice from the lessor to the lessee. In this instance, however, the landowner would not have the ability, as the technology currently exists, to determine whether electricity is flowing through the lines within the easement footprint. A possible resolution would be to have the instrument provide that after a certain amount of time, say 14 or 30 days, the grantee would be required to provide notice that electricity is not flowing, assuming it is not an instance of force majeure, which can be dealt with in a separate provision. It would then be the landowner's responsibility to keep track of the date and occasionally inquire as to whether electricity is flowing, and upon the expiration of the time period, the easement would automatically terminate.

### **4. Removal**

For transmission easement agreements that provide for the possibility of termination of the interest, some provision should be included to address removal standards and removal bonds. Generally, such terms will govern when, how, and to what extent the transmission easement improvements should be removed, and how the work will be funded.

#### ***a) Removal standards***

A provision should be included in the easement that determines the instances and standards related to removing the remnants of the transmission easement on the landowner's property. Again, typical provisions are found in wind leases that can be applied here. The easement should specify that the improvements should be removed from the premises within a set time period (6 months to a year) following termination of the lease. This will include not only the poles, lines, transformers, and any other above-ground equipment, but should address the extent to which the foundations anchoring the poles are removed. Obviously the standards for removing some or all of the foundations will be dependent upon the types of lines to be strung and the poles suspending them. Therefore, the instrument should specify the depth and

width of foundation to be removed. For example, the language of the easement may delineate that the grantee is required to remove any improvements, including foundations and footings, to a depth of, say, 5 feet. There is some question regarding the roadways constructed by grantee to access the transmission easement and whether the grantor would desire to have the roads removed at all, not to mention that a grantee may not be inclined to agree to such a removal, especially if the roadway is quite lengthy. The concept is one landowners and developers alike should consider during the negotiation process.

The next step in any removal process will be returning the surface of the land to some agreed-to standard. Terms can range from generally returning the surface to its original condition that existed at the time of execution of the easement agreement, restoring the surface to its approximate condition at a date certain, or specifying standards for the types of grasses to reseed, the types of soil to utilize in grading the surface, and collecting and properly disposing of trash and debris from the site before exiting. For example, depending on the types of transmission lines to be installed on the property, the depth and width of the foundation to anchor the poles will need to be removed to some extent.

#### ***b) Removal Bond***

As mentioned above, the removal provision can provide a time period within which the grantee must remove the improvements from the subject property. If a time period is agreed to, the provision should also address what should be done in the event the grantee fails to meet this deadline. A removal bond can assist on this issue. Removal bonds are becoming quite common provisions in wind leases, and the same standards and terms should be provided for in a transmission easement, but applicable to the certain improvements involved with transmission as delineated above. Grantors should attempt to negotiate the inclusion of a provision that specifies when the bond is utilized, how it is funded, and when such funding will commence.

The bond provision generally sets out a date, usually an anniversary of the effective date of the easement, after which the grantee must obtain, fund, and deliver to grantor a bond in an amount sufficient to cover the estimated costs of removing the improvements upon the property. This raises two issues. First, the amount of the bond should be no less than one hundred percent (100%) of the estimated costs, but since the costs are “estimated,” it may be worthwhile to request the bond be greater than 100% in the event the costs are unintentionally underestimated. Second, it may be of benefit to provide an opportunity to have the estimate provided by an unaffiliated third party in the event the parties to the instrument are unable to agree on an estimate. The bond should be updated on a regular basis to account for an increase or decrease in the estimated costs of removal, and that estimate may also be required to be performed by an unaffiliated third party. An additional vehicle to utilize that provides for increases in removal costs over time is a price index adjustment that will reflect inflation, but it remains to be seen whether such an index will appropriately reflect the true cost of removal.

#### **5. Existing Uses**

The proposed transmission easement (generally in a private easement situation) will likely take into consideration existing uses on the property, from grazing to ranching to farming to hunting, all providing the opportunity for the landowner to continue utilizing the property as it was utilized prior to the installation of a transmission line, so long as those activities do not interfere with the use and enjoyment of the easement by the lessee. Yet the agreement should

also specify any remedies (most likely in the form of agreed-to damages) that the grantor is subject to for disturbance to the existing uses of the property.

The existing uses provisions are important to both parties, for the reasons discussed above for the grantor, and for the purposes of knowledge and restricting activities for the grantee. Grantee desires to have knowledge of all existing uses prior to securing the transmission easement in order to verify that it will have enough space and access in order to operate its system, and with which its operations will not be disturbed or negatively affected.

#### **E. Only Time Will Tell**

As goes transmission capacity, so goes wind development. The actions by the Texas Legislature and the PUCT are significant, but far from resolving the overall problem of a general lack of available transmission capacity for wind generation. While the PUCT ordered the construction of over 18,000 new MW of capacity, it should be noted that the current approximation of electricity production capacity (potential) from the windy lands of Texas is on the order of 524,000 MW.<sup>55</sup> What that means is that there remains a very large amount of potentially productive acreage that will, at best, be extended for another length of time until those areas are themselves designated a CREZ, or until sufficient capacity is constructed to accommodate that generation. The possibility exists also that, based on the on-the-ground results of the CREZ process, transmission providers will be more likely to agree to construct and/or upgrade transmission lines without having a completed project.

Landowners must be vigilant in understanding all of the terms of any proposed transmission easement, whether in the context of condemnation or private easement negotiations. Considering the potential length of the term of the easements, the property owner must be certain that he or she (and his or her successors) can “live with” the provisions of the agreement. It is true that time will ultimately tell, but one is better off not waiting that long to see the results.

## **V. CONCLUSION**

Wind is gaining strength. There can be no question that the idea of wind power generating large amounts of our nation’s electricity is oozing into the national consciousness, whether as a result of political rhetoric or scientific review. Regardless of how it comes to light, wind power as at least a partial solution to our energy and economic problems is becoming more widely accepted, and as it often does, the law will respond accordingly.

This paper addressed some of the issues associated with the various stages of the life of a wind lease and the some of the particular provisions of importance during those stages. One must recall that in relative terms, especially when compared to other common forms of electricity generation (oil and gas and coal), that wind power is generally in its infancy. As the technology, economy, and societal energy needs (and wants) continue to change, so too will the aspects of representing parties involved on either side of a wind project. Moreover, the sheer

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<sup>55</sup> Texas State Energy Conservation Office, *Texas’ Renewable Energy Resources*, <http://www.infinitepower.org/reswind.htm> (last visited January 25, 2010).

massiveness of the amount of transmission necessary to meet the potential growth of wind and renewable energy development in the state also likely implicates many landowners in addressing either a private easement proposal or condemnation notice. Texas will be leading the way on both accounts, just as it already does.