

WIND FARM LEASING

By: Douglas M. Bregman, Esq.

The increasing use of windpower is not just a lot of hot air. Obtaining the land on which to place the turbines can be a clouded undertaking. This article will present some information which can provide some shelter from the storm.

The installed wind energy capacity was enlarged in 2008 alone by 50% in the United States². In fact, in the last two years the quantity of commercially produced wind energy increased to be more than twice that which was generated in the prior 25 years. At this point, the United States is the world leader. This growth has also sparked technological improvements.

Despite these improvements, the rapid increase in wind energy capacity investment is currently somewhat on the wane. The reason for this is almost strictly due to the lull in the availability of financing. Wind energy lenders such as Wachovia, Lehman Brothers and AIG are now out of business or not lending in the field.

There are financial incentives which should drive the industry once financing becomes available again. The tax benefits are still in place, and are certainly enjoying political support. But, many of those investors who would have sought these tax benefits are not currently in the economic circumstances to be looking to shield profits. Moreover, the industry will be given a boost by the implementation of renewable energy portfolio standards. These standards ask that electric utility companies obtain a certain percentage of their power from renewable energy sources.

Those active in the industry are searching for land on which to establish windfarms. Wind data, mainly the wind speed average (usually at least 13 mph), are collected over a period of time. Another important factor is the existence of nearby transmission lines. Other upfront due diligence must be considered, such as taking the political temperature of the potential community where the turbines may be installed, determining scientific viability, such as the influence on weather³, and performing avian migration cycle studies.

Of course, beyond the scientific studies, the windpower developer needs to be negotiating with the landowners to obtain easements, options to lease, or contracts to buy. This land acquisition program is performed on a parallel track with those working to establish the siting and project feasibility.

The pieces of real estate needed to be secured in some way fall into several categories. The area needed for each turbine is approximately one acre. A substructure needs to be built on approximately three to five acres. Also, one or more operations and maintenance facilities need to be built on two or three acres to have a small building and yard available. A communications facility (a microwave tower) may need to be accommodated. Roads need to be laid out to handle the construction, to bring in the sizable equipment, and to maintain the installation. Finally, the utility lines, above or below ground, need to be linked through easements.

While the land can be purchased, most typically it is leased, for several reasons. Leasing involves less capital outlay; the wind farm only needs to utilize less than 10% of the total real estate; and the landowners can still continue to use their land, such as for farms.

The transaction typically begins with an option to lease and a right of entry agreement. During the term of these documents, the developer can perform its due diligence.

If the years of due diligence lead to a determination that the land is appropriate to utilize for a wind farm, the option to lease is exercised. At this point, the wind lease term begins. What follows are some of the critical elements of the wind lease:

1. Term. The duration of the lease needs to take into account the time necessary to get permits, construct the operation, integrate the farm generation into the utility grid, the useful life of the equipment, and perhaps extension terms if the farm is feasible beyond the period initially anticipated. Lease terms are somewhere between 30 and 50 years.
2. Compensation. This can take many forms. There can be a base rental which is a function of

comparable land rental rates in the area of the wind farm juxtaposed with the economics of the developer and the remainder usage capability of the landowner once the wind farm has been installed. There can be a bonus payment based on the number of wind turbines that can be placed on the land. There can be compensation based upon royalties calculated as a percentage of income once the production of electricity begins. The landowner may want to receive not only one or more of these forms of compensation, but also gain a payment for crop or other damage caused by the wind turbines, and penalties the farmer may receive for property removed from the Federal Conservation Resource Program.

3. Right to Terminate. If part of the leased area cannot be used or the economics change, the developer wants to retain the flexibility to minimize the cost. The landowner also wants to move the project along and minimize its long-term commitment to the wind farm if its development is not going to be successful.

4. Use Rights. Issues such as noise, sunlight shadow, mineral rights ownership and visual effects need to be discussed, understood and negotiated so as to allay concerns and eliminate surprises and litigation.

5. Decommissioning. The costs and responsibilities attached to the end of the project need to be negotiated. If the land needs to be restored, the specifics of this responsibility need to be defined.

6. Other Issues. Many other subjects must be incorporated into the wind lease. For example, assignment, default, casualty, insurance and environmental topics must be included.

In summary, the wind lease is a complicated document which requires detailed preparation and negotiation. To prepare and finalize a wind lease is not a breeze of a job.

1 - The inspiration and much of the background for this article comes from the Spring 2009 Papers published by the American College of Real Estate Lawyers.

2 - At this writing, no wind farms have been built in Maryland.

3 - Barrie, D. B. and Kirk-Davidoff, D. B.: Weather response to management of a large wind turbine array, Atmos. Chem. Phys. Discuss., 9, 2917-2931, 2009.

Douglas M. Bregman is the Managing Partner and founder of Bregman, Berbert, Schwartz & Gilday, LLC in Bethesda. He practices in the areas of Real Estate Transactions and Litigation, Business and Corporate Matters, Wills, Estate Administration, and Mediation and Arbitration. He can be reached at 301-656-2707 or dbregman@bregmanlaw.com