

ANATOMY OF A WIND ENERGY LEASE

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CHAPTER 7

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I. INTRODUCTION

If you have had occasion to drive through West Texas recently, particularly along the stretch of Interstate 20 between Abilene and Sweetwater, or in the more remote areas of McCamey and Fort Stockton, you may have noticed something new among the usual array of pump jacks, mesquite and cattle on the barren landscape: Wind energy turbines. The turbines are easy to see as they are normally about 240 feet high, with propellers that have a radius of 80 feet and a diameter of 160 feet. The turbines are spaced in long rows, and at night dot the landscape with blinking red lights.

Wind turbines represent a renewable energy source that has been widely utilized in Europe for over a decade¹ and is now coming of age in this Country. Texas is already home to thousands of turbines, the majority of which are located in West Texas. The largest concentration of wind turbines in Texas is in the McCamey area, with several new wind farms planned throughout the High Plains region.² Because Texas ranks second in the nation for wind energy potential,³ it is likely many more wind farms will be constructed throughout the state.

As with oil and gas development, before wind energy turbines can be erected, leases and other legal documents must be secured from landowners. To date, there are no published forms for wind energy leases. The forms that do exist are owned almost exclusively by the wind companies,⁴ who, as a rule, are reluctant to allow their use for educational purposes.⁵ This reluctance stems from a number of factors, including the enormous investment in time and money a wind company spends creating a lease template from which to work. This article addresses the major elements commonly found in wind energy leases and, where possible, offers forms and suggested modifications.

II. THE WIND ENERGY LEASE

There are currently numerous wind energy lease forms in use in Texas. Although there is some variation, these leases are identical in that their provisions are concerned with protecting the lessee's future investment in the property. In this respect, the wind leases in use today can be compared to the printed form oil and gas leases in use fifty years ago. As opposed to oil and gas leases now in use, wind energy leases may easily be 30 to 40 pages in length, exclusive of the land description. They contain many additional provisions, often ignored by

parties to an oil and gas lease, which reflect the very different nature of the wind energy lease. It is a lease of the surface only of the land (i.e. a tenancy for years) as opposed to a conveyance of a fee simple determinable as in the case of an oil and gas lease. Of necessity, therefore, the wind energy lease contains provisions often found in other surface leases which focus on the type of estate received by the wind lessee.

A large part of the increased length of the wind lease may be attributed to the fact that wind farms are capital intensive projects involving tens and sometimes hundreds of millions of dollars. For this reason, every wind lease is drafted in recognition of the lessee's plans to finance its development and operation.⁶ Concerns about lending requirements often cause the wind company to be very resistant to changes in the printed form of the lease. The landowner, on the other hand, may wish to change some provisions and add others in order to preserve and protect the land and his or her right to use the same for competing uses such as farming, ranching, oil and gas exploration, hunting and recreation. The farmer or rancher will seek to maximize his income from the land from all sources, including wind lease payments. Wind farms may extend over a very large area and thus have a broad area of influence, but actually occupy only a small part of the land. The "footprint" or amount of land actually taken up by a turbine is generally very small and the remaining acreage can be used for other compatible land uses, such as grazing or farming.⁷ As will be shown, however, hunting may be a more difficult issue. These concerns and the accommodation of competing uses of the land often require extensive negotiation and compromise in order to reach an agreement satisfactory to both parties. See Appendix 1, Exhibit "B" for a sample lease form.

III. THE WIND ENERGY LEASE OPTION

Probably every wind lease in use in Texas today is predicated upon an exclusive option granted by the landowner for a given term ranging from one to five years, which may be extended (e.g. such as a two-year option with a two-year extension). The option may be contained within the terms of the wind lease or the subject of a separate agreement. See Appendix 1 for an example of a separate option agreement.

The purpose of the option is to allow the wind company time to conduct a wind study to determine whether the potential site is suitable for wind development. Typically, the option grants to the optionee/lessee the exclusive right of ingress and egress over and across the land for the purposes of (a) installing, maintaining, operating, inspecting and removing one or

more wind monitoring devices (i.e. meteorological towers), including the performance of all tests and studies associated therewith; (b) surveying the land; and (c) performing such other tests and studies as the wind company may desire in connection with the option, including environmental, avian and cultural resource assessments, and geotechnical, foundation and soil tests.

The consideration for the option is usually a flat fee paid to the landowner at the time it is executed. The fee is often calculated on a price per acre basis for each acre of land covered by the option (e.g. \$5.00 to \$20.00 per acre). The amount of the consideration may be dependent upon the length of the option period. The landowner may also seek additional consideration, such as a flat fee of \$2,500.00 for each meteorological tower installed upon the premises during the option period. In addition to these amounts, the landowner may also have provisions for the payment of surface damages resulting from the optionee's activities on the land.

In addition to the term, consideration, and permitted activities, the option also includes provisions with regard to termination, assignment, notice, and the rights and responsibilities of the parties during the option term. The landowner may also wish to include provisions such as the following:

- a. that the activities of the optionee be conducted with a minimum of thirty-six hours notice to the landowner and with approval by the landowner of routes of access to and upon the property;
- b. that the optionee's activities on the property not unreasonably interfere with the landowner's farming and ranching activities;
- c. that at no time shall the optionee or any authorized agent of optionee bring firearms onto the land; and
- d. that the landowner be allowed to lease the land for hunting purposes during the option period, provided that reasonable and necessary precautions are taken by both parties for the protection of the optionee's personnel and property.

In almost every case, the exercise of the option by the wind company makes the lease effective and immediately binding upon the parties. As a result, it is necessary for the wind company and landowner to negotiate all of the terms and provisions of the wind energy lease in advance. Considering the many detailed provisions contained in the lease, this procedure can be very time consuming and expensive. Thus, if the option is not exercised, the attorney's fees and costs paid by

each party for drafting the lease will be for naught. One exception is an option agreement which includes a "term sheet" that outlines the basic terms and conditions of the proposed wind energy lease and provides that, upon exercise of the option, the landowner and optionee "shall use commercially reasonable efforts to negotiate in good faith to agree upon a comprehensive Wind Energy Lease acceptable to each party and with the language typically required by optionee's lenders and title company, as well as language typically required by landowners, within one hundred twenty (120) days of the negotiations being initiated by optionee..." It provides that the wind energy lease shall contain the same economic terms and provisions as contained within the "term sheet."⁸

IV. MAJOR ELEMENTS OF THE WIND ENERGY LEASE

A. Purpose

The clause or clauses describing the purpose or permitted uses of the surface in the wind energy lease generally allow the lessee to undertake any activity the lessee determines is necessary, helpful, appropriate or convenient in connection with, or incidental to, the accomplishment of the construction and maintenance of the wind farm. See Appendix 2. It is important to note that the permitted uses include not only the assembly and installation of wind turbines, but also of transmission and gathering lines, both overhead and underground, substations, energy storage facilities, telecommunication equipment, roads, pipelines, control, maintenance and administration buildings, utility installations, lay down areas, maintenance yards, water wells, fences, as well as other improvements, facilities, appliances, machinery and equipment in any way related to or associated with the permitted uses. Many of the above described uses are only engaged in during the building phase of the wind farm. Thereafter, surface use is generally limited to normal maintenance and upkeep of the project. The lease may also contain a clause that allows the lessee to conduct site tours for the public.

As will be seen, if the landowner wishes to restrict uses of the surface of the land by the lessee, additional provisions must be added to the lease. For example, if the landowner does not wish for a substation or for "O and M buildings"⁹ to be placed upon the land, the landowner must delete these provisions from the permitted uses or add a provision prohibiting these uses. Since at the outset the lessee may not know whether substations and other facilities will be placed on the leased property, it may be very resistant to such changes.

B. Term

The term of a wind energy lease can range from 20 to 45 years, or more. The length of the term may be affected by:

- a. the life of the wind turbines installed (i.e. 20 to 25 years), and/or
- b. the minimum amount of time the lessee needs to recoup its investment and make a reasonable profit.

Although there are many variations, the term may be either:

- a. a single term, such as thirty (30) years, commencing on the effective date and expiring on [__date__], or
- b. an initial term which may be as short as one to two years (i.e. the construction period) or as long as fifteen to twenty years, with an extended term or terms of ten to fifteen years each.¹⁰

In negotiating the length of the lease term, the parties must balance their competing concerns:

- a. that the landowner is negotiating a lease that may well extend beyond his or her lifetime and which will affect future uses of the land; and
- b. that the wind company is seeking to recover its costs and maximize profits while taking advantage of future innovations in the industry.

Given these concerns, the average term of a wind energy lease is approximately 30 to 35 years, including the time required in construction of the project.

C. Rent/Royalty

The primary source of compensation to the landowner in a wind energy lease is found in the rental and/or royalty clause. However, most leases also provide for additional compensation by way of bonus payments before commencement of construction, installation payments, and minimum royalty. An analysis of these clauses in the order of their appearance in the lease form is as follows:

1. Bonus Payments Before Commencement of Construction

Bonus payments are usually either of the following:

- a. monthly payments beginning on the effective date of the lease, prorated for partial months, until the commencement of construction (e.g. monthly rental payments of \$1,000.00 paid in advance). See Appendix 3a.
- b. an amount paid on the lease commencement date calculated by multiplying a dollar figure (e.g. \$3,000.00) by the number of turbines to be located on the lease land, but not less than \$_____, plus \$_____ per rod, multiplied by the number of rods included in each access and transmission easement upon the premises. An additional amount may also be paid for the location of a substation or other facilities upon the land. See Appendix 3b. For a further discussion of substation payments, see paragraph D.4. below regarding surface damages.

2. Installation Payments

Installation fees may be payable in conjunction with bonus payments, or in lieu thereof. This clause provides that the lessee shall pay to the lessor a sum equal to \$[_____] (e.g. \$3,000.00) per megawatt of installed capacity upon the land in two equal installments, with the first installment being due and payable within sixty (60) days of the commencement of construction, and the remaining installment being due and payable within sixty (60) days of the first day of production of wind generated electric power on the premises.

The purpose of this clause is to compensate the landowner for all surface and other damages incurred during the construction phase of the project. Apparently, it is based upon the assumption that the more megawatts of capacity (i.e. turbines) placed upon the land, the greater the surface damages. See Appendix 3c.

3. Royalty

Royalty, which is also referred to as rent, operating fees and/or monthly production payments, is described as a percentage of the gross revenues, as that term is defined in the lease. It is paid either monthly or quarterly. There is no standard definition of gross revenues, and the term is variously described from lease to lease as to the items which are to be included and excluded. A definition favorable to the landowner is found in Appendix 3d.

Royalty may be paid on a semi-fixed basis, such as 3-3.5% of the gross revenues for the first 20 years and 4% thereafter, or on a graduated scale, such as 4% of the gross revenues for the first 10 years, 4.5% for years

10 through 15, 5% for years 15 through 20, 5.5% for years 25 through 25, and so on.

As in oil and gas leases, the amount of royalty in the lease will depend on the bargaining power of the lessor and the willingness of the wind company to increase its standard offer. Likewise, the amount of money a landowner may expect to receive as royalty during any given year of the lease term depends on many additional factors such as:

- a. the number of megawatts (i.e. turbine power) installed on the property, which will be dictated by the size of the turbines used. Turbines may vary in size from .66 MW to 1.8 MW.¹¹
- b. wind capacity of the area, with 40 to 50 percent being considered to be the optimum range;
- c. hours of operation of the turbines on an annual basis;
- d. availability of a transmission line with sufficient capacity; and
- e. price, usually figured on a per kWh basis with one MW = 1,000 kW.

4. Minimum Royalty

The Minimum Royalty clause in a wind lease serves two purposes: (1) it provides income to the landowner during the construction phase of the project; and (2) the landowner receives a minimum payment even if the turbines located on the property are temporarily not generating electricity or are generating very little electricity. Because Minimum Royalty payments are costly, in the event no turbines are located on the leased property, it is likely that the wind company will exercise its right to terminate the lease.

A Minimum Royalty clause is frequently drafted as the greater of: (a) \$[____](e.g. \$2,000) per megawatt per year installed on the land; or (b) \$[_____] (an amount usually figured on a per acreage basis, e.g., \$10.00 per acre); provided, that said sum is prorated for partial years and is due and payable only to the extent that the royalty payments do not exceed the minimum royalty during any calendar year.

Often language is added to this provision which provides that the minimum royalty shall increase by a stated percentage after a specified period of time or during any extended term of the lease. A sample minimum royalty clause is set out in Appendix 4.

D. Uses Reserved by the Landowner; Protection of the Surface

Due to the fact that the wind energy lease is given for such a long term, the landowner may be concerned as to how his or her other uses of the land will be affected now and in the future. Normally, the wind lease simply states that the landowner expressly reserves the right to use the land for all other purposes not granted to the lessee under the lease so long as said uses do not interfere in any way with the lessee's operations. By way of elaboration, the attorney representing the landowner may wish to negotiate additional lease provisions which preserve specific landowner uses and expressly identify the rights and responsibilities of the lessee in the maintenance, protection and restoration of the surface.

1. Ranching and Agricultural Use

As in an oil and gas lease, the landowner whose ranch is covered by a wind lease will seek to include specific details regarding ingress and egress to the land, as well as provisions for maintenance of roads, locking of gates, fixing of fences, fencing of dangerous machinery, distance requirements from houses, barns, corrals and water tanks, and other such provisions in order to protect his or her livestock and property. The landowner/farmer will also wish to include provisions for the maintenance and replacement of terraces, avoidance of CRP (Crop Rotation Program) lands, placement of roads and power lines, and similar terms so that his or her farming operations are not unduly hindered by the wind operation.

2. Oil and Gas Exploration

A landowner who also owns all or an undivided interest in the mineral estate will wish to preserve his or her right to explore and develop the land for oil and gas. Due to the fact that the mineral estate is dominant to the surface, making the wind lease subservient to the surface rights of a mineral owner and his oil and gas lessee, the wind company will also be interested in protecting its operations from interference. If there is no outstanding oil and gas lease on the land and the lessor's involvement in a subsequent oil and gas lease is important to the future development of the property, express language that allows the landowner to lease the land for oil and gas exploration and development, but protects the location of the wind turbines and other installations from interference by the oil company and its assigns is essential. If the land is already subject to an oil and gas lease, drafting can be more difficult, but a wind lessee might at least expect to receive the benefit of the accommodation doctrine, which requires an oil and gas lessee to accommodate existing

surface uses where such accommodation is reasonably possible, consistent with industry practice, and practicable within the confines of the premises. *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Tarrant County Water Control and Improvement District No. 1 v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993); *Sun Oil Co. v. Whittaker*, 483 S.W.2d 808 (Tex. 1972).¹²

3. Hunting and Other Recreational Uses

As every rancher knows, hunting is big business in Texas. In many areas, hunting has supplanted cattle raising as the primary source of income from the land. In drafting the wind energy lease, the landowner may wish to maintain the right to lease the land for hunting, so that he or she might continue to receive that income. The wind energy company, on the other hand, has grave concerns about liability issues, not only for its own employees and property, but also for those of its business invitees, independent contractors and others who must come on the land to maintain the project. These conflicting positions frequently lead to serious disagreement between the parties. Almost all wind leases include a "Hunter's Waiver and Release Agreement" as an exhibit to the lease. All persons hunting on any part of the land covered by the wind lease, or entering upon the land for recreational purposes, are required to execute the waiver and release prior to entry. Additionally, some companies insist that there be no hunting at all during certain periods (such as the construction phase) while others require hunters not only to sign a release, but also to call the wind company on entering and leaving the land and to notify the company (orally or by telefax) of their whereabouts on the land each day.¹³

In negotiating these clauses, it is important to remember that rifle hunting season exists only for about two months of the year (i.e., November and December), whereas shotgun hunting (i.e., bird hunting) exists from September until late Spring (i.e., dove, quail and turkey season). The most concern is really with rifle hunting, since a rifle bullet can travel as far as a mile or more, but a shotgun's effective range is not over 50 yards.¹⁴ As shown by the example in Appendix 5, common sense and reasonable precautions may be all that is necessary to protect each of the parties' interests. Some wind companies, however, take the position that this clause is non-negotiable. In such instances, the landowner will have to evaluate which activity will generate the most income.

4. Surface Damages, Maintenance, and Restoration

a. Surface Damages

Unlike most current oil and gas leases, the wind energy lease often does not contain provisions for the payment of surface damages. As shown in paragraph C.2. above, the wind company takes the position that the bonus payments and/or installation payments paid to the lessor at the beginning of the lease are considered to cover all surface damages incurred in the initial construction of the project. Substations are an exception. If a substation is to be located upon the lease, the lease usually provides for the payment to lessor of a flat fee (i.e. \$5,000.00) at the time of construction or a stated dollar figure paid annually during the term of the lease. Surface damages incurred after the initial construction phase are the subject of an "Additional Disturbance" clause. See Appendix 6. Under this clause, surface damages are paid only if such damages are not in connection with the installation of any additional turbines on the land. The presumption is that the installation of additional turbines will increase the landowner's royalty, thereby compensating the landowner for any additional surface damages.

Some wind leases also contain provisions regarding the use of water and the excavation and use of caliche. The wind company may negotiate for use of water from surface tanks or existing water wells. If there are no existing water wells, the wind company may negotiate an option to drill a water well or may simply truck the water in. A company will generally truck the water in as the water is usually only needed to clean the turbine blades prior to installation.

As in modern oil and gas leases, the landowner will seek to negotiate the highest possible price for his or her water and caliche and will likely also seek to restrict the use of water by the lessee, as it is an extremely valuable resource.

b. Maintenance

The wind lease usually contains general terms regarding the obligation of the lessee to maintain the surface of the land. As shown above, the landowner may wish to add provisions that specify in detail the lessee's responsibilities.

c. Restoration

As in most current oil and gas leases, the wind energy lease contains a provision which provides that within a stated period of time after the termination or expiration of the lease, the lessee shall, upon the written request of the landowner, remove all of its improvements from the land, other than roadways, and restore the land

to its approximate original condition that existed before the lessee constructed its improvements, all at the lessee's sole cost and expense. Normally, the removal operation includes any subsurface improvements located within three to five feet of the surface of the land.¹⁵

E. Taxes

The wind lease usually includes or should include a clause which provides that the lessee shall be responsible for any annual increase in the landowner's *ad valorem* taxes levied as a result of the wind energy project, thus making the landowner responsible only for ad valorem taxes attributable to his or her ownership of the land and any improvements he or she installs thereon.

F. Insurance and Construction Liens

The wind lease provides that the lessee shall, at its expense, maintain a broad form comprehensive coverage policy of general commercial liability insurance. Some forms also require the landowner to purchase a similar policy. Most wind leases require that the lessee keep the land free of mechanic's and materialman's liens for labor and materials provided to the project.

G. Assignment

Like the oil and gas lease, the wind lease may be assigned at the lessee's sole discretion.

H. Termination

Also, as in oil and gas leases, the lessee in a wind lease has the right, at any time, to surrender or terminate all or any portion of its right, title and interest in the lease. The landowner, on the other hand, has no corresponding right to terminate the lease, except in the case of a payment default. See paragraph J. below.

I. Indemnity

Indemnity clauses are standard in the wind energy lease and may be extremely broad. Like the service company in an oil field service contract, the landowner will need to pay careful attention to this clause and seek to modify the same in order to restrict his or her liability.

J. Default and Remedies

Provisions regarding default and remedies in the wind lease are similar to other surface leases. Typically, the only way the landowner can terminate the lease upon default by the lessee is for non-payment, and then only after the lessee has been notified of the same and given an opportunity to cure. The lessee's breach of any other term of the agreement only affords the landowner a "cause of action under applicable law."

Given the huge amount of capital investment made by the lessee and its investors in a wind project, the landowner will probably find it extremely difficult, if not impossible, to include a provision in the lease allowing the landowner to terminate the lease for anything other than a payment default.

K. Disputes; Venue and/or Arbitration

Due to the fact that wind leases are almost exclusively found in the rural areas of the state, the wind company may seek to include an arbitration clause or alternate venue site for the resolution of any disputes regarding the lease or its terms. Like other companies operating in rural areas, the wind company may be concerned about being "home-towned" by a local judge and/or jury. The landowner, on the other hand, may not wish to resolve his or her disputes under the lease by an unfamiliar process (like arbitration) in a far away city, such as Dallas or Houston. Consequently, the landowner and wind company have valid competing concerns over venue and the best method to resolve disputes.

L. Confidentiality

Every wind lease contains a confidentiality clause which provides that the terms of the lease are proprietary and must be kept confidential. As a result, the lease itself is never recorded. Instead, as in some oil and gas leases, a Memorandum of Lease is executed by the parties and filed of record in the county where the land is located.¹⁶

M. Miscellaneous Provisions

There are numerous additional provisions in a wind energy lease including representations and warranties of the lessor and the lessee, title, mortgages, subordination, hazardous materials, condemnation, non-obstruction easements, and the like. To address all of these clauses would be far beyond the scope of this article. Examples of many of these clauses are contained within the printed lease form in Appendix 1.

V. ADDITIONAL DRAFTING CONSIDERATIONS

A. Separate or Community Leases?

In most cases, a separate wind energy lease is prepared for each tract of land included in the wind power project, so that the landowner receives royalty only from the turbines located on his or her land. An interesting variation is found in Appendix 1, which is a form of community lease that contains the following provisions:

1. "Royalty. ...as between the parties constituting 'Owner,' the royalty payment shall be divided in the following ratio: ____."
2. "Operated as single property. The parties constituting Owner are acting in concert. Lessee shall be entitled to treat the Property as a single property and the Owner as a single owner. Lessee shall not be required to see to allocations among the parties constituting Owner."

For obvious reasons, the community lease will not be favored by the large landowner in a wind energy project, as he or she will desire to receive all of the royalty from the turbines located on his or her land. It may be more applicable in the situation where a project involves multiple small acreage tracts, none of which can accommodate many turbines.

B. Overhang Provision

As with the drainage provisions in an oil and gas lease, the landowner in a wind lease may well be concerned about a turbine or turbines which either overhang or are located a short distance from his land. A sample overhang provision is found in Appendix 7. Under this provision, the landowner receives additional royalty for the "taking" of wind from his or her land. Wind companies, on the other hand, prefer not to deal with the revenue sharing required by an overhang provision. If necessary, the wind company would rather make a one-time payment (or perhaps annual payments) to the landowner as compensation for the "drainage," similar to compensatory royalty. Moreover, the wind company seeks to avoid this issue by including a setback waiver in the lease or by obtaining an overhang easement from the landowner. The setback waiver provision provides that if the landowner now or in the future owns or leases any land adjacent to the leased land and the lessee holds a lease on said adjacent property and has installed or constructed or desires to install or construct wind power facilities on said land near the common boundary between the two properties, the landowner waives any and all setbacks and setback requirements, whether imposed by applicable law or by any person or entity. The provision further provides that the landowner shall, without demanding additional consideration, execute any setback waiver, setback elimination or other document reasonably requested by the lessee in this regard. Likewise, the overhang easement, which is contained in a separate document, provides that the landowner grants unto the lessee an irrevocable, exclusive easement appurtenant to the land for the right

and privilege to permit the wind facilities located on adjacent properties to overhang the landowner's land. See Appendix 8.

C. Retained Acreage/Continuous Development Clause

Wind leases, like oil and gas leases, at the outset of a project often cover far more land that will ultimately be used in the wind farm. Although the wind company, as a matter of practice, will probably release any unused acreage, this clause will insure that it will do so. A sample retained acreage clause is set out in Appendix 9. No form for a continuous development clause has yet been seen, which leaves the field open for a creative wind attorney to devise one.

VI. CONCLUSION

The wind energy leases in use in Texas today are in the beginning stages of their evolution. As such, they are similar to the "Producers 88" printed form oil and gas leases utilized by the large oil companies prior to the advent of the lease rider. As more and more attorneys become involved in the drafting of these leases, it is expected that the forms will become less diverse, and the lengthy provisions more understandable and subject to adaptation. It is hoped that this article will be an aid in this continuing process.

* * *

END NOTES:

¹ British Wind Energy Association, Wind Farms of the United Kingdom, 2003.

² John Spicer, Wind Development in Texas, (AWEA Windpower Conference, 2003), pp. 7 & 8.

³ "An Assessment of the Available Wind Land Area and Wind Energy Potential in the Contiguous United States," Pacific Northwest Laboratory, 1991.

⁴ An exception is The University of Texas System, which has developed its own lease form.

⁵ The authors contacted five wind companies and requested use of their lease forms (or excerpts therefrom) in the preparation of this paper. Three of the companies (all of whom are major operators in Texas) denied the request, but did offer general information, while one company allowed limited use of selected provisions. Only one company granted the request (which is the form in Appendix 1).

⁶ Ernest E. Smith, Wind Energy in Texas (Advanced Oil, Gas and Mineral Law Course, 2001), p. 14.

⁷ AWEA, Wind Energy and Economic Development: Building Sustainable Jobs and Communities (undated), at 2, available at www.awea.org/pubs/factsheets/EconDev.pdf ("Farmers can grow crops or raise cattle next to the towers. Wind farms may extend over a large geographical area, but their actual 'footprint' covers only a very small portion of the land...")

⁸ This option, which is the subject of a separate agreement, contains a paragraph which reads as follows:

"Grant of Option to Optionee. Owner hereby grants to Optionee an option to lease all or portions of the Property in accordance with the terms and conditions of the term sheet ('Term Sheet'), which is attached hereto as Exhibit 'B,' and made a part hereof. Owner and Optionee agree that the Term terms and conditions relating to the lease and does not necessarily summarize all terms and conditions, covenants, and representations, warranties and other provisions which shall be contained in the definitive legal documentation for the lease contemplated by this Option Agreement (the 'Wind Energy Lease'). Owner and Optionee shall use commercially reasonable efforts to negotiate in good faith to agree upon a comprehensive Wind Energy Lease acceptable to each party and with the language typically required by Optionee's lenders and title company within one hundred twenty (120) days of the negotiations being initiated by Optionee, which negotiations may be initiated at Optionee's sole discretion. The Wind Energy Lease shall contain the same economic terms as described in Exhibit 'B.' Optionee shall have the right to exercise the Option Agreement at any time during the Term (as defined below) of the Option Agreement."

The dangers of this procedure are obvious. Despite commercially reasonable efforts by both parties, it may be that the parties will ultimately disagree as to the specific wording of the basic terms and conditions contained within the "Term Sheet," or will disagree on terms not included within the "Term Sheet." On the other hand, the landowner may wish to balance the chance of a problem occurring in later drafting the lease against the up-front cost (which can be substantial) of preparing the lease in advance.

⁹ Operations and Maintenance Buildings may include office and storage buildings, as well as a fenced storage yard.

¹⁰ Ernest E. Smith, Wind Energy in Texas, supra, at p. 6.

¹¹ The turbines installed at the Trent Mesa Project in eastern Nolan County are 1.5 MW, as are the turbines at the Sweetwater Wind Power Project in southern Nolan County. These turbines are 80 meters high, with a propeller radius of 35 meters.

¹² Ernest E. Smith, Wind Energy in Texas, supra, at p. 10.

¹³ Such stringent requirements may indicate that wind companies, unlike oil and gas companies, have a fundamental misunderstanding of the Texas hunting ethic. One Texas rancher has described such requirements as not just impractical, but also as "cultural imperialism." The rancher, whose land is currently under a wind lease containing similar requirements, preferred not to be identified.

¹⁴ Most counties also have a bow season for deer, which should not be an issue for concern to the wind company.

¹⁵ Many landowner clients have been concerned that wind turbines, substations and transmission facilities are not as easy to remove from the premises at the expiration of the lease term as pump jacks or oil tanks. Their fear is that the wind company or successor wind company will not have the financial resources for an expensive clean up operation on the termination of the lease. For this reason, some landowners have sought to include provisions in their leases for a "removal deposit" in the form of a bond, cash or other security.

¹⁶ There is a real question as to whether the landowner, when talking with his or her friends at the Dairy Queen or coffee shop, ever gives any heed to this provision. Regardless, all wind companies continue to insist upon its inclusion, citing: (a) the cost and expense in creating the lease form and (b) the desire that one landowner will not be able to learn what another landowner is getting, among other reasons.

APPENDICES

FORMS AND INSTRUCTIONS

The following forms are either used with permission or have been developed by the author for this paper.

As with all forms, these forms are included for illustrative purposes only and should not be used unless independent analysis and consideration is given by a licensed attorney as to their applicability to a given fact situation.

APPENDIX 1

OPTION AGREEMENT

THIS OPTION AGREEMENT (the "Agreement") is entered into by and between the five (5) persons or groups identified below as landowners (individually, a "Landowner" and collectively, the "Landowners"), and _____, a Texas limited liability company, and its successors and assigns (the "Optionee").

RECITALS:

A. The following Landowners are the legal and equitable owners of the following affected property situated in _____ County, Texas:

* is Landowner #1 and owner of the property described on Exhibit "A-1" attached hereto; * is Landowner #2 and owner of the property described on Exhibit "A-2" attached hereto; * is Landowner #3 and owner of the property described on Exhibit "A-3" attached hereto; * is Landowner #4 and owner of the property described on Exhibit "A-4" attached hereto; and * is Landowner #5 and owner of the property described on Exhibit "A-5" attached hereto. Exhibits "A-1" through "A-5" attached hereto, are hereby incorporated herein and made a part hereof for all purposes. The land described on such exhibits collectively is referred to herein as the "Property," and for all purposes hereunder, each of the Landowners shall be deemed to own the number of acres specified on Exhibits "A-1" through "A-5" attached hereto.

B. Optionee is desirous of acquiring the exclusive right and option (but without any obligation) to lease the Property, at an agreed price and terms, all subject to the conditions and other agreements hereinafter set forth, and Landowners are agreeable to granting such an option to Optionee, upon such conditions and agreements.

NOW, THEREFORE, for and in consideration of the aforementioned recitals, the mutual covenants and undertakings of the parties hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency thereof being acknowledged and confessed, Landowners and Optionee agree as follows:

1. Grant and Term of Option. For the consideration expressed in Paragraph 2 below, Landowners hereby grant to Optionee the exclusive right and option (the "Option") during three (3) successive one (1) year terms (collectively, the "Term") to lease the Property. In the event the Option is exercised in accordance with the terms hereof, the parties shall enter into the lease attached hereto as Exhibit "B" and made a part hereof for all purposes (the "Lease").

2. Consideration for Grant of Option. The Option is granted for the first year of the Term in consideration of Optionee's payment to each of the Landowners the sum of Eight and No/100 Dollars (\$8.00) for each acre owned by such Landowner, as set forth on Exhibit "A" attached hereto, simultaneously with the full execution hereof, the receipt and sufficiency of which are hereby acknowledged and confessed by Landowners. If Optionee desires to extend the Option for the second and third years of the Term, Optionee shall pay a like sum to Optionee on or before each anniversary of the effective date hereof, as applicable. Once the Option has been exercised, or the Term allowed to lapse, no further option fee shall be payable. If the Option is not exercised during the Term, the aforementioned sums previously paid by Optionee to Landowners shall be retained by Landowners in full consideration of the granting of the Option. If the Option is exercised during the Term, the aforementioned sum shall not be credited to the rents under the Lease.

3. Exercise of Option. Optionee may exercise the Option by delivery of written notice to Landowners of its decision to do so at any time during the Term. Within ten (10) business days following delivery of such Landowners and Optionee shall execute the following: (a) the Lease; (b) a Memorandum of Lease in recordable form to give public notice of the existence of the Lease and the Property affected, but not the economic terms thereof; and (c) such other documents and instruments as may be reasonably necessary to consummate the transaction contemplated hereby. All closing costs shall be paid by Optionee; provided, however, that each party shall pay its own attorneys' fees.

4. Operation of Property During the Term. During the Term, Optionee shall have full access to the Property, to conduct any feasibility or other tests, studies, borings or investigations Optionee deems necessary or desirable in connection with Optionee's determination, in its sole and absolute discretion, whether or not the Property is suitable for the purpose of developing a wind farm (i.e., the construction, installation, operation and maintenance of a site for the conversion of wind energy to electricity, the collection and transmission of wind generated electric power, with wind turbines, transmission lines and all other related equipment). Without limiting the generality of the foregoing, Optionee is specifically entitled to construct, maintain and utilize one (1) or more eighty (80) meter test towers. Such investigations and studies shall be at the sole cost, expense and liability of Optionee, and Landowners shall not be liable or responsible therefor. In the event that the Option lapses without exercise, Optionee shall promptly restore the Property to its prior condition, or with the consent of Landowners to another condition reasonably acceptable to Landowners. Subject to the foregoing, Landowners may continue to operate the Property as now operated for farm and ranch purposes, so long as the same does not interfere with such tests and studies. Landowners may not further develop the Property during the Term.

5. Representations and Warranties. Each party hereto represents and warrants to the other that such party (a) has and, to the extent applicable, the person executing this Agreement on behalf of such Landowner, has received all requisite power and authority to execute this Agreement and consummate the transactions contemplated hereby, without the joinder or consent of any other person or party; (b) has not been represented by a real estate broker or agent; and (c) has been represented by counsel of its own choosing. Landowners further represent and warrant to, and covenant agree with, Optionee that no portion of the Property is (i) encumbered by a lien or mortgage and that any future lien or mortgage shall be subject to the Option and/or Lease, as applicable; and (ii) subject to any lease or rental, occupancy or other agreement, including, without limitation, any oil, gas or other mineral lease, that would interfere with Optionee's development, maintenance and operation of the Property as a wind farm, as more fully described in the Lease.

6. Confidentiality. Landowners agree that the terms and conditions of this Option, and of the Lease, and any documentation or information provided by Optionee to Landowners in connection with the Option or the Lease (including, without limitation, the payment of the rent under the Lease) shall be kept confidential subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information.

7. Memorandum of Option. The parties shall execute and deliver a Memorandum of Option simultaneously with the execution and delivery hereof, and Optionee shall be entitled to record same at its own expense.

8. Notices. All notices, demands, statements, and requests (collectively, a "notice") required or permitted to be given under this Agreement must be in writing and shall be deemed to have been properly given or served as of the date hereinafter specified: (i) on the date of personal service upon the person to whom the notice is addressed or if such person is not available the date such notice is left at the address of the person to whom it is directed, (ii) on the next business day following the date the notice is postmarked by the United States Post Office, provided it is sent prepaid, registered or certified mail, return receipt requested, and (iii) on the date the notice is delivered by a courier service (including Federal Express, Express Mail or similar operation) to the address of the person to whom it is directed, provided delivery is confirmed by the courier service. The addresses of the signatories to this Agreement are set forth below:

To Landowners:

To Optionee:

9. Miscellaneous.

(a) This Agreement contains the entire agreement between the parties relating to the Option herein granted and shall be amended only by an instrument in writing executed by the parties hereto.

- (b) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns, as the case may require.
- (c) In the event of any controversy, claim or dispute between the parties hereto which arises out of, or relates to, this Agreement or the breach hereof, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and expenses.
- (d) **This Agreement shall be performable in _____ County, Texas, and is to be construed in accordance with the laws of the State of Texas.**
- (e) This Agreement may be executed in multiple counterparts, each of which shall constitute an original.
- (f) Optionee may assign this Option without the prior written consent of Landowners.
- (g) All references in this Agreement to the "date hereof" or the "effective date" or "the full execution hereof" shall be deemed to refer to the last date, in point of time, which all parties hereto have fully executed this Agreement and their signatures have been acknowledged.

REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.
SIGNATURE PAGES FOLLOW.

* * *

[A separate signature page for each party is attached to the Option Agreement.
Examples follow for the Optionee and a Landowner.]

SIGNATURE PAGE TO THE OPTION AGREEMENT

EXECUTED by Optionee on this ____ day of _____, 2003.

OPTIONEE:

a Texas limited liability company

By: _____,
_____, President

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, a Notary Public in and for said state, on this day personally appeared _____, the President of _____, a Texas limited liability company, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of such limited liability company.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this ____ day of _____, 2003.

[Personalized Seal]

Notary Public, State of Texas

* * *

SIGNATURE PAGE TO THE OPTION AGREEMENT

EXECUTED by Landowner on this ____ day of _____, 2003.

LANDOWNER:

Printed Name: _____
Landowner #1

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, a Notary Public in and for said state, on this day personally appeared _____, known or proved on acceptable evidence to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this ____ day of _____, 2003.

[Personalized Seal]

Notary Public, State of Texas

EXHIBIT "B" TO OPTION AGREEMENT

SURFACE LEASE

This SURFACE LEASE (the "Lease") is made and entered into effective as of the Effective Date by and between _____ (collectively, the "Owner") and _____, a Texas limited liability company (the "Lessee").

1. Basic Lease Information/Definitions.

"Effective Date:" _____

"Owner:" _____

"Lessee:" _____, a Texas limited liability company

"Premises:" Approximately _____ acres of land, more or less, as more fully described on Exhibit "A" attached hereto and incorporated herein for all purposes.

"Lease Term:" The period commencing on the Effective Date and continuing for a period of thirty (30) years thereafter, expiring on _____. The term "Lease Term," as used herein, shall include all renewals or extensions hereof unless the context clearly indicates to the contrary.

"Renewal Option:" A period of thirty (30) years, commencing on the expiration of the Lease Term.

"Rental:" Rental shall be paid in accordance with Section 3 hereof.

"Permitted Use:" Lessee may continuously use and occupy the Premises for the purpose of wind energy conversion to electricity on the Premises, including, without limitation, (a) the collection and transmission by Lessee of wind generated electric power on the Premises; (b) the construction, installation, operation and maintenance by Lessee of wind turbines, transmission lines and all other related equipment and facilities on the Premises (the "Improvements") for their use or operation in conjunction with large wind turbines on the Premises (the "Wind Energy Projects"); and (c) access by Lessee to and from Wind Energy Projects on the Premises and for any purposes incidental thereto. Lessee shall be entitled to use or remove any improvements, if any, now located on the Premises solely for the purposes herein intended.

"Owner's Address:" _____

Telephone: _____

Fax: _____

with copy to: _____

Telephone: _____

Fax: _____

"Lessee's Address:" _____, President

Telephone: _____

Fax: _____

with a copy to: _____

Telephone: _____

Fax: _____

Each reference in the Lease to any of the information and definitions set forth in this Section 1 shall mean and refer to the information and definitions hereinabove set forth and shall be used in conjunction with and limited by all references thereto in the provisions of this Lease.

2. **Granting Clause.** Owner, for and in consideration of the Rental and other charges to be paid hereunder and the other covenants and agreements to be performed by Lessee, hereby demises and leases the Premises to Lessee, and Lessee hereby leases the Premises from Owner on the terms and conditions set forth herein, commencing on the Effective Date and ending on the last day of the Lease Term unless sooner terminated or extended as herein provided.

3. **Rental.** Lessee shall pay to Owner, at Owner’s Address or at such other address as Owner may designate by notice in writing to Lessee, the following Rental (herein so called), for the Lease Term.

a. **Royalty.** Commencing with the first day of production of wind generated electric power on the Premises (the “Production Commencement Date”), Lessee will pay Owner the following “Royalty”: (i) from the Production Commencement Date through the fifteenth (15th) anniversary of the Production Commencement Date, four percent (4%) of Gross Revenues (as defined below); (ii) from the day after the fifteenth (15th) anniversary of the Production Commencement Date, through the thirtieth (30th) anniversary of the Production Commencement Date, six percent (6%) of the Gross Revenues, and (iii) from the day after the thirtieth (30th) anniversary of the Production Commencement Date until the expiration of the Renewal Option (if exercised) eight percent (8%) of the Gross Revenues. Each payment made in accordance with this subsection shall be referred to as a “Royalty Payment.” Each percentage referenced above shall be referred to as a “Royalty Rate”. Royalty Payments shall be made quarterly within forty-five (45) days after the end of each calendar quarter (being February 15th, May 15th, August 15th and November 15th) beginning with the first calendar quarter after the Production Commencement Date; provided however, Royalty for the full or partial calendar quarter in which this Lease terminates or expires shall be due and payable on the effective date of such expiration or termination (“Termination Date”). As between the parties constituting “Owner,” the Royalty Payments shall be divided in the following ratio: _____

b. **Definition of “Gross Revenues.”**

i. For the purposes of this Lease, “Gross Revenues” is defined as the sum of all gross receipts of Lessee from the sale of electricity generated by Lessee on the Premises, net of all expenses of collection, including, without limitation, attorneys’ fees and court costs. Gross revenues shall not include any tax or other credits received by, or paid to, Lessee by any governmental or quasi governmental authority, including, without limitation, any renewable energy credits , carbon dioxide credits or other federal income tax credits or any property tax credits or abatements.

ii. For purposes of determining payments in accordance with the foregoing, when electricity from wind energy projects on both the Premises and other property is delivered to a common meter, the number of kilowatt hours of electricity generated on the Premises shall be determined for each quarterly period in accordance with the following formula:

$$(CM)(\frac{P}{PCM})=TKW$$

where (i) CM is the total number of kilowatt hours available for sale at such common meter, (ii) P is the total number of kilowatt hours generated by Wind Energy Projects located on the Premises, as measured by individual meters for each such Wind Energy Project, (iii) PCM is the total number of kilowatt hours generated by wind energy projects located on all properties (including both the Premises and other properties) that deliver electricity to such common meter, as measured by individual meters on each wind energy project that delivers electricity to such meter, and (iv) TKW is the total number of kilowatt hours generated by Lessee on the Premises for use in determining the payments due to Owner in accordance with this Section 3.

iii. In conjunction with each Royalty Payment made to Owner, Lessee shall furnish to Owner a statement setting forth the amount of Gross Revenues received by Lessee during the calendar quarter and the Royalty Payment due Owner for such calendar quarter.

4. **Delinquent Payments.** If Lessee should fail to pay Owner any sum to be paid by Lessee to Owner hereunder

within thirty (30) days after such payment is due, interest on the unpaid amount shall accrue at a rate of ten percent (10%) per annum or the maximum rate allowed by law, whichever is lesser, from the date payment was due until the date payment is made. An adjustment payment made by Lessee as the result of an independent audit conducted at Lessee's expense shall not be subject to a late charge as described herein.

5. **Renewal and Extension.** Should Lessee wish to exercise the Renewal Option, Lessee should advise Owner in writing of Lessee's desire not later than one hundred eighty (180) days after the expiration of this Lease.

6. **Use of the Premises.**

a. **Permitted Use.** Lessee may use the Premises for the Permitted Use specified in Section 1, and for any other lawful purpose or purposes associated therewith, including, without limitation, the removal of any fences, tanks and other fixtures and personality on or under the surface in order to install or have access to the fixtures and equipment necessary for the Permitted Use .

b. **Owner's Use.** Subject to Lessee's rights under Section 6.a., Owner shall have the subordinate and inferior right to use of the Premises for farm and ranch purposes which do not, in Lessee's judgement, interfere with Lessee's use, enjoyment, and occupancy of the Premises. Any such use by Owner shall be at its own risk, expense and liability and Lessee shall have no responsibility therefor.

7. **Installation and Maintenance of the Improvements.**

a. **Installation of Improvements.** Other than the Improvements, Lessee shall not cause any improvements to be installed on the Premises without the prior written consent of Owner, which consent shall not be unreasonably withheld or delayed. All construction work done by Lessee on the Premises shall be in compliance with all governmental requirements. All improvements installed by Lessee shall be and remain the property of Lessee and may be removed by Lessee.

b. **Keeping the Premises Clean.** Lessee shall take good care of its Improvements and use good faith efforts to keep the same free from debris and waste at all times, except those caused by Owner. Lessee shall use commercially reasonable efforts to keep the Premises neat and clean at all times, and shall remove all refuse, litter and debris created by Lessee and its invitees, licensees, agents and contractors from the Premises; provided, however, that Lessee shall not be required to remove the remains of any improvements on the Premises as of the Effective Date or subsequently constructed by Owner.

c. **Utilities.** Lessee shall pay promptly before same is due, all electrical and other utility charges, if any, relating to the Wind Energy Projects. Lessee shall cause all such accounts for utilities, if any, to be placed in Lessee's name.

8. **Holding Over.** In the event Lessee occupies the Premises or any part thereof after the expiration or earlier termination of this Lease, unless otherwise agreed in writing by Owner, Lessee shall hold the Premises as a tenant-at-will only at a daily rental equal to the average Rental over the preceding calendar year of the term of the Lease calculated on a *per diem* basis. In no event shall such holding over constitute or be construed as a renewal or extension of this Lease and, upon the expiration of the Lease Term and/or the term of the Renewal Option, as the case may be, or the earlier termination of this Lease, Lessee shall immediately surrender the Premises to Owner on demand by Owner.

9. **Eminent Domain.**

a. **Definitions.** The following definitions apply in construing provisions of this Lease relating to a taking of all or any part of the Premises or the Improvements or any interest in them by eminent domain or inverse condemnation:

- i. "Taking" means any taking by eminent domain or by inverse condemnation or for any public or quasi-public use under any statute. The transfer of title may be either a transfer resulting from the recording of a final order in condemnation or a voluntary transfer or conveyance to the condemning authority or entity under threat of condemnation in avoidance of an exercise of eminent domain. The Taking shall be considered to take place as of the later of (x) the date actual physical possession is taken by the condemnor or (y) the date on which the right to compensation and damages accrues under the law applicable to the Premises.

- ii. "Total Taking" means the Taking of the fee title to all the Premises.
 - ii. "Substantial Taking" means the Taking of so much of the Premises that the remaining Premises would not be economically and feasibly usable, in Lessee's opinion, by Lessee in connection with the Permitted Use.
 - iv. "Partial Taking" means any Taking other than a Total Taking or Substantial Taking.
- b. Notice to Other Party. The party receiving any notice of the kinds specified below shall promptly give the other party notice of the receipt, contents and date of the notice received:
- i. Notice of intended Taking.
 - ii. Service of any legal process relating to condemnation of the Premises.
 - iii. Notice in connection with any proceedings or negotiations with respect to such condemnation.
 - iv. Notice of intent or willingness to make or negotiate a private purchase, sale or transfer in lieu of condemnation.
- c. Representative of Each Party; Effectuation. Owner and Lessee shall each have the right to represent its respective interests in each proceeding or negotiation with respect to a Taking or intended Taking and to make full proof of his or its claims. Owner and Lessee each agrees to execute and deliver to the other any instruments that may be required to effectuate or facilitate the provisions of this Lease relating to condemnation.
- d. Total or Substantial Taking. On a Total Taking, Lessee's obligation to pay Rent shall terminate on the date of Taking. If Lessee determines that the Taking is a Substantial Taking, Lessee may, by notice to Owner given within one hundred twenty (120) days after Lessee receives notice of intended Taking, elect to treat the Taking as a Substantial Taking. If Lessee does not so notify Owner, the Taking shall be deemed a Partial Taking.
- e. Delivery of Possession. Lessee may continue to occupy the Premises until the day of Taking.
- f. Award for Total Taking or Substantial Taking. On a Total Taking or Substantial Taking, the award therefor shall be distributed and paid to Lessee and Owner as their respective interests under this Lease (as if the same had not been terminated) may appear. In determining their respective interests:
- i. The interest of Owner shall be based on the value of Owner's reversionary interest in the Premises (excluding any of Lessee's Improvements) taking into account the leasehold estate created by this Lease, the amount of rental paid by Lessee hereunder and all of the other terms and provisions of this Lease; and
 - ii. The interest of Lessee shall be based on the value of Lessee's interest in the Premises, including the value of the Lessee's Improvements for the Term and the value of Lessee's leasehold estate and interests under this Lease.
- g. Partial Taking. In the event of a Partial Taking, Owner shall be entitled to a portion of the award equal to the value of the fee simple title to the portion of the Premises taken, exclusive of the value of Lessee's Improvements and Lessee shall be entitled to the balance of the award. In such event, this Lease shall remain in full force and effect covering the remaining portion of the Premises.
- h. Taking the Less than Fee Title. On any Taking of the temporary use of all or any part or parts of the Premises for a period, or of any estate less than the fee, ending on or before the expiration date of the Term, neither the Term nor the Rent shall be reduced or affected in any way, and Lessee shall be entitled to any and all awards for the use or estate taken. If any such Taking is for a period extending beyond the expiration date of the Term, the Taking shall be treated under the foregoing provisions for Total, Substantial and Partial Takings.

10. **Taxes and Assessments.** Lessee shall pay only the additional taxes, assessments and charges, general and specific, that may be levied or assessed by reason of Lessee's use of the Premises and Improvements and equipment situated thereon, including without limitation taxes, assessments, and charges of any nature levied or assessed against Lessee's leasehold interest hereunder or any Improvements on the Premises constructed by or belonging to Lessee.

Lessee shall not be responsible at any time during the term of this Lease for any taxes or assessments currently levied or assessed against the Premises, or the Owner's estate concurrent use, or occupancy, as the same may be adjusted from time to time. Owner shall be responsible for all other taxes, assessments and charges. Notwithstanding the foregoing, Owner and Lessee agree to reasonably cooperate with each other to reduce the taxes, assessments and charges that may be levied or assessed with respect to the Premises and Lessee's use thereof

11. Default and Remedies.

a. Events of Default. The following events shall be deemed to be events of default by Lessee under this Lease:

- i. Lessee shall fail to pay within thirty (30) days after written notice from Owner to Lessee of its failure to pay when due any Rental or any other sum payable by Lessee under this Lease.
- ii. Lessee shall fail to comply with any other term, provisions or covenant of this Lease within ninety (90) days after notice from Owner to Lessee specifying wherein Lessee has failed to comply; provided, however, that if the nature of Lessee's obligation is of such a nature that it cannot reasonably be cured within such 90 day period, Lessee shall not be deemed to be in default so long as Lessee commences curing such failure within such 90 day period and diligently prosecutes same to completions.

b. Remedies. Upon occurrence of any event of default by Lessee, Owner may enforce the provisions of this Lease in any manner provided by law or in equity. With respect to any amounts due to Owner hereunder and collected by an attorney after default or through judicial, bankruptcy, or probate proceedings, Lessee shall pay all reasonable costs of collection, including, without limitation, reasonable attorney's fees and court costs.

12. **Waiver of Statutory Liens.** In consideration of the mutual benefits arising under this Lease, Owner, to the extent permitted by the laws and Constitution of the State of Texas, hereby waives its statutory liens created under Chapter 54 of the *Texas Property Code* (or the successor thereto) in any property of Lessee (including, but not limited, to all fixtures, machinery, equipment, furnishings, and other articles of personal property now or hereafter placed in or on the Premises by Lessee). Owner shall execute any waivers or other written evidence of the provisions of this section as Lessee may reasonably request. Owner shall also execute any easements over, across or under the Premises that Lessee may reasonably request.

13. **Exclusion of Mineral Estate.** This Lease covers only the so-called surface estate of the Premises and does not include any part of the mineral estate. However, Lessee may make such use of the subsurface as may be necessary or desirable to support and utilize the Improvements or as is otherwise necessary for the Permitted Use.

14. **Owner's Representations and Covenants.** Owner hereby represents and covenants as follows:

a. **Owner's Authority.** Owner is the sole owner and holder of fee simple title to the surface estate of the Premises subject to any and all easements, rights-of-way, covenants, conditions, restrictions, outstanding mineral leases, interests or royalty interests, if any, relating to the Premises, to the extent, the same may be in force and effect and either shown of record in the Office of the County Clerk of Hardeman County, Texas, or apparent on the Premises.

b. **No Interference.** Lessee shall peaceably and quietly hold and enjoy the Premises from and after the Effective Date and continuing until the expiration or earlier termination of this Lease, without hindrance from Owner or those claiming title or possession by, through or under Owner, subject to the terms and conditions of this Lease, including the performance by Lessee of all of the terms and conditions of this Lease to be performed by Lessee. Owner shall not materially interfere with the wind speed or wind flow over the Premises by any act or omission by Owner on the Premises.

c. **Liens.** Owner represents that Owner has not granted any mortgages, deeds of trust, or voluntary liens or security interests encumbering all or any portion of the Premises.

d. **Third Parties.** There are no currently existing purchase options, rights of refusal or sales contracts in favor of any third parties relating to the Premises or any interest therein that could materially interfere with the development, construction or operation of Wind Energy Projects on the Premises or that could materially and adversely affect or change the wind flow over the Premises.

15. Notices.

a. **Payments.** All Rental and other payments required to be made by Lessee to Owner hereunder shall be payable to Owner at the address set forth in Section 1 or at such other address as Owner may designate in writing.

b. **Notices.** All notices required by this Lease shall be delivered by hand or sent by United States mail, postage prepaid, certified or registered mail, addressed as set forth in Section 1, or at such other address as any of said parties have theretofore specified by written notice delivered in accordance herewith. Any notice or document (excluding Rental and other payments) required to be delivered hereunder shall be deemed to be delivered upon receipt if personally delivered, and whether or not received, when deposited in the United States mail, postage prepaid, certified or registered mail (with or without return receipt requested), addressed as indicated above. Either Owner or Lessee may change its respective addressee, address, copy recipient and/or its address by giving notice of such change to the other party in the manner provided herein; provided, however, that for this purpose only, unless and until such written notice is actually received, the addressee, address, copy recipient and its address specified for each party shall be deemed to continue in effect for all purposes.

16. Mortgage Provisions.

a. **Right to Mortgage Interest.** Notwithstanding anything herein to the contrary, Lessee may mortgage, pledge or otherwise encumber Lessee's leasehold interest in the Premises and any improvements constructed on the Premises by Lessee to a Mortgagee. The term "Mortgagee" means either (i) the mortgagee under a Mortgage, or (ii) the trustee and beneficiary under a deed of trust which for purposes hereof shall constitute a Mortgage; in each case, prior to the time such person becomes the lessee under this Lease. The term "Mortgage" means an indenture of first mortgage or first deed of trust and/or other lien instruments to secure borrowings or obligations of Lessee to a Mortgagee. No Mortgage shall encumber or affect in any way the interest of Owner hereunder or Owner's fee interest in and to the Premises.

b. The Mortgagee under the Mortgage affecting the Premises shall be entitled to receive notice of any default by Lessee, provided that such Mortgagee shall have delivered a copy of a notice in the manner provided in this subsection and in the form hereinafter contained to Owner. The form of such notice shall substantially be as follows:

The undersigned, whose address is _____, does hereby certify that it is the Mortgagee, as defined in that certain Surface Lease, a memorandum or short form of which was recorded on _____, 200____, in the Real Property Records of _____ County, Texas, of the Premises, as defined in said document. In the event that any notice shall be given of the default of the Lessee, a copy thereof shall be delivered to the undersigned who shall have all rights of the Lessee to cure such default. Failure to deliver to copy of such notice to the undersigned shall in no way affect the validity of the notice of the default as it respects the Lessee, but shall make the same invalid as it respects the Mortgage of the undersigned.

Any such notice to a Mortgagee shall be given in the same manner as provided in Section 15. The giving of any notice of default or the failure to deliver a copy to the Mortgagee shall not create any liability on the part of Owner. If any notice shall be given of the default of Lessee and Lessee has failed to cure or commence to cure such default within the initial 90 day cure period provided in Section 11 of this Lease, then any such Mortgagee, which has given notice as above provided, shall be entitled to receive an additional notice given in the manner provided in this section that Lessee has failed to cure such default and such Mortgagee shall have thirty (30) days after said additional notice to cure any such default or, if such default cannot be cured within thirty (30) days, to diligently commence curing within such time and diligently pursue such cure to completion within a reasonable time thereafter.

c. Owner agrees that upon the occurrence of any event of default under the documents, instruments or agreements executed by Lessee in connection with the Mortgage, the Mortgagee may (but shall not be obligated to) assume, or cause a new lessee or purchaser of the leasehold estate created hereby to assume, all the interests, rights, and obligations of Lessee thereafter arising under this Lease.

d. Owner agrees to reasonably consider any written documentation reasonably requested by a Mortgagee to confirm the rights that are provided to the Mortgagee in this Section 16.

17. Miscellaneous.

a. Confidentiality. Owner agrees that the terms and conditions of this Lease and any documentation or information provided by Lessee to Owner in connection with the confirmation of Royalty Payments made by Lessee hereunder shall be kept confidential subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information.

b. Applicable Law/Venue. This Lease shall be construed and interpreted in accordance with the laws of the State of Texas. Any dispute arising out of or in connection with this Lease shall be resolved in the state or federal courts located in _____ County.

c. Severability. In case any one or more of the provisions contained in this Lease shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Lease shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

d. Entire Agreement. This Lease constitutes the sole and entire agreement between the parties and cannot be amended except by written instrument signed by both parties.

e. Binding Nature. This Lease shall be binding upon and shall inure to the benefit of Owner and Lessee, and their respective heirs, successors, assigns, and legal representatives.

f. Authority to Enter into this Lease.

i. Lessee has the unrestricted right and authority and has taken all necessary action to authorize Lessee to execute this Lease and to grant to Owner the rights hereunder. Each person signing this Lease on behalf of Lessee is authorized to do so. When signed by Lessee, this Lease constitutes a valid and binding agreement enforceable against Lessee in accordance with its terms.

ii. Owner has the unrestricted right and authority and has taken all necessary action to authorize Owner to execute this Lease and to grant to Lessee the rights hereunder. The person signing this Lease on behalf of Owner is authorized to do so. When signed by Owner, this Lease constitutes a valid and binding agreement enforceable against Owner in accordance with its terms.

g. Relationship of the Parties. The relationship created hereby shall be the relationship of landlord and tenant and shall not be construed in any manner to constitute a partnership, joint venture, or principal-agent relationship between the parties hereto, and neither party shall have authority to bind the other, except as expressly provided herein.

h. Captions. The captions used herein are for convenience only and do not limit or amplify the provisions hereof.

i. Gender. Words of any gender used in this Lease shall be held and construed to include any other gender and words in the singular number shall be held to include the plural, unless the context otherwise requires.

j. Memorandum of Lease. Lessee shall have the right to record a memorandum of this Lease in a form mutually acceptable to Lessee and Owner, and Owner shall execute any such memorandum upon written request of Lessee. Neither Owner nor Lessee shall record this Lease in its entirety.

k. Counterparts. This Lease may be executed in multiple counterparts, no one of which need be executed by all parties hereto, each of which shall constitute an original. Counterparts thus executed shall together constitute one and the same instrument.

l. Right to Inspect Records. Lessee shall keep true, accurate and complete books, records, accounts, contracts and data sufficient to support and to verify calculation of Rental owned under this Lease. Owner shall have the right at all reasonable times and upon reasonable notice, personally or by representative, to inspect the books, accounts, contracts, records and data within the possession or control of Lessee pertaining to the production, transportation or sale of electricity produced from the Premises at the office of Lessee, including, (without limitation) statements from third parties which verify price, value or quantity of electricity generated by wind energy projects on the Premises; provided that Owner may not take copies of any such information unless agreed to in writing by Lessee. Owner shall be required to keep any such information confidential subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information (and if allowed by law, shall execute a confidentiality agreement evidencing same).

m. Meter Calibration. Lessee shall test and calibrate the meters at the common substations and/or meters at property lines in accordance with the power purchase contracts for purchase of electricity generated by Wind Energy Projects on the Premises and, in any event at least one (1) time during any three (3) consecutive calendar years.

n. Operated as single property. The parties constituting Owner are acting in concert. Lessee shall be entitled to treat the Property as a single property and the Owner as a single owner. Lessee shall not be required to see to allocations among the parties constituting Owner.

o. Assignment. Lessee may freely assign all or any portion of, or interest in, Lessee's rights, title and interest created hereby, and upon any such assignment, the previous Lessee shall be fully released herefrom, but only as to the rights, title and interest so assigned.

18. Exhibits. All exhibits referred to in this Lease are listed below and attached hereto and incorporated herein for all purposes.

Exhibit "A" - Legal Description of Premises

IN WITNESS WHEREOF, the parties have executed this Lease to be effective as of (although not necessarily on) the Effective Date set forth in Section 1 above.

REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.
SIGNATURE PAGES FOLLOW.

[Separate signature pages for each Landowner follow,
in the following format.]

SIGNATURE PAGE TO THE SURFACE LEASE

EXECUTED by Landowner on this ____ day of _____ 2003.

LANDOWNER:

Printed Name: _____
Landowner #1

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, a Notary Public in and for said state, on this day personally appeared _____, known or proved on acceptable evidence to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this ____ day of _____ 2003.

[Personalized Seal]

Notary Public, State of Texas

APPENDIX 2

Purposes of Lease. Pursuant to this Lease, Lessee shall have possession of the Property for the following purposes:

- a. Determining the feasibility of wind energy conversion on the Property or on neighboring lands, including studies of wind speed, wind direction and other meteorological data;
- b. Converting wind energy into electrical energy, and collecting and transmitting the electrical energy so converted;
- c. Developing, constructing, reconstructing, erecting, installing, improving, replacing, relocating and removing from time to time, and using, maintaining, repairing, operating and monitoring, the following, for the benefit of one or more Projects (as defined below): (a) wind machines, wind energy conversion systems and wind power generating facilities (including associated towers, foundations, support structures, guy wires, braces and other structures and equipment), of any type or technology (collectively, "**Generating Units**"); (b) transmission facilities, including overhead and underground transmission, distribution and collector lines, wires and cables, conduit, footings, foundations, towers, poles, crossarms, guy lines and anchors, substations, interconnection and/or switching facilities, circuit breakers and transformers, and energy storage facilities; (c) overhead and underground control, communications and radio relay systems and telecommunications equipment, including fiber, wires, cables, conduit and poles; (d) meteorological towers and wind measurement equipment; (e) roads and erosion control facilities; (f) water pipelines and pumping facilities; (g) control, maintenance and administration buildings; (h) utility installations; (i) laydown areas and maintenance yards; (j) signs; (k) fences and other safety and protection facilities; and (l) other improvements, facilities, appliances, machinery and equipment in any way related to or associated with any of the foregoing (all of the foregoing, including the Generating Units, collectively, "**Wind Power Facilities**");
- d. Vehicular and pedestrian ingress, egress and access to and from Wind Power Facilities on, over and across the Property by means of roads and lanes thereon if existing, or otherwise by such roads as Lessee or anyone else may construct from time to time, in each case for the benefit of one or more Projects (collectively, "**Access Rights**");
- e. Drilling, redrilling, maintaining, repairing, using, operating, improving, replacing, relocating, plugging and abandoning water wells, and pumping and using water as needed in connection with one or more Projects;
- f. Conducting eco-tourism site tours to advertise and demonstrate the ecological and other benefits of electrical generation from wind power; and

Undertaking any other activities that the Lessee determines are necessary, helpful, appropriate or convenient in connection with, incidental to or to accomplish any of the foregoing purposes or for the benefit of one or more Projects, including conducting surveys and environmental, biological, cultural and other tests and studies. Without limiting the generality of the foregoing, the Parties recognize that (a) power generation technologies are improving at a rapid rate and that Lessee may (but shall not be required to) from time to time replace existing Generating Units on the Property with newer models (and potentially larger) Generating Units and (b) the Operations may be accomplished by Lessee, or one or more third parties authorized by Lessee.

APPENDIX 3

APPENDIX 3a

Bonus Payment

Monthly Rental Payments of \$1,000.00 each shall be paid in advance, beginning on the effective date and prorated for partial months, until the Commencement of Construction.

APPENDIX 3b

Bonus Payment (Alternative Form)

The Bonus Payment is composed of the following amounts:

Wind Turbines. The sum of three thousand and no/100 dollars (\$3,000.00) multiplied by the number of Wind Turbines to be located on the Lease Land, but in no event less than \$_____.

Access and Transmission Easements. The sum of ten and no/100 dollars (\$10.00) multiplied by the number of rods from the beginning point to the ending point of each Access Easement and each Transmission Easement.

In the event a Substation Easement is established on the owner's land, the Lessee shall pay the owner damages in the amount of \$5,000.00 for the use of owner's land. The Substation Easement shall not encompass an area greater than five (5) acres of land. Owner and Lessee shall mutually agree upon the location of any Substation Easement.

APPENDIX 3c

Installation Fees. Lessee shall pay to owner installation fees equal to One Thousand Five Hundred and no/100's Dollars (\$1,500.00) per megawatt of installed capacity on the leased land, of which fifty percent (50%) shall be due and payable within sixty (60) days of commencement of construction and the remaining fifty percent (50%) shall be due and payable within sixty (60) days of the first day of production of wind generated electric power on the premises (the "Production Commencement Date").

APPENDIX 3d

Definition of "Gross Revenues."

For the purpose of this Lease, "Gross Revenues" is defined as the sum of (i) all gross receipts of Lessee from the sale of electricity generated by Lessee on the Premises; provided, however, that if electricity is sold to a subsidiary or affiliate of Lessee, then, and only then, the gross receipts from the sale of electricity under such contract shall be calculated using a sale price of not less than the arithmetical average of the prices paid by any purchaser or purchasers (including Lessee or any subsidiary or affiliate of Lessee) for electricity produced in the region of the Electric Reliability Council of Texas during the calendar year immediately preceding the year in which such electricity production from the Premises occurs, plus (ii) the greater of gross proceeds received by either Lessee or any subsidiary or affiliate of Lessee from the sale of any credits, credit certificates or similar items such as those for greenhouse gas reduction, or the generation of green power, renewable energy or alternative energy, created by any governmental authority and generated by Wind Energy Projects on the Premises, including, but not limited to renewable energy credits, as defined in 16 *Texas Administrative Code* §25.173 (or the successor thereto) (the "Credits"); but specifically excluding any and all federal production tax credits, investment tax credits and any other tax credits which are or will be generated by a Wind Energy Project on the Premises (collectively, "Investment Tax Credits"), plus (iii) the greater of gross proceeds or other cash benefits received by either Lessee or any subsidiary or affiliate of Lessee in connection with or under or derived from any agreement, compromise, settlement, judgment or arrangement for or relating to the sale, use or other disposition of electricity generated or capable of being generated from the Premises, excluding Investment Tax Credits, legal fees paid to outside counsel and construction or mechanical warranties.

APPENDIX 3e

Royalty.

Commencing with the Production Commencement Date, Lessee will pay Owner the following "Royalty": (i) from the Production Commencement Date through the tenth (10th) anniversary of the Production Commencement Date, four percent (4%) of Gross Revenues (as defined below); (ii) from the day after the tenth (10th) anniversary of the Production Commencement Date, through the fifteenth (15th) anniversary of the Production Commencement Date, four and one half percent (4.5%) of the Gross Revenues; (iii) from the day after the fifteenth (15th) anniversary of the Production Commencement Date until the twentieth (20th) anniversary of the Production Commencement Date, five percent (5%) of the Gross Revenues, and (iv) from the day after the twentieth (20th) anniversary of the Production Commencement Date, through the twenty-fifth (25th) anniversary of the Production Commencement Date, five and one half percent (5.5%) of the Gross Revenues, and (v) from the day after the twenty-fifth (25th) anniversary of the Production Commencement Date through the thirtieth (30th) anniversary of the Production Commencement Date, six percent (6%) of the Gross Revenues, and (vi) from the day after the thirtieth (30th) anniversary of the Production Commencement Date until the expiration of the renewal option (if exercised), eight percent (8%) of the Gross Revenues. Each payment made in accordance with this subsection shall be referred to as a "Royalty Payment." Each percentage referenced above shall be referred to as a "Royalty Rate". Royalty Payments shall be made quarterly within forty-five (45) days after the end of each calendar quarter (being February 15th, May 15th, August 15th and November 15th) beginning with the first calendar quarter after the Production Commencement Date; provided however, Royalty for the full or partial calendar quarter in which this Lease terminates or expires shall be due and payable on the effective date of such expiration or termination ("Termination Date").

APPENDIX 4

Minimum Royalty.

Lessee agrees to pay to Owner minimum royalty (the "Minimum Royalty") annually during the initial and any extended term of this Lease of an amount equal to the greater of: (a) One Thousand and no/100's Dollars (\$1,000.00) per megawatt installed upon the property, or (b) Ten and no/100's Dollars (\$10.00) per acre for every acre of land covered by this Lease; provided that said sum shall be prorated for partial years and further provided that the royalties paid to Owner each year do not exceed such minimum royalty. Lessee shall be allowed credit against the minimum royalty for any royalties actually paid to Owner during any year. If Lessee terminates this lease prior to the end of the lease term, the full minimum royalty for that year will be due and payable. The amounts referenced in items (a) and (b) above for determining the Minimum Royalty shall increase by twenty-five percent (25%) for each Extended Lease Term (i.e. years 10-20 and years 20-30).

* * *

APPENDIX 5

Hunting.

It is specifically understood that Owner has the right to hunt upon the property or to lease the property for hunting purposes, provided that during deer season, which is approximately November 1 through January 5 of each year, adequate precautions will be taken by both Lessee and Owner as are necessary for the protection Lessee's employees and property, if any, upon the premises, during the term of this lease. In this event, Lessee will notify Owner, at least thirty six (36) hours in advance, regarding the place or places where Lessee's employees will be working, so that necessary precautions may be taken by both Owner and Lessee.

[Alternative Provision]

Owner agrees that no hunting blinds will be constructed, or other hunting activities conducted within one hundred feet of any turbine, substation, or transmission line installed by Grantee on the premises.

* * *

APPENDIX 6

Additional Disturbance.

Following the initial phase of the construction of this wind project and during the term of this Lease, if additional roads, power lines and/or MET towers are constructed or other activities are conducted on the premises causing additional surface damage, and such damage is not in connection with the installation of any additional turbines on the premises, then, in that event, Lessee agrees to pay to Owner additional compensation of Twenty and no/100's Dollars (\$20.00) per rod for each such additional access road or power line constructed, or a similar sum calculated on an acreage basis for damages related to MET towers, or other activities causing surface damage, which sums shall be paid, as they accrue.

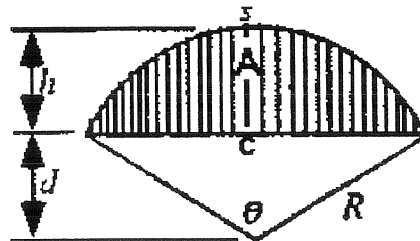
APPENDIX 7

5.2. Wind Turbine Overhang Easement. Owner grants to operator an irrevocable, non-exclusive easement, appurtenant to the Lease and the Wind Power Project, for the right and privilege to permit the rotors of any Wind Turbines located on adjacent tracts of land (whether or not owned by Owner) to overhang the Land. Owner shall not interfere with the operation of Wind Turbine rotors that overhang the Land provided, however, that if only a portion of the Swept Area of a Wind Turbine is located upon the Owner's land, and the revenue attributable to a Wind Turbine will be allocated to the Owner's land in accordance with the percentage of the Landlord's allocated area to Swept Area (calculated to a tenth of a percentage point), as such terms are hereinafter defined:

(i) "Swept Area" shall be defined as that area included within a circle drawn around a Wind Turbine foundation with the center of the circle being the center point of the Wind Turbine foundation (the "Center Point") with the diameter of the circle measured in feet being the approximate design rotor diameter of the Wind Turbine blades, and the area of the circle being calculated as πR^2 feet where π (pi) = 3.1416 and $R = \frac{1}{2}$ diameter.

(ii) if the Center Point is not upon the Premises, the Landlord's allocated area is calculated using the formula described below (see <http://mathworld.wolfram.com/Segment.html>):

$$\text{Segment Area (shaded area in illustration below)} = R^2 \cos^{-1}\left(\frac{R-h}{R}\right) - (R-h)\sqrt{2Rh-h^2}$$



A portion of a disk whose upper boundary is a circular arc and whose lower boundary is a chord making a central angle $\theta < \pi$ radians (180°), illustrated above as the shaded region. Let R be the radius of the circle, c the chord length, s the arc length, h the height of the arced portion, and d the height of the triangular portion. Where:

$$R = h + d; s = R\theta; d = \frac{1}{2}\sqrt{4R^2 - c^2} \text{ and; } c = 2\sqrt{h(2R-h)}.$$

(iii) If the Center Point is located upon the Premises, the Landlord's allocated area will be the difference between the Swept Area and the Segment Area calculated pursuant to (ii) above.

APPENDIX 8

OVERHANG EASEMENT

This Overhang Easement (“Overhang Easement”), dated as of [DATE], 200_, is granted by [LANDOWNER’S FULL NAME AS IT APPEARS ON TITLE REPORT] (“Grantor”) to _____, (“Grantee”) with reference to real property owned by Grantor (the “Property”) located in _____, County (“County”), Texas, as more particularly described in Exhibit “A” attached hereto and incorporated herein by reference.

RECITALS:

A. Grantee is a party to an Electric Transmission Easement (as amended from time to time, the “Transmission Easement”) with respect to property adjacent to the Property. The Transmission Easement was recorded on [DATE GROUND LEASE MEMO RECORDED], at Volume ____, Page ____, as Instrument No. ____ in the Official Records, _____ County, Texas.

B. Pursuant to the terms and conditions of the Transmission Easement, Grantee has the right to exclusively use such adjacent property for the installation, construction, reconstruction, relocation, operation, maintenance, replacement, repair, upgrade, and removal of electric transmission and telecommunications lines and related facilities, including a line or lines of towers or poles, with such wires and cables as from time to time are suspended therefrom, and/or underground wires and cables, for the transmission of electrical energy and/or for communications purposes, and all necessary and proper foundations, footings, crossarms and other appliances and fixtures for use in connection with said towers, wires and cables on, along and in the adjacent property (collectively, the “Facilities”), and for providing free and uninterrupted pedestrian and vehicular ingress to and egress from the adjacent property, to and from the Facilities.

NOW, THEREFORE, in exchange for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor covenants as follows:

1. Grant of Easement. Grantor grants unto Grantee, its successors, assigns, lessees, and all others authorized to utilize its easement rights, an irrevocable, exclusive easement appurtenant to the land for the right and privilege to permit the Facilities located on adjacent properties to overhang the Property by no more than ____ feet at a height of at least _____ feet above the ground. This grant of easement expressly includes the right of Grantee to enter upon any part of the Property to enforce Grantee’s rights hereunder, including the physical removal of trees or structures which interfere with the Transmission Easement. Grantor shall not interfere with the operation of the Facilities that overhang the Property.

2. Term. This Overhang Easement shall last throughout the term of the Transmission Easement and all renewals or continuations thereof, and this Overhang Easement shall not terminate until one (1) year after the final termination of the Transmission Easement.

3. Setback Waivers. Grantor hereby acknowledges that Grantee plans to construct the Facilities at and/or near the common boundary between the Property and the adjacent land. Therefore, Grantor hereby waives any and all setbacks and setback requirements, whether imposed by applicable law or by any person or entity, including any setback requirements described in the zoning ordinance of the County or in any governmental entitlement or permit heretofore or hereafter issued to Grantee. Further, if so requested by Grantee, or any such assignee, or affiliate, Grantor shall, without demanding additional consideration therefor, (i) execute (and if appropriate cause to be acknowledged) any setback waiver, setback elimination or other document or instrument reasonably requested by Grantee, an assignee or the County in connection therewith and (ii) return the same thereto within ten (10) days after such request.

4. Prior Encumbrances. This Overhang Easement is subject to existing rights-of-way for highways, roads, railroads or electric power transmission lines and telegraph and telephone lines heretofore granted of record across any part of the Property.

5. Attorney's Fees. If either party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.
6. Binding Effect. This agreement binds and inures to the benefit of the parties and their respective heirs, successors, and permitted assigns.
7. Choice of Law. This agreement will be construed under the laws of the State of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county in which the Property is located.
8. Counterparts. This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.
9. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.
10. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions and conditions of this agreement and all transactions contemplated by this agreement.
11. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.
12. Integration. This agreement contains the complete agreement of the parties and cannot be varied except by written agreement of the parties. The parties agree that there are no oral agreements, representations or warranties that are not expressly set forth in this agreement.
13. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of this agreement. Whenever context requires, the singular will include the plural, and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.
14. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.
15. Estoppel Certificate. Grantor shall, within ten (10) days after written request by Grantee execute and deliver to Grantee an estoppel certificate (a) certifying that this Overhang Easement is in full force and effect and has not been modified (or if modified stating with particularity the nature thereof), (b) certifying that to the best of Grantor's knowledge there are no uncured events of default hereunder (or, if any uncured events of default exist, stating with particularity the nature thereof), and (c) containing any other certifications as may reasonably be requested. Any such certificates may be conclusively relied upon by Grantee. The failure of the Grantor to deliver any such certificate within such time shall be conclusive upon the Grantor that (i) this Overhang Easement is in full force and effect and has not been modified, (ii) there are no uncured events of default by the Grantee hereunder, and (iii) the other certifications so requested are in fact true and correct.
16. Runs With the Land. This Overhang Easement shall run with the land and shall be binding upon, and inure to the benefit of, Grantor and Grantee and their respective successors, assigns, heirs, personal representatives and tenants, or persons claiming through them.

17. Assignability. Grantee (or any successor or assign), in its sole discretion and without further action by Grantor, shall have the right to assign or convey all or any portion of its rights pursuant to this Overhang Easement to an assignee or tenant on either an exclusive or a nonexclusive basis.

18. Legal Enforcement. This Overhang Easement shall be governed by and interpreted in accordance with the laws of the State of Texas, and the parties shall be entitled to all available judicial and non-judicial remedies for enforcement of its rights, including, but not limited to, restraining orders and preliminary or permanent injunctions. The parties agree to first attempt to settle any dispute arising out of or in connection with this Overhang Easement by good-faith negotiation. Should any provision of this Overhang Easement be held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions hereof shall remain in full force and effect. In this regard, the parties agree and acknowledge that the rights granted under this Overhang Easement are unique and irreplaceable, and that the failure of Grantor, its successors or assigns to perform under this Overhang Easement would result in damage to Grantee, its successors and assigns, that could not be adequately compensated by a monetary award. The rights and remedies granted in this Overhang Easement are cumulative, and the exercise of such rights or remedies shall be without prejudice to the enforcement of any other right or remedy authorized by law or this Overhang Easement. Pursuit of any right or remedy provided for in this Overhang Easement shall not constitute a waiver of any other right or remedy. No waiver of any violation shall be deemed or construed to constitute a waiver of any other violation or other breach of any of the terms, provisions and covenants contained in this Overhang Easement, and forbearance to enforce one or more of the rights or remedies provided herein shall not be deemed or construed to constitute a waiver of such violation or of any other right or remedy provided for in this Overhang Easement.

IN WITNESS WHEREOF, the undersigned has caused this Overhang Easement to be duly executed as of the date and year first set forth herein.

GRANTOR:

By: _____

Address: _____

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

Before me, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he/she executed the same for the purposes and consideration herein expressed.

Given under my hand and seal of office this the ____ day of _____, 200__.

Notary Public, State of Texas

GRANTEE:

By: _____
Its [President]

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

Before me, the undersigned authority, on this day personally appeared _____, President of _____, a Texas [corporation - limited liability company], known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he/she executed the same for the purposes and consideration herein expressed.

Given under my hand and seal of office this the ____ day of _____, 200__.

Notary Public, State of Texas

* * *

[EXHIBIT FOLLOWS ON SUBSEQUENT PAGES]

EXHIBIT "A"

Property Description

Real property situated in the County of _____, of Texas, consisting of approximately _____ acres of land, more or less, more particularly described as follows, to-wit:

APPENDIX 9

“Retained Acreage.”

On or before five (5) years after the Lessee commences the production of wind energy in commercial quantities on the land (said date being the “Retained Acreage Release Date”), the Lessee shall have surveyed the exact location of any physical improvements that it has made upon the property including, without limitation, turbines, towers, controller boxes, foundations, guy wires, roads, underground and overhead electrical wires, communication lines, poles and cross members, substations and transmission facilities (the “Improvements”) and shall further locate and cause to be shown on such survey the areas of the land (the “Utilized Acreage”) containing the improvements with the following boundaries:

- (a) Approximately 50 feet from the closest point on which a meteorological tower, road, guy wire, or transmission line is located;
- (b) Approximately 150 feet from the perimeter of any substation; or
- (c) 300 feet from the axis of horizontal rotation of any turbine located on the land.

On or before the Retained Acreage Release Date, the Lessee shall provide a copy of the survey and a legal description of the utilized acreage to Owner. Effective upon the Retained Acreage Release Date, all of the land, other than the utilized acreage shall be released from this lease but shall remain subject to the Lessee’s right of ingress and egress across said land as access to the utilized acreage. Said release shall be evidenced by a document suitable for recording in the County Clerk’s office of county in which the land is located.