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### **Overview**

Farmers have long used wind energy. Beginning in the 1800's, farmers installed several million windmills across the Midwest and Plains to pump water and generate power for lights and radios. Today, farmers, ranchers, and other rural landowners in suitable areas are utilizing wind energy in a different manner. But, where did the current emphasis on wind generation of electricity come from? There were early attempts dating back to the 1970s and 1980s, but it wasn't until the late 1980s and early 1990s, that Enron (an energy company based in Houston, TX) lobbied the Congress with a friendly "renewable energy" project, and packaged it with their "electricity deregulation" lobbying and political efforts. Their efforts were successful in getting laws passed at both the federal and state levels that would permit them to tie into the grid, require utilities to buy unreliable and unpredictable electricity (i.e., electricity generated by wind) under Renewable Portfolio Standards,<sup>1</sup> allow them to sell "renewable energy certificates" separate and apart from the electricity, and utilize a newly created production tax credit and take advantage of a special accelerated depreciation rule.

By leasing out or granting easements over a portion of their land to wind energy developers for the installation of high-tech wind turbines, rural landowners hope to diversify overall income and provide additional stability to the variability of farm income. However, wind

farming presents numerous legal issues that landowners must carefully consider before entering into an agreement with a wind development company.

### **The Potential for Wind Energy Development Nationally**

Wind farms are clusters of wind turbines that generate electricity. They tend to be located in areas with reliable and favorable wind speeds that are near electric power transmission lines and, in some instances, large cities.<sup>2</sup> Private companies are developing most of the wind farms in the U.S., typically by obtaining easements or leases from private landowners and assigning the rights obtained to power marketers, electric utilities, and, in some instances, directly to specific companies or government agencies. Presently, wind generates less than two percent of the electric power utilized in the U.S., but it is believed that by 2020, six percent of the nation's power will be generated by wind.<sup>3</sup>

Because wind turbines require large areas of land with strong, steady winds, certain parts of the country have the potential to be a significant player in the future development of wind farming.<sup>4</sup>

## **Iowa's Growing Influence on Wind Energy Development**

Currently, Iowa is the third largest producer of wind energy in the United States, ranking behind only Texas and California.<sup>5</sup> According to Iowa State University's Iowa Energy Center, the potential for wind energy is the highest in northwest and north central Iowa, with average wind speeds of 15.7-17.9 mph.<sup>6</sup> In 1996, the Iowa legislature approved the creation of the Alternative Energy Revolving Loan Program (AERLP), a program designed to promote the development of wind energy production across the state.<sup>7</sup> Since its creation, the AERLP has provided nearly \$10.5 million of financing for renewable energy production, including financing of ten independent owners of wind turbines across Iowa.

Many state-wide producer-supported organizations, such as the Iowa Farm Bureau Federation (IFBF) support wind farming in Iowa. The IFBF estimates that Iowa alone has the potential to produce up to 4.8 times its own annual electrical consumption through wind power.<sup>8</sup> Wind turbine construction facilities in Iowa are being formed and creating jobs for Iowans, including residents in communities such as Newton and Fort Madison.<sup>9</sup> In addition, the Iowa Economic Development Board offers incentives such as forgivable loans and state tax credits and sales tax refunds to those companies seeking to invest in wind energy production in Iowa.<sup>10</sup>

## **Government Incentives for Wind Energy Production**

**Federal.** Both the federal government and numerous states have provided incentives to encourage wind energy development. The federal Renewable Energy Production Tax Credit provides an income tax credit per kilowatt-hour for the production of electricity from a qualified wind energy facility placed in service after December 31, 1993, and before January 1, 2010.<sup>11</sup> The credit is presently 2.1 cents per kilowatt-hour and is adjusted annually for inflation. The credit applies to each kilowatt-hour of electricity produced from wind that is

sold to unrelated parties during the first 10 years after a wind energy facility is placed in service.<sup>12</sup> Likewise, the Renewable Energy Production Incentive Program provides financial incentive payments for electricity produced and sold by new qualifying renewable energy generation facilities. For depreciation purposes, renewable energy systems placed in service after 1986 are classified as 5-year property utilizing the double-declining balance method.<sup>13</sup>

Companies that own "wind farms" must have substantial taxable income from other sources to take advantage of these two tax provisions.<sup>14</sup>

**State.** At the state level, some states provide reductions or exemptions for state or local property, sales or other taxes applicable to "renewable energy property."<sup>15</sup> and companies developing large-scale wind farms are typically given state income tax breaks.<sup>16</sup> In some instances wind farm developers, in an attempt to curry favor with state and local officials and obtain positive public relations, make voluntary payments in lieu of taxes to offset part of the revenue lost by state and local governments as a result of the exemptions. However, the payments are not likely, in most instances, to adequately cover the costs that will be incurred because of the wind-farm development – such as for road construction and repair, as well as police and fire protection.<sup>17</sup>

**Iowa tax incentives.** Wind energy, including electricity generated by wind turbines, qualifies as an alternative and renewable energy source in the state of Iowa for purposes of the Iowa Renewable Energy Tax Credit.<sup>18</sup> To qualify as an eligible wind energy conversion facility for the purpose of taking advantage of the credit, the facility must be located in Iowa, with at least 51% owned by an Iowa resident or authorized farming corporation, limited liability corporation, trust, family farm corporation, family trust, an electric cooperative association, or school district.<sup>19</sup> The credit is 1.0 cent per kilowatt hour for energy sold by eligible wind energy producing facilities.<sup>20</sup> The maximum total to be applied toward personal income tax, business income tax, or a financial institution's tax is for 450 megawatts. To qualify for the

credit, the wind-generating facility must be approved by the Iowa Utilities Board.<sup>21</sup>

To further incentivize wind energy development, Iowa offers a special property tax valuation for “wind energy conversion property”- defined as the property with windmills, wind turbines, towers and electrical equipment and substations.<sup>22</sup> To qualify for this special valuation, a city council or county board of supervisors must approve the application by ordinance, to be enacted, not less than 30 days after a public hearing is held.<sup>23</sup> Qualifying wind energy conversion property, first assessed on or after January 1, 1994, shall be valued for property taxes for the first year at zero percent of the net acquisition cost.<sup>24</sup> For subsequent years, the rate increases by five percentage points each year of the net acquisition costs.

The Iowa Department of Revenue has issued a policy letter to explain that the sales price of a crane that is purchased for use in installing wind energy conversion property is exempt from sales and use tax.<sup>25</sup> However, the purchase of equipment used to construct roads for use in the construction of wind energy conversion property is not exempt.<sup>26</sup> The sales price from the sale of wind energy conversion property along with the sale of *materials* used to manufacture, install or construct wind energy conversion property is exempt from sales and use tax.<sup>27</sup> “Wind energy conversion property” means any device, including, but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, which converts wind energy to a form of usable energy. So, IDOR has taken the position that a crane used to erect towers and raise nacelles and their contents and rotor blades to a proper height qualifies as “materials” used to install wind energy conversion property. IDOR specifically noted that “materials” commonly refers to “tools or apparatus for a particular task.”<sup>28</sup> However, a road used to get the “materials” to the site does not qualify as “wind energy conversion property.”<sup>29</sup> Thus, the equipment that is purchased for use in constructing these roads does not qualify for the tax exemption.<sup>30</sup>

Iowa does impose a “replacement generation tax” of \$.06 per kilowatt hour of electricity produced in the state, in place of a property tax on energy generation facilities.<sup>31</sup> However, the state exempts wind energy facilities and methane gas conversion facilities from this tax.<sup>32</sup> Further, a city or county in Iowa is allowed to pass an ordinance for wind energy equipment to be given a special property tax valuation rate, beginning at zero percent of the net cost of acquiring the equipment and increasing by 5% annually (the maximum rate is 30%).<sup>33</sup> Additionally, the increase in value to a wind energy property is exempt from state property tax, creating a unique opportunity for tax payers.

Most recently, the Iowa legislature, on May 9, 2008, passed legislation allowing Iowa banks to qualify for tax credits for investment in wind energy facilities.<sup>34</sup> The bill extends, until 2012, the deadline for wind energy facilities to start producing energy to qualify for tax credits.<sup>35</sup> Additionally, the bill allows an unlimited credit transfer, allowing wind energy tax credits to be used for sales taxes.<sup>36</sup>

**Other states.** Several states with substantial wind energy potential are supporting state tax credits and energy policy designed to incentivize the development of wind energy facilities and more efficient energy transmission. On May 6, 2008, the South Dakota legislature passed a bill providing tax incentives for the construction of wind energy facilities and energy transmission equipment with a capacity of less than 5,000 kilowatts of nameplate capacity.<sup>37</sup> Earlier in the year, the South Dakota Governor signed H.B. 1320 into law. The legislation exempts power-generating wind farms from most state and local taxes, but subjects them to an alternative annual tax that is based on the number of kilowatts a wind farm can produce. Also, the bill specifies that any company owning or leasing a wind farm is subject to retail sales and service taxes. But, wind energy facilities and energy transmission equipment is exempt for other state, county, municipal and district taxes.

This legislation was spurred by the stunning growth of the wind power industry in the United States. In 2006, nearly \$4 billion was invested in

new wind projects in 34 states, increasing the total wind power capacity in the U.S. by 45 percent.<sup>38</sup> Despite this growth, only one percent of the nation's total energy supply is derived from wind energy.<sup>39</sup>

States are developing wind energy tax policy in response to efforts on the federal level. As mentioned above, I.R.C. §45 allows an income tax credit for wind energy production for utility-scale wind turbines at two cents per kilowatt-hour of produced electricity, causing the cost of production to fall dramatically.<sup>40</sup> The federal tax credit is vitally important to the growth of the industry, as lulls in U.S. wind development in the past ten years correspond with Congress' failure to renew the tax credit legislation periodically.<sup>41</sup> The current credit legislation will expire at the end of 2012.

Because of the non-permanency of wind energy tax policy at the federal level, states are beefing up their wind energy tax incentives to attract wind developers. Altogether, 34 states have tax incentives for wind development, including property tax breaks, sales tax exemption on wind energy equipment purchases, corporate and financing incentives.<sup>42</sup> The state of California was the first to offer a state investment tax credit for wind energy development and the legislature has recently adopted a solar and wind energy credit, providing personal and corporate income tax credits for the purchasing and installation of renewable energy systems.<sup>43</sup> Similarly, Minnesota has set a lofty goal of generating at least a quarter of its energy needs from renewable energy, most likely wind energy production.<sup>44</sup> In 2002, the state exempted all wind energy systems from state property tax, instead taxing the actual wind energy produced at variable rates, depending on the megawatts per system.<sup>45</sup>

Texas, the national leader in wind energy production, takes a more complicated approach to wind energy tax policy, largely due to the deregulation of the Texas electric industry in 1999. Texas allows a deduction from state franchise tax for renewable energy sources and several property tax incentives.<sup>46</sup> A unique provision is the allowance of local property tax

abatements for wind projects in the state.<sup>47</sup> These abatements exempt all or part of the increase in real or tangible personal property from up to ten years.<sup>48</sup> Local governments are the sole grantors of these abatements used to create local "reinvestment" zones and foster job creation and economic development.<sup>49</sup>

## **The Mechanics of Wind Turbines**

The typical wind turbine sits atop a tower that ranges from 170 to 320 feet high. The blade diameter is 75 to 100 feet with a weight between 8,000 and 10,000 pounds. The cost to install is approximately \$1 million per megawatt of installed capacity, with the typical turbine having an installed capacity of 750 kilowatts to 1.5 megawatts. A 1.5 megawatt turbine can generally produce enough energy to power 400-500 homes annually. A section of land can house anywhere from six to twelve turbines. The turbines are very sophisticated machines with computerized controls. A turbine's generator output increases as wind speed increases, with maximum power typically generated with wind speeds of 30-35 mph. The turbines are usually programmed with cut-out wind speed of between 55 and 65 mph.

## **Liability Concerns- When Will Civil Damages Be Awarded to a Landowner?**

There are several legal liability issues that may arise from the construction, maintenance, and energy production from wind turbines on agricultural land. Typically, a landowner is required to enter into written contractual agreements before a wind turbine is constructed on the land. It is important to keep in mind that tort liability may be assessed in cases where harm results as a result of a party's negligence with respect to the construction or maintenance of wind turbines. A rural landowner must be careful to specify in any contract that he is not liable for the negligence of others with respect to wind turbines. A farmer may further protect himself from negligence liability by taking reasonable care in the operation of the wind turbines and having liability insurance in place to cover all unexpected claims. Generally, if a farmer is not in charge of the maintenance or

operation of the wind turbine, he will be held to a lower standard of care. This does not mean, however, that a farmer or landowner will be immune from liability in a negligence suit.

Nuisance is another common tort in the realm of wind energy production, where a wind farm may interfere with another person's use or enjoyment of his or her property. To be held liable for a private nuisance, the interference must be substantial and unreasonable. It is very rare that a private nuisance claim holds leads to a finding of damages. A public nuisance is an "unreasonable interference with a right that is common to the general public", meaning that it interferes with "public health, safety, comfort, or convenience or is illegal."

The following are some additional potential liability concerns associated with wind energy development:

- Damages to adjacent property caused by the alteration of the flow of surface water due to the construction of access roads.
- Stray voltage from the turbines (this may be a particular concern for nearby dairy operations).
- Interference with electromagnetic fields.
- Fire caused either by malfunction of a turbine or as a result of a lightning strike.
- Possible interference with television and radio signals.
- Death of birds and/or bats that are protected by state and/or federal environmental laws

### **Criminal Liability for Fraudulent Conduct**

While most liability disputes relating to wind energy projects are handled in civil court according to contract or property law, criminal violations are possible. For example, in September 2007, the pioneer of Minnesota's wind energy development initiative was charged with participating in fraudulent conduct in the Federal District Court in Minnesota.<sup>50</sup> Allegedly,

the wind developer overstated the amount of power being produced by wind generators in operation for 2003 and 2004, amounting to nearly \$388,000 in overcharges assessed to the energy purchasing company.<sup>51</sup> The amount of wind energy produced in the state of Minnesota significantly increased from 25 megawatts in 1994, to almost 900 megawatts in 2007, making Minnesota the fourth largest wind energy producer in the nation.<sup>52</sup> The wind developer, owner of a family-owned company with hundreds of community and private investors across southwestern Minnesota, vehemently denied the criminal charges, stating that the last thing he would want to do is defraud his purchasers.<sup>53</sup> However, a 2005 search warrant uncovered evidence of the overstatement in billing. A contributing factor in the Federal charges was the additional billing of nearly \$176,000, in 2003 and 2004, to the Minnesota Commerce Department for state wind energy incentive payments.<sup>54</sup> In late 2008, the developer was sentenced to 21 months in federal prison.

### **Valuation Issues**

The placement of wind turbines on farmland will impact valuation for federal estate tax purposes upon the owner's death. For federal estate tax purposes, the key valuation date is as of the date of the decedent's death. Thus, a long-term wind energy agreement signed shortly before death likely has little impact on the date of death value of the property included in the decedent's estate. Because the agreement will have an initial development/prospecting phase that runs for several years before the primary phase of the easement, there remains uncertainty (as of the date of death) if death occurs within the prospecting phase as to whether wind generation will *ever* occur on the premises. Thus, there should be no valuation enhancement.

However, if death occurs after turbines have been installed and have become operational, IRS could argue for a valuation enhancement. But, there may be offsetting factors. At the present time, anecdotal data indicates that wind turbines have a depressing effect on nearby land values and are a drag on the ag real estate market.

Most recent anecdotal data from Illinois indicates that assessed value on farmland is dropping approximately 22-30 percent on farmland that is near land where wind turbines have been placed. Also, the increased risk of getting sued for nuisance has a dampening effect on value. Likewise, the annual payments, to an extent, are replacement income for the property rights that have been given up in getting the turbines in the first place. Many of the agreements are quite restrictive in terms of potential development of the property, farming activities, placement of buildings, etc. A willing buyer would take all of those factors into consideration when determining what price to pay for the property (IRS test).

Thus, to arrive at the proper valuation of an existing contract, the present value of the contract would have to be discounted in order to derive a value for the stream of payments. That result could then be offset by the factors mentioned above.

At the present time, IRS has not issued any guidance on the matter.

For federal estate tax purposes, agricultural land may be valued at its agricultural use value rather than its fair market value at the time of death. The executor of the decedent's estate must make an election to value the land at its use value and the election (for deaths in 2009) has the potential to reduce the value of the land included in the estate by up to \$1 million. With the federal estate tax rate presently set at 45%, which could lead to maximum tax savings of \$450,000. Numerous requirements must be satisfied for the estate to qualify to make the election, and the elected land must pass to family members that will continue to farm the land (or lease it under a lease where the lease income is based on crop prices or production levels) for 10 years after the decedent's death. If the property is converted to a non-agricultural use during that 10-year period, recapture tax is triggered. That means the heirs have to pay all of the tax savings achieved by making the election back to the government, with interest. In addition, at the time the election is made, IRS puts a lien on the

property to ensure payment in the event a recapture-triggering event occurs.

In one recent matter involving a Texas set of facts, the decedent died owning agricultural land. A special use valuation election was made and the property passed to the decedent's family members. The heirs were subsequently approached by a wind energy company about placement of wind turbines on the property. The heirs executed the wind energy lease which required that all existing liens be subordinated to the interests of the wind energy company - a common provision in wind energy leases. When the heirs approached the IRS about subordinating the IRS lien, IRS refused, viewed the wind energy lease as a disqualifying cash lease, and asserted recapture tax on all of the property subject to the election. Subsequent negotiations resulted in IRS asserting recapture tax on only the land actually removed from ag production. The heirs paid the tax. The heirs' refund suit is anticipated to be filed in the Federal District Court for the Northern District of Texas.

**Note:** The IRS has won a case in the U.S. Court of Appeals for the Third Circuit in which they asserted recapture tax upon the grant of an easement.<sup>55</sup> In that case, the trial court held that granting the state of New Jersey an easement in qualified farm property was *not* a disqualifying disposition of the property that triggered recapture tax under I.R.C. Sec. 2032A(c)(1). Instead, such a grant was merely a contract right under state law. The appellate court reversed, finding that there was a disposition of a property interest under federal law. Interestingly, the easement involved an ag preservation easement ensuring that the land would *not* be developed.

### Other Legal Issues

Except in situations where malice is present, U.S. law does not recognize a negative easement

for the free flow of wind. In other words, the owner of tract A cannot restrict the activities of the owner of adjacent tract B on tract B that might impact the flow of the wind from tract B to tract A. If the uses to which tract B is put interfere with the flow of the wind across the tract, but are otherwise reasonable, the owner of tract A would not be able to stop those activities from occurring. To ensure that B's activities wouldn't impact wind energy development on tract A, the owner of tract A would have to purchase an easement over tract B (or purchase tract B).

**Note:** Some states have enacted wind easement statutes that secure wind access. The states enacting such statutes are: Minnesota, Montana, Nebraska, Oregon, South Dakota and Wisconsin. The Virgin Islands has also enacted a wind easement statute. Oregon law also authorizes municipalities to protect access to wind via local ordinance.

### **Recent National Case Law and Developments**

**Nuisance.** There has been an increase across the nation in the filing of nuisance-type cases involving the construction and placement of wind farms. For example, in 2002 a windmill located in a residential area was held to be a nuisance because of the noise it created.<sup>56</sup> In a 2007 case,<sup>57</sup> a large-scale wind farm with 200 turbines was proposed to be constructed in close proximity to a residential development. The homeowners sued to permanently enjoin the construction and operation of the wind farm, citing possible noise, aesthetical impact on the viewshed, flicker and strobe effect of light reflecting from the turbine blades, potential danger from broken blades, ice throws and reduced property values. The court held that the wind farm could constitute a nuisance and that the plaintiffs' claims were sufficient to prospectively enjoin a nuisance. The court also noted that even though the State Public Service Commission had approved the facility, such approval did not abrogate the common law of nuisance.

In March 2008, a landowner in Missouri sued the county commission which approved the construction of a large-scale wind farm adjacent to his property. The landowner also claimed that he was physically attacked by a county commissioner for his public opposition to the siting of the wind turbines. In addition, the landowner claimed that the wind turbines were a nuisance, because his land was completely surrounded by the turbines, the turbines caused a "powerful strobe light effect," were loud and contributed to the loss of equity and marketability of his home and the loss of view and quiet enjoyment of his property. The Federal District Court for the Western District of Missouri dismissed the case, but noted that the plaintiff could amend his complaint to replace the county commission with a private party as the defendant.<sup>58</sup>

On April 18, 2008, the Federal Aviation Administration (FAA) was ordered to reconsider its decision to allow the construction of a wind farm near the site of the new Las Vegas Airport.<sup>59</sup> The evidence presented indicated that the turbines would interfere with the airport's radar systems. The Federal district court determined that the FAA's determination was arbitrary and capricious.<sup>60</sup>

In late August 2008, the Texas Court of Appeals upheld a trial court ruling that dismissed a nuisance lawsuit filed by property owners that complained about the "aesthetical impact" of a large-scale, 421-turbine wind farm.<sup>61</sup> The plaintiffs asserted that the jury was entitled to consider the farm's "visual impact" along with descriptions of the wind turbines blinking lights, flickering shadows and noise. However, the court noted that the common-law doctrine of nuisance in Texas had never recognized a nuisance claim based on aesthetical impact. The court, while sympathetic to the plaintiffs' claims, refused to expand nuisance law to cover actions for aesthetical impact that causes emotional injury, determining that such an extension was beyond the purview of an intermediate appellate court.<sup>62</sup>

**Zoning.** Zoning issues can also arise with respect to wind-farm development. Recently,

the Supreme Court of New York approved setback requirements for wind turbine placement away from residences, public roads, and properties that did not contain wind turbines.<sup>63</sup> The county agency's approval of minimum setback requirements was not a de facto unconstitutional taking within the scope of the New York Constitution.<sup>64</sup> Since the agency gave reasons for its determination, including environmental concerns, the surrounding property owners were able to distance themselves from the turbine facilities.<sup>65</sup> In a different case, the New York Supreme Court upheld the grant of a conditional use permit for the construction of a wind farm.<sup>66</sup> In the case, the court held that the local zoning board's determination that the wind farm constituted a public utility for zoning law purposes were entitled to deference and were not shown to be unreasonable or not rationally based. The court noted that the zoning board considered various environmental impact studies that the wind farm had submitted and held public hearings. A different New York case<sup>67</sup> illustrates the tension between landowners seeking additional revenue from wind turbines and adjacent property owners that place a high value on aesthetics. A town enacted a ban on the development of commercial wind farms. Supporters that voted for the ban included owners of second homes. However, the votes of the second-home owners was challenged by supporters of wind farm development on the basis that the owners were not residents of the town as defined by New York election law. The defendant agreed, but the court reinstated the voter registrations of the second-home owners - they had demonstrated significant and genuine contacts with the town such that their choice of the town as their residence for voting purposes should have been honored. Six of the eight second-home owners had homes in the town, but lived and worked in another city during the week. In addition, each second-home owner didn't vote anywhere else and listed the town as their residence on their driver's license.

On October 30, 2009, a unanimous Kansas Supreme Court upheld a Wabaunsee County ordinance banning commercial wind farms in the county.<sup>68</sup> The Court determined that the

county had properly followed state statutory procedures in adopting the ordinance, and that ordinance was reasonable based on County's consideration of aesthetics, ecology, flora and fauna of the Flint Hills. The county held numerous public hearings on the issue with the overwhelming majority of the public expressing lack of support for commercial wind farm development in the county. The Court cited the numerous adverse effects of commercial wind farms including damage to the local ecology and the prairie chicken habitat (including breeding grounds, nesting and feeding areas and flight patterns) and the unsightly nature of large wind turbines. The Court also noted that commercial wind farms have a negative impact on property values, and that agricultural and nature-based tourism would also suffer. The Court, however, ordered the parties to submit additional briefing and prepare for oral argument on whether the ordinance constitutes a "taking" of plaintiffs' property rights without just compensation, and whether the ordinance violates the Commerce Clause by discriminating against interstate commerce. Those issues are set to be considered in early 2010.

**Property Values.** In November 2007, a local Vermont Board of Civil Authority (BCA) ruled that a wind turbine reduced the value of adjacent property by 10 percent for real property tax purposes.<sup>69</sup> The evidence showed that the wind turbine was within 300 feet of the petitioner's home, and the petitioner claimed that the turbine's noise, blinking light, glare from the blades, and resulting vibrations decreased the home's value.<sup>70</sup> Before reaching their decision, the BCA sent a committee of three persons to visit the petitioner's property to evaluate the situation.<sup>71</sup> The committee reported back that the turbine produced constant sound and flashing lights from its turning blades, and recommended an eight percent reduction in valuation of the petitioner's property.<sup>72</sup>

**Contractual Issues.** In a recent New York case, the plaintiff bought the defendant's farm (including the residence) and sought to have the sale contract rescinded based on the seller's alleged fraud and misrepresentations for not disclosing that plans were in the works for the



construction of large wind turbines on an adjacent parcel.<sup>73</sup> The plaintiffs submitted the affidavit of a neighbor of the defendant who detailed two conversations with the defendant that occurred months before the defendant put his farm on the market during which the wind farm development was discussed.<sup>74</sup> The defendant, at that time, stated that the presence of commercial wind turbines on the adjacent tract would “force” him to sell his farm.<sup>75</sup> When the plaintiff sought to rescind the contract, the defendant claimed he had no duty to the plaintiff and that the doctrine of caveat emptor (“buyer beware”) was a complete defense to the action.<sup>76</sup> The court denied summary judgment for the seller and allowed the case to go to trial.<sup>77</sup>

**The Public Trust.** The Public Trust doctrine holds that certain resources are preserved for public use, and that the government is required to maintain those resources for the public’s reasonable use. The Public Trust Doctrine was involved in a recent case brought against an owner/operator of a large-scale wind farm.<sup>78</sup> Under the facts of the case, an environmental group claimed that wind turbines at the Altamont Pass Wind Resource Area in Alameda and Contra Costa counties had killed tens of thousands of raptors and other birds since the 1982. The Alameda County Board of Supervisors was in the process of considering applications to extend and consolidate existing 20-year permits to operate the wind turbines when the plaintiffs sued. The plaintiff claimed that the operation of the wind farm violated state and federal law, including the public trust doctrine – a doctrine which holds that certain resources are preserved for public use, and that the government is required to maintain those resources for the public’s reasonable use. But, the trial court dismissed all claims except for the alleged public trust violation for lack of standing.

The appellate court affirmed, noting that the case was filed against the wrong party.<sup>79</sup> The plaintiffs sued the owners and operators of 5,000 wind turbine generators at the Altamont Pass wind farm. However, the court emphasized that wildlife, including birds, is considered a public trust resource, and that private parties can sue to

enforce the public trust. But, such an action (when brought by a “beneficiary”) must be brought against the “trustee” of the public trust – namely, the government agencies (such as the state and federal fish and game departments) charged with the responsibility to implement and preserve the “trust.” Only the trustee has the sole right to sue the owners and operators of the wind turbines for violation of the public trust. A “beneficiary” cannot sue the party that is believed to be harming trust property. In any event, the court noted that the public agencies responsible for protecting the public trust (such as the Department of Fish and Game) had done so.

So, the court would not let the case go forward without the expertise of the government agencies responsible for protecting the trust resources. The proper means to challenge the adequacy of the agencies’ measures was by petition for a writ of mandate after exhaustion of administrative remedies.<sup>80</sup>

### **Recent Legal Developments in Iowa With Respect to Wind Energy**

Several school districts in Iowa have taken an interest in wind-energy production. In 2003, when a school district began generating wind power from a donated wind turbine, they claimed to have an agreement with the city to sell the electricity.<sup>81</sup> Relying on the agreement, the school constructed a new wind turbine.<sup>82</sup> The city brought suit, claiming that any contract entered into between the school and the city was void, because the municipality lacked authority to make such an agreement.<sup>83</sup> The Iowa Supreme Court cautioned that the school was on notice that the city had no authority to enter into an agreement to purchase the electricity generated by its turbines.<sup>84</sup> The school was left without any recourse in this dispute. Presently, several other school districts across the state have become interested in wind-energy production as a possible revenue-raiser. It remains to be seen what the courts will allow.

In 2003, when a utility customer erected a wind turbine on his land and attempted to connect it with the electric service being provided to him

by his electric company, the Iowa Supreme Court determined the proper hierarchy of authority in this area.<sup>85</sup> The issue was whether the Iowa Code sections relating to alternative energy providers, such as wind turbines, applied to an electric company, regulated by The Federal Public Utility Regulatory Policies Act (PURPA).<sup>86</sup> The court found that since the electric utility was not subject to the Iowa Code, federal law prevailed here.<sup>87</sup>

In a related context, Iowa Courts have recently addressed the issue of adjacent landowners' rights to input in the construction of cell phone towers. In this case, the plaintiff, a landowner, challenged the construction of a cell phone tower built across the road from his home, on the basis that he was not given adequate notice of the hearing held regarding the issuance of a permit for the tower's construction.<sup>88</sup> The Iowa Court of Appeals ruled that the landowner was only entitled to notice by publication at least seven days before the time set for public hearing.<sup>89</sup>

The court noted that Iowa law requires that notice of a pending application for a conditional use permit must be reasonable under the circumstances.<sup>90</sup> So, rural landowners objecting to the construction of cell towers or wind turbines must be diligent in determining the time and place of public hearings.

**Net metering.** The Iowa Court of Appeals has rendered the latest court opinion in a legal battle over net metering that has been going on in Iowa for about 10 years. Iowa's net metering rule was a creation of the Iowa Utilities Board in 1983 and allows customers with alternative energy generation systems to sell electricity to their investor-owned utilities on a netted basis against their metered retail usage.<sup>91</sup> In this case, the plaintiffs bought wind-powered generators from another plaintiff and tried to reduce their energy expenses by producing their own power and selling any excess energy to the defendant- a non-regulated utility. But, the Iowa net metering rules do not apply to electric cooperatives because they are not regulated by the Iowa Utilities Board (IUB). The plaintiffs sued in federal court, but the case was dismissed for lack

of subject matter jurisdiction. The plaintiffs then took the matter to the Federal Energy Regulatory Commission (FERC) on the basis that their wind energy system was a qualifying facility (QF) under the Public Utility Regulatory Policies Act (PURPA) and also filed an action in state district court.

In 2005, the Iowa Supreme Court reversed its previous ruling and concluded that net metering was not required by either Iowa or federal law. The court noted that the issue of net metering carried with it great policy concerns, and that FERC was the appropriate tribunal to decide whether net metering fit within the requirements of PURPA. Specifically, the Court held that PURPA did not require net metering by non-regulated utilities. Shortly after the Iowa Supreme Court issued its ruling, FERC found that even though PURPA did not explicitly require net metering, the defendant had to offer net metering to the plaintiffs.

Later in 2005, the President signed into law the Energy Policy Act of 2005 (Act). While the Act does not mandate federal net metering and interconnection standards, it does direct non-regulated utilities to consider whether to adopt net metering within three years of enactment of the Act. In early 2006, upon reconsideration of its 2005 order, FERC reversed itself in light of the Act vesting discretion in the defendant to determine whether net metering should be offered to customers. The plaintiffs sought enforcement of FERC's 2005 ruling, but the trial court refused.

On further review, the Iowa Court of Appeals affirmed. The court held that the trial court's ruling was consistent with the Act which entrusted the decision to offer net metering to the defendant and not FERC.<sup>92</sup>

### **Federal Farm Program Payment Eligibility**

When negotiating a wind energy easement, it is important for rural landowners to understand the impact such an agreement may have on their eligibility for federal farm program payments. Farmers should consult their local Farm Service Agency before entering into these agreements

for a more detailed explanation of the program rules and whether they will lose benefits or suffer serious financial penalties.

For those farmers considering wind energy easements and participating in the Direct and Counter-cyclical Payment Program, authorized by the 2002 Farm Bill, there is a prohibition on making nonagricultural use of acreage enrolled in the program. Farmers will need to consider if there will be a penalty for withdrawing acreage from the program for the purpose wind energy.

### Tax Reporting Issues

When an agreement is entered into with a wind energy company, the landowner will commonly have three types of payments:

1. The payment for the company's acquisition of an easement or a lease over a part of the landowner's property;
2. Crop damage payments; and
3. Annual payments associated with turbines or the amount of production from the turbines.

**Easement payments.** The sale of an easement is treated as the sale of an asset.<sup>93</sup> But, if the taxpayer retains more than naked legal title to the property affected by the easement, the consideration received is treated as a return of capital.<sup>94</sup> As a result, the proceeds are applied as a reduction of the taxpayer's basis in the property, with any excess treated as capital gain.<sup>95</sup>

The Treasury Regulations provide the following as a general rule:

When a part of a larger property is sold, the cost or other basis of the entire property shall be equitably apportioned among the several parts, and the gain realized or loss sustained on the part of the entire property sold is the difference between the selling price and the cost or other basis allocated to such part. The sale of each part is treated as a separate transaction and gain or loss shall be computed separately on each part.

Thus, gain or loss shall be determined at the time of sale of each part and not deferred until the entire property has been disposed of.<sup>96</sup>

The Treasury Regulation, therefore, presents two tax issues associated with allocating the landowner's income tax basis in the property:

- The allocation of basis between the portion of the property that is subject to the easement and the balance of the property that is not subject to the easement;<sup>97</sup> and
- The allocation of basis between the rights created by the easement and the balance of the rights in the property.

Based on the Regulation, one thing is clear – a taxpayer cannot compare the entire basis in the property from which an easement is acquired with the sale price of the easement. For example, in *Iske v. Comr.*,<sup>98</sup> the taxpayer sold easements during condemnation proceedings and did not include the compensation in gross income on the tax return for that year because, as the taxpayer argued, he did not receive a taxable gain on the sale of the easements. But, the court disagreed with the taxpayer's position. The court reasoned that Treas. Reg. §1.61-6(a) required the taxpayer to apportion his basis in the property between the land sold and the land retained. The taxpayer could not use his entire basis in the two parcels involved to offset the amount he received for the easements.

**Example:** Garrulous Energy Company paid \$4,000 for an easement along the eastern boundary of Marcia Megawatt's farm for the construction of an access road to the location on Marcia's farm where a wind turbine will be erected. The easement covers approximately five acres of Marcia's 160-acre farm. Marcia has an income tax basis of \$750 per acre in her farmland. For purposes of reporting gain from the \$4,000 easement payment, Marcia would be able to offset the \$4,000 payment by the \$3,750 income tax basis that is allocable to the five acres that the easement

impacts (\$750 per acre basis x 5 acres). Thus, Marcia must only report \$250 of gain from the sale of the easement.<sup>99</sup>

If the easement impacts the taxpayer's entire property (which is uncommon), the amount received for the easement reduces the taxpayer's basis in the entire property for purposes of computing taxable gain.

**Example:** Larry Landowner sells multiple easements to Tumescient Wind Corporation for access to a major wind turbine project on Larry's farm. The easements cover 50 acres and bisect Larry's property. Tumescient constructed fences on each side of every easement and installed gates in the fences so that Larry could move his livestock through the easements. For purposes of reporting gain from the sale of the easements, Larry should be able to reduce the basis in all of his ranchland by the amount he received for the easements. That's the result if Larry can establish that the easements impacted Larry's use of all of his property, rather than just the 50 acres covered by the easements.<sup>100</sup>

Income tax basis must also be allocated between the rights that the taxpayer retains and the easement rights that are sold. For purposes of this basis allocation, the general rule is that the allocation of basis in the property must be allocated between the interest sold and the interest retained in the proportions that their respective fair market values bear to the fair market value of the entire property.<sup>101</sup> But, if it is not possible to allocate basis of the entire property between the interest that is sold and the interest that is retained, then the amount received for the easement can be used to reduce the basis in the entire property affected.<sup>102</sup>

An important issue to resolve is the actual amount of a client's property that is impacted by a wind farm project. The first place to start is to examine the terms of the particular easement. Many easements will prohibit the landowner from building anything else on the property that

would interfere with the maintenance of the windmill or block the wind that drives the windmill. In that case, the landowner has a reasonable argument that the easement impacts *all* of the landowner's property. If there is sufficient basis in the land to absorb the easement payment, the landowner will not have any gain to report.

**Example:** Tom owns an 80-acre tract of farmland with no improvements. It is entirely pastureland, and Tom paid \$40,000 for the tract in 1983. Tom has been approached by a wind energy company to construct three wind turbines on his property. The company is willing to pay Tom \$20,000 for an easement. The easement terms prevent Tom from building anything on this property that would obstruct the company's access to the wind turbines or that would block the wind to the turbines. Tom should be able to reduce the basis in his entire tract by the amount of the easement payment. That would result in his basis being \$20,000, and Tom would not have any gain to report.

**Note:** If the wind energy company were to pay Tom an additional amount for the right to construct additional wind turbines on his property in a future year, Tom would again reduce his remaining basis in his tract by the amount of the payment. To the extent the payment exceeds Tom's basis in his property, Tom would have a taxable gain that would be reported on Form 4797, Part 1 (where it is netted with other I.R.C. §1231 gains and losses).

There is caselaw supporting the argument that an easement can impact *all* of a taxpayer's property and, hence, allows the taxpayer's entire basis in the property to be applied against the easement payment.

- *Bledsoe v. United States*<sup>103</sup> - the landowner sold nine perpetual easements to the U.S. Army Corps of Engineers to allow road access to a dam. Although the easements covered only 47.3 acres, the court allowed the landowner to reduce the basis of the entire property because the easements restricted his use of the property. The easements varied in width from 100 to 400 feet and bisected his ranch. The easement holder then constructed a fence along the road on both sides and built gates in the fences so that the taxpayer could move his cattle across the easements. The court noted that the easements were not sales (that's contrary to the general rule) and that the taxpayer was entitled to apply the easement proceeds against the basis in the property.
- *Inja Land Com., Ltd. v. Comr.*<sup>104</sup> - the City of Los Angeles paid the landowner \$50,000 for an easement that allowed the city to flood the land when it diverted water into a river that flowed through the land. The easement did not cover the entire tract, but because it affected the use of the entire tract, the court allowed the payment for the easement to reduce the basis of the entire tract.

**Crop damage payments.** Payments that are made to a landowner (or a tenant) for damage to crops are reported as payments received for sale of the crop. Thus, the landowner reports the payment on line 4 of the landowner's Schedule F (Form 1040) as crop proceeds.

**Lease payments.** In addition to the payment for the easement, landowners commonly receive annual lease payments. Because these payments are not for land used in agricultural production, they are not subject to self-employment tax regardless of the landowner's participation in the activity.<sup>105</sup> That means that the annual income from the lease payment should be reported on Schedule E (Form 1040). It is unlikely that the landowner would have any deductible rental expenses.

### **Legal Issues for Landowners to Consider in Negotiating Wind Energy Easements**

There are two parts to a typical wind development agreement. The first part involves an agreement for prospecting and development of the property, the terms of which will give the prospecting company the right to enter the premises, evaluate the property for potential wind energy development, and construct the necessary turbines and related structures if the developer deems the property to have the potential for wind energy development. This part of the agreement will typically give the developer the exclusive right to develop the property for a limited amount of time (usually 2-5 years), and may contain an option for the developer to extend the length of the development term. At the present time, development agreements are providing landowners with annual payments within a range of \$2 to \$10 per acre subject to the agreement. If wind energy development does not occur during the term of the agreement, the landowner may negotiate a new wind energy agreement with another developer, if possible and if desired.

The second part of the agreement involves the contract for the development and operation of wind turbines on the property. This part of the agreement will involve a much longer term (typically 20-50 years) with an option (or multiple options) to extend the agreement even further. Landowner compensation under this part of the agreement may be based on the number of turbines placed on the property, per megawatt of energy generated or on a royalty-based compensation structure. A key point for landowners is to make sure that the compensation structure contains an inflation-adjuster clause.

While both parts may be contained in a single document, landowners may benefit from having the two parts separated out and put in different agreements.

A wind energy agreement should never be negotiated without first having the agreement reviewed by legal counsel. Wind energy agreements are long-term agreements that will impact the land subject to the agreement for

many years, likely beyond the lifetime of the landowner who executes the agreement. The following is a list of questions that landowners should ask when analyzing any wind energy agreement:

### **Scope Questions:**

- How much of the land will be subject to the agreement?

**Note:** The legal description of the covered property is critical.

- How long will the land subject to the agreement be affected?
- Based on the property rights that are given up, are the proposed payments adequate for the present time and for the life of the agreement? (Note: The answer to this question requires an understanding of the mechanics and economics of wind energy production.)

### **Estate Planning Issues**

- Is it planned that the farming operation will expand in the future? If so, how will the placement of wind turbines on the property impact the farm's potential development and/or expansion?
- Has the issue of wind turbines development been discussed with the on-farm heirs?

### **Payment Questions:**

- Is the landowner entitled to any or all energy credits related to the project?
- If the agreement offers an up-front lump-sum payment, is the payment representative of a fair amount of the rights involved?
- What are the tax consequences of wind energy payments that will be paid under the agreement? (Note: The answer to this question depends on tax changes at the federal and state levels – an area which is in

an almost constant state of flux.)

- Are payments under the agreement based on revenues generated by the wind turbines? Can the landowner get information as to how the owner's revenue will be calculated?
- If the wind energy company puts additional equipment on the towers and collects compensation for such placement is the landowner entitled to some of the additional compensation?
- Does the agreement guarantee that a set number of wind energy turbines will be constructed on the land by a specific date and, if not, is the developer willing to guarantee a minimum amount of payments?

### **What are the developer's rights?**

- Does the developer want to develop the land or simply use a portion of the surface for a term of years?
- Is the developer able to sell or transfer without the landowner's consent any of the land use rights obtained under the agreement? If so, will the original developer remain liable if the new developer or holder of the easement right does not pay the landowner or otherwise defaults?
- What events trigger the developer's right to terminate the contract? Can the developer terminate the contract at any time without cause? If so, how are payments due under the agreement to be handled?

### **Cost Questions:**

- Will any portions of the property require gating, fencing or limiting of access in any manner? If so, who pays for the cost or building and/or repairing such measures for restricting access?
- Is there any potential for environmental contamination or the release of hazardous materials onto the premises because of the

presence of wind turbines on the property?  
If so, how are associated costs to be borne?

- Are any additional costs associated with compliance with governmental regulations of wind turbines, present and in the future, the responsibility of the landowner, developer or wind energy company?
- What is the cost of the landowner becoming an additional insured on the insurance policy of the wind energy company?
- Are there any potential costs of construction liens that might be placed on the property?
- If the agreement limits the ability of the landowner to expand the farm or make improvements (such as installing irrigation equipment, field tile, or additional structures), what are the economic costs to the overall operation of such limitations?
- The development of the property will require the construction of roads. Does the agreement provide compensation for any damage to existing drainage tile and/or additional costs associated with the change in the flow of surface water that could negatively impact adjacent property?
- If the development of the property with wind turbines increases the ad valorem real property valuation of the property, must the landowner pay the additional taxes?
- If an adjacent landowner files a lawsuit against the landowner based on nuisance or other tort theories, will the wind energy company pay the landowner's legal costs and any resulting judgment rendered against the landowner directly tied to the presence of the wind turbines?
- When the agreement ends or is otherwise terminated, does the landowner bear the cost of removing wind energy structures?

### **What are the landowner's rights?**

- What termination rights does the landowner have? How does the landowner exercise those rights?

**Note:** Wind energy agreements often contain termination clauses designed to minimize the risk of termination to the developer so as to aid the developer in receiving financing. Accordingly, wind energy agreements typically prevent a landowner from terminating (or taking action against the wind energy company) an agreement due to noise, flicker, vibrations, air turbulence, electromagnetic interference with global positioning systems, and other effects caused by the wind turbines.

- If the agreement is terminated, whether by consent of the parties or otherwise, what happens to the wind energy structures and located facilities erected on the property? What is the developer required to remove? How soon must structures be removed? Who pays for their removal?

### **Crafting an Equitable Agreement**

When a wind energy agreement is being negotiated, certain issues are critical to the creation of an equitable agreement. Unfortunately, a common problem with many wind energy agreements is that once they are proposed and submitted to a landowner, the company wanting to execute an agreement tends to refuse to negotiate changes to the terms of the agreement. The company's ability to refuse to negotiate terms of the proposed agreement will depend largely on whether a landowner has meaningful options and competent legal representation.<sup>106</sup> Key provisions to a wind energy agreement that require careful attention by legal counsel for landowners contemplating a wind farm include the following:

- Is the proposed contract a lease or an easement? If a lease is involved, it should be long enough for the developer to recoup its investment (probably at least 20 years). Does the developer have a right of renewal? If so, does the landowner have the right to

renegotiate any of the lease terms? Any lease should not be perpetual- a violation of the rule against perpetuities might be involved (at least in those states that have retained the rule).

- If an easement is involved, does the easement include turbine sites, substations, air space, buffer areas, vegetation restrictions, building restrictions, transmissions, and associated rights of way?
- Is a sale of the land contemplated? If so, how is the selling price computed? Any sale price should consist of the fair market value of the land plus the wind energy value.
- What are the setback requirements and fees to neighboring landowners?
- What is the amount of compensation to be paid? Take care to ensure that the definition of “gross revenue” is done properly. Is it defined as the sale of electrons or the sale of green credits, or is it calculated in some other manner?
- Is the revenue to be a flat amount annually, an annual payment per tower, a percentage of gross proceeds, a payment of a certain amount of kilowatt hours generated annually, or an amount based on the selling price of megawatts per year, whichever amount is greater?
- Is an inflationary factor built into the contract payment provisions? To protect the landowner’s interest, there should be.
- Does the agreement cover land that will not be needed for the wind farm and related structures? From the landowner’s perspective, there shouldn’t be such coverage.
- An up-front lump-sum payment has tax consequences- make sure they are understood.
- What are the intentions of the developer concerning the use of the land? That makes

understanding the use provisions of the agreement of primary importance. The construction clause should limit the construction of wind energy structures to not more than 3 or 4 years with adequate compensation paid to the landowner for restricting the use of the land during that time.

- Can the developer assign the agreement? If so, a clause should be inserted that ensures the original developer’s liability if the assignee defaults under the terms of the agreement. (Note: Developers want the ability to assign the agreement and subordination language.)
- Is the landowner willing to consent to a mortgagee of the developer? If so, a clause should be included that limits the landowner’s obligations to the mortgagee.
- Consider including an indemnification clause that indemnifies the landowner for any liability incurred as a result of permissive activities (such as crop tenants, custom harvesters, and subsurface tenants) on the property subject to the wind energy agreement.
- What are the landowner’s rights concerning usage of the property? For example, will the landowner be able to lease the property for hunting or other recreational activities? Will the landowner be able to mortgage or insure the property? Can the landowner develop any other potential mineral or renewable energy exploration?
- Consider the use of a clause that requires the landowner to be treated as favorably as neighbors (consider how to define “neighbor”) executing similar agreements.
- Include a clause requiring the removal of all improvements the developer makes upon termination (whether voluntary or otherwise) of the agreement. Relatedly, for developments in the Flint Hills (eastern Kansas), include a provision specifying



which party gets the rock that gets excavated to build the wind energy structures.

**Note:** Regardless of whether termination is voluntary or involuntary, it is critical to set-forth timing and costs associated with decommissioning.

- Require the agreement to be recorded (not just a “memorandum of agreement”) to eliminate the necessity of having to locate a copy of the lease in the event of sale or mortgage of the property.
- Never agree to confidentiality clauses concerning the terms and conditions of the agreement.
- Have the contract reviewed by the landowner’s insurance agent for analysis of any additional risks created by the wind energy project. In addition, consideration should be made as to whether a bonding should be required. Similarly, a landowner should consider being a payee on the developer’s insurance policy.
- Will the agreement violate any USDA land-use restrictions if the subject land is enrolled in a USDA program? If such a possibility exists, consider including in the agreement a clause requiring the developer to indemnify the landowner for any lost government payments or the imposition of any penalties.
- Will the wind farm development be designed so as to minimize interference with aerial crop dusting activities?
- Can the landowner sell the property, or can portions of the property be sold?
- Evaluate the agreement with an eye toward the risk faced by the landowner. This includes environmental concerns, issues that could be raised by neighbors (i.e., nuisance-related concerns), and potential violation of applicable zoning and set-back requirements.

### State-Level Policy Issues

The growth of wind energy industry and development of agricultural real estate for large-scale wind farms raises a question as to whether state legislatures should enact statutory provisions addressing landowners’ concerns and provider uniformity as to certain lease/easement provisions. Potential areas to be addressed could include: (1) whether there should be a maximum length of easement terms before renegotiation occurs; the number of turbines that can be erected in a township; and a mechanism for determining the value of landowners’ wind rights; (2) whether there should be a statewide decommissioning fund to assure payment of costs for removal of obsolete facilities; (3) whether there should be a fund capturing some of the value of harvesting wind to be shared with the public; (4) whether there should be minimum standards required of all easement agreements for such things as reimbursement for crop loss, compaction, road and line easements; (5) whether developers should be allowed to sale easements to other persons or entities without a landowner’s consent; (6) whether a landowner should be able to void an easement agreement for non-development within a certain period of time; (7) whether counties should be required to adopt a permitting process to insure that developers operate publicly; (8) whether a landowner should be able to cancel an easement/lease if the final location of a turbine unreasonably interferes with the landowner’s intended use of the land; (9) whether standard terms for indemnification, insurance, payment of taxes and similar items should be statutorily provided.

### Conclusion

From a landowner's perspective, many wind energy leases and/or easements are inadequate, unfair and offer limited economic benefits when compared to the revenues generated (and tax subsidies received) by large-scale wind energy developers. The most common shortcomings of such agreements include: (1) contractual terms extending too long into the future; (2) contractual language that binds landowners to unilateral amendments; (3) inadequate compensation clauses (and compensation

clauses that are difficult to understand); (4) provisions that are the result of unequal bargaining power. While some landowners are reporting better experiences in recent months - better contract terms and compensation levels - that may be the result of greater competition among wind energy developers, greater education on the part of landowners and lawyers, and increased oversight by state regulators (the vast majority of wind energy developers are not subject to the regulatory rules that most utilities are subject to).

Clearly, wind farming has the potential to provide significant economic benefits for rural landowners. However, substantial peril exists that landowners who don't carefully evaluate proposed agreements with developers can be taken advantage of significantly. Landowners should have any proposed agreement evaluated by legal counsel and attempt to negotiate any unfavorable terms. Failure to do so could result in many years of dissatisfaction for landowners.

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<sup>1</sup> A renewable portfolio standard is a mandate that requires a certain amount a state's energy needs to be met by "renewable" technologies regardless of the cost of producing such energy.

<sup>2</sup> The leading states in wind energy production are California, Texas, Iowa and Minnesota. The top five states for wind energy potential are North Dakota, Texas, Kansas, South Dakota and Montana. The proper siting is critical for wind availability and minimization of wind flow interference and landowner conflicts.

<sup>3</sup> According to the Wind Energy Association, wind *could* produce over 10 billion kilowatts annually. That is three times the amount of power used presently in the United States. But, wind turbines generate electricity only about 40 percent of the time and can change output almost constantly which can create problems for modern electric grids that cannot vary in voltages by more than a few percentage points.

<sup>4</sup> In his book, "The Wind Farm Scam," John Etherington points out that wind turbines cannot generate enough energy to reduce global CO<sub>2</sub> levels to any meaningful degree. Etherington points out

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that the wind energy industry is excessively subsidized and cannot achieve cost efficiency.

<sup>5</sup> <http://www.energy.iastate.edu/renewable/wind> (Iowa Energy Center, Renewable Energy and Energy Efficiency). Iowa ranks second in wind power generating capacity, according to the American Wind Energy Association.

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

<sup>7</sup> Iowa Code §476.46 (\$5.9 million were funneled toward Iowa's investor-owned utilities to be managed by the Iowa Energy Center.)

<sup>8</sup> <http://www.iowafarmbureau.com/windassessments>

<sup>9</sup> <http://domesticfuel.com/2008/02/18/wind-energy-bringing-more-jobs-to-iowa/>. However, in early 2009, a Wisconsin-based company announced that it was scrapping its plans to build a \$90 million wind tower facility in Keokuk, Iowa. Also, a recent economic study from King Juan Carlos University in Madrid, Spain, debunks the theory that increased renewable energy subsidies result in job creation. The study, based on Spain's experience with wind and solar energy production (in Spain, wind generates 11 percent of electrical power demand), concluded that for every new position that depends on energy tax subsidies, at least 2.2 jobs in other industries are eliminated. Further, Spain paid \$775,000 for every green job they created through subsidies since 2000 (\$100,000 per year per job). Why? The researchers concluded that wind energy is very inefficient when compared to fossil fuels and generating energy from wind (and solar) causes energy prices to rise and industries to move out. High-tech industries that rely on cheap energy, in an economic downturn, would have little choice but to move on. The study noted that Spain's Acerinox SA the nation's largest stainless-steel producer, blamed domestic energy costs for deciding to expand its operations in countries with cheaper energy costs. The study also noted that Microsoft and Google moved their servers to the Canadian border because they benefitted from cheaper energy at that location. The author of the study is Gabriel Calzada, an economics professor at King Juan Carlos University.

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

<sup>11</sup> I.R.C. §45(d).

<sup>12</sup> As an illustration of the tax benefit to a wind-farm owner of the provision, consider the following: A company proposes to construct a 150 MW "wind farm" in Iowa. Assuming a 40 percent capacity factor, the amount of the tax credit (in 2008) would be \$11,037,600 - (150,000 kW x 8,760 hours x .40 x \$.021). The federal tax credit is a direct reduction of tax liability on a dollar-for-dollar basis.

<sup>13</sup> The five-year 200 percent double-declining balance method can be used for capital costs of facilities

using wind to produce electricity for sale. Nearly all other electric generating facilities must use 20-year depreciation. Accordingly, MidAmerican Energy should be able to deduct from taxable income its entire \$386 million capital investment in its 360 megawatt (MW) “wind farm” in Iowa during the period from 2004-2010. Assuming marginal tax rates of 35 percent for federal and 12 percent for Iowa corporate income tax, the depreciation deductions would reduce tax liability by \$181 million during the period from 2004-2010. That is in addition to the roughly \$300 million in tax benefits over 20 years from the project due to the Federal Production Tax Credit (\$175 to \$195 million) and forgiveness of Iowa property tax (\$130 million).

<sup>14</sup> This is one reason why small “wind farm” development companies often sell off their project to larger companies or find ways to “sell” the tax benefits.

<sup>15</sup> These states include, for example, New York, West Virginia, Wisconsin, Minnesota, South Dakota and Kansas. See, e.g., Kan. Stat. Ann. §79-201.

<sup>16</sup> The generous federal accelerated depreciation deduction allowed for wind farms (see note 10 *supra* and accompanying text) provides a large state tax benefit also in those states that follow the federal rule. For example, in Kansas, corporate income is taxed at the basic rate of 4 percent with a 3.35 percent surtax on income above \$50,000. The beginning point in determining Kansas taxable income is the federal taxable income of the corporation. Thus, the accelerated depreciation provision at the federal level reduces the taxable income basis used before applying Kansas’ 7.35 percent marginal income tax rate. This benefit is even greater in states with higher corporate income tax rates such as Iowa, with a 12 percent rate. Minnesota and Nebraska also have relatively high tax rates on businesses.

<sup>17</sup> Typically, such payments are offered only in the early years of a project to help gain public and political support for the necessary approvals to construct the wind-farm.

<sup>18</sup> Iowa Code § 469.31 (2008).

<sup>19</sup> Iowa Code §476C.1(2008) (at least one owner for each two must have one-half megawatts of nameplate generating capacity or the energy production capacity equivalent for hydrogen fuel or heat for a commercial purpose of the otherwise eligible renewable energy facility.)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Iowa Code § 427B.26. The provision is limited by Iowa Code §476B.4, which disallows wind-energy production tax credit for kilowatt-hours of electricity

produced on “wind-energy conversion property.” In addition, no tax credits are allowed if the electricity is sold to a related person.)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> IDOR Policy Letter, 2008-08300008 (Jan. 30, 2008).

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

<sup>27</sup> IOWA CODE § 423.3(54) (2008).

<sup>28</sup> IDOR Policy Letter, 2008-08300008 (Jan. 30, 2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Billy Hamilton, *Blowin’ in the Wind—Wind Energy and Tax Policy*, 48 State Tax Notes, 421 (May 5, 2008).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Jack Hunt, *Iowa Governor Approves Wind Energy Tax Credits Bill*, 2008 State Tax Analysts State Tax Today, 2008 STT 91-7 (May 9, 2008).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> South Dakota Final HB 1320, 2008 STT 88-35 (May 6, 2008).

<sup>38</sup> Billy Hamilton, *Blowin’ in the Wind—Wind Energy and Tax Policy*, 48 State Tax Notes, 421 (May 5, 2008).

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Billy Hamilton, *Blowin’ in the Wind—Wind Energy and Tax Policy*, 48 State Tax Notes, 421 (May 5, 2008).

<sup>45</sup> *Id.* However, wind energy systems generating under 250 kilowatts are exempt from production tax in Minnesota.

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

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *Wind Energy Pioneer Facing Federal Fraud Charges*, THE BISMARCK TRIBUNE, North Dakota News Section, Sept. 23, 2007, available at <http://www.bismarcktribune.com/articles/2007/09/23/news/state/139817.txt>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Estate of Gibbs v. United States, 161 F.3d 242 (3d Cir. 1998).

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<sup>56</sup> *Rose v. Chaikin*, 187 N.J. Super. 210 453 A.2d 1378 (N.J. Super. 1982).

<sup>57</sup> *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 647 S.E.2d 879 (2007).

<sup>58</sup> *Porter v. Gentry County Commission*, No. 08-6029-CV-SJ-FJG, 2008 U.S. Dist. LEXIS 58800 (W.D. Mo. Aug. 4, 2008).

<sup>59</sup> *Clark County v. Federal Aviation Administration*, 522 F.3d 437 (D.C. Cir. Apr. 2008).

<sup>60</sup> *Id.*

<sup>61</sup> *Rankin, et al. v. FPL Energy, LLC, et al.*, 266 S.W.3d 506 (Tex. Ct. App. 2008)

<sup>62</sup> *Id.* Thus, the court seems to have indicated that an appeal to the state Supreme Court would be in order

<sup>63</sup> *Advocates for Prattsburgh, Inc., v. Stueben County Industrial Development Agency*, 48 A.D.3d 1157, 851 N.Y.S.2d 759 (2008).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *In re West Beekmantown Neighborhood Association, Inc., et al. v. Zoning Board*, 53 A.D.3d 954, 861 N.Y.S.2d 864 (2008).

<sup>67</sup> *In re Willkie*, 865 N.Y.S.2d 739 (N.Y. Ct. App. 2008).

<sup>68</sup> *Zimmerman, et al. v. Board of County Commissioners*, No. 98,487, 2009 Kan. LEXIS 1073 (Kan. Sup. Ct. Oct. 30, 2009).

<sup>69</sup> *Orleans County Vermont, Town of Derby, Board of Civil Authority Ruling*, November 2007.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Boyle, et al. v. McGlynn, et al.*, 814 N.Y.S.2d 312 (2006).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Center for Biological Diversity, Inc. v. FPL Group, Inc., et al.*, 166 Cal. App. 4th 1349, 83 Cal. Rptr. 3d 588 (2008).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *City of Akron v. Akron-Westfield Community School District*, 659 N.W.2d 223 (Iowa 2003).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Office of Consumer Advocate v. Iowa Utilities Board*, 656 N.W. 2d 101 (Iowa 2003).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *McClure v. Verizon Wireless*, No. 7-394/06-0244, 2007 Iowa App. LEXIS 1061 (Iowa Ct. App., Oct. 12, 2007).

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The rule (Iowa Admin. Code §199-15.11(5)) applies to all customer classes. There is no mention of a limit on either the size of a net metering system or on total enrollment. The rule requires that utilities purchase customers' net excess generation at avoided cost- the utility's incremental cost for capacity or energy (or both) that, but for the acquisition of energy or capacity from another source, the utility would have to incur.

<sup>92</sup> *Windway Technologies, Inc., et al. v. Midland Power Cooperative*, No. 6-836/06-0276, 2007 Iowa App. LEXIS 284 (Iowa Ct. App. Mar. 14, 2007). The plaintiffs appealed the court's denial of their motion for a new trial and motion to recuse. The court noted that the appeal failed to comply with the Iowa Rules of Appellate Procedure and should be dismissed. The court stated that the fact that the plaintiffs weren't represented by legal counsel did not excuse them from following the rules. In addition, the court stated that it would not perform the plaintiffs' research and advocacy for them. However, the court declined to award attorney fees to the energy company. *Windway Technologies, Inc., et al. v. Midland Power Cooperative*, No. 8-434/07-1222, 2008 Iowa App. LEXIS 445 (Iowa Ct. App. Jul. 16, 2008).

<sup>93</sup> Generally, if the grant of an easement deprives the taxpayer of practically all of the beneficial interest in the land, except for the retention of mere legal title, the transaction is considered to be a sale of the land that the easement covers. In such cases, gain or loss is computed in the same manner as in the case of a sale of the land itself under I.R.C. §§1221 or 1231. See Rev. Rul. 54-575, 1954-2 C.B. 145.

<sup>94</sup> See, e.g., *Conway v. United States*, 73-1 U.S.T.C. ¶9,318 (W.D. Ky. 1973).

<sup>95</sup> See Rev. Rul. 59-121, 1959-1 C.B. 212; *Wineberg v. Comr.*, 326 F.2d 157 (9th Cir. 1963)(under Kentucky law, warranty deed conveying right-of-way constituted conveyance of an easement and not fee simple title to real estate; under facts of case, interest conveyed was easement because title would revert to taxpayer upon abandonment and because no grantee could relinquish fee simple title by abandonment; taxpayers also reserved mineral rights and right of ingress and egress across easement; accordingly, taxpayer entitled to apply easement grant proceeds to reduction of basis in remaining tracts of land).

<sup>96</sup> Treas. Reg. §1.61-6(a).

<sup>97</sup> If the easement affects only a specific portion of the tract, only the basis allocable to the affected portion is reduced by the price received from the easement. Rev. Rul. 68-291, C.B. 1968-1, 351.

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<sup>98</sup> T.C. Memo. 1980-61.

<sup>99</sup> The gain would be I.R.C. §1231 gain. For further guidance on the calculation technique utilized in the example, see Rev. Rul. 68-291, 1968-1 C.B. 351.

<sup>100</sup> See, e.g., *Bledsoe v. United States*, 67-2 U.S.T.C. ¶9,581 (N.D. Okla. 1967); *Conway v. United States*, 73-1 U.S.T.C. ¶9318 (W.D. Ky. 1973).

<sup>101</sup> Rev. Rul. 77-413, 1977-2 C.B. 298.

<sup>102</sup> Rev. Rul. 77-414, 1977-2 C.B. 299.

<sup>103</sup> 67-2 U.S.T.C. §9,581 (N.D. Okla. 1967).

<sup>104</sup> 9 T.C. 727 (1947).

<sup>105</sup> I.R.C. §1402(a)(1).

<sup>106</sup> Of particular concern is a provision in many wind energy agreements under which the landowner agrees to indemnify and reimburse the developer if a third party on the property with the landowner's permission damages the wind farm structures. For example, if a landowner contracts with a custom cutter to harvest crops on the premises that is also subject to a wind energy lease, and the custom cutter's activities set the field on fire, causing damage to the wind farm structures, the landowner, under such an indemnification provision, is liable for the resulting damage. Another concern is that with some wind energy agreements, the landowner executes the contract with a shell corporation created solely for liability purposes.

## **Appendix**

### Sample Wind Energy Agreement

Prepared By:  
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Attorney at Law  
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Edmore, Michigan 48829  
(989) 427-3436

## **WIND ENERGY LEASE**

THIS WIND ENERGY LEASE (this "**Lease**") is made, dated and effective as of \_\_\_\_\_, 2008 (the "**Effective Date**"), by and between \_\_\_\_\_ ("**Lessor**") and \_\_\_\_\_, a Michigan limited liability company ("**Lessee**"), whose address is \_\_\_\_\_; and Lessor and Lessee (together, the "**Parties**" and each a "**Party**") hereby contract and agree as follows:

**1. Lease.** For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Lessor, Lessor hereby leases to Lessee and its successors and assigns, and Lessee hereby leases from Lessor, that certain real property, including all air space thereof, described on Exhibit "A" attached hereto and incorporated herein, as generally depicted on the map attached hereto as Exhibit "A-1" (the "**Property**"); provided, however, that this Lease is solely for wind energy purposes, and not for any other purpose. Among other things, this Lease includes (a) the exclusive right and easement on, over and across the Property for the free and unobstructed flow of wind currents and wind resources, together with the exclusive right to (i) develop, use, convert, maintain and capture such wind, (ii) convert wind energy into electrical energy and (iii) derive and keep all credits and income therefrom (subject to the payment of Rent to Lessor, as set forth below), and (b) the exclusive right and easement to permit the rotors of Generating Units located on adjacent properties to overhang the Property. The Parties agree that the Property consists of \_\_\_\_\_ (\_\_\_\_\_) acres of land (the "**Total Acreage**").

**2. Purpose of Lease.** Without limiting the generality of the foregoing, Lessee shall have possession of the Property for the following wind energy uses and purposes (collectively, "**Wind Operations**"), to be conducted in such locations on the Property as Lessee may determine, and whether accomplished by Lessee or a third party authorized by Lessee: (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) developing, constructing, erecting, installing, improving, enlarging, replacing, repowering, relocating and removing from time to time, and using, maintaining, repairing, operating and monitoring the following, whether for the benefit of Wind Power Facilities on the Property or on other lands: (i) wind energy conversion systems and wind power generating facilities, including associated towers, foundations, support structures and equipment (collectively, "**Generating Units**"); (ii) electrical transmission, distribution and control facilities, and communications facilities, including overhead and underground 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 (collectively, "**Transmission Facilities**"); (iii) anemometers, meteorological towers and wind measurement, monitoring and recording equipment and facilities; (iv) roads, bridges, culverts and erosion control facilities; (v) control, maintenance and administration buildings, (vi) laydown areas and maintenance yards; (vii) utility lines and installations; (viii) fences, gates and other safety and protection facilities; and (ix) other improvements, fixtures, 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**"); (c) vehicular and pedestrian ingress, egress and access to and from Wind Power Facilities (whether located on the Property or on other lands), on, over and across the Property, by means of roads thereon if existing (which Lessee may widen, strengthen or otherwise improve), or otherwise by such roads as Lessee may construct from time to time ("**Access Rights**"); and (d) undertaking any other activities that Lessee determines are necessary, helpful, appropriate, convenient or cost-effective in connection with or to accomplish any of the foregoing purposes, including conducting surveys and soils, environmental, biological, cultural and other tests and studies, and clearing vegetation.

**3. Lessee's Obligations.** In addition to the other obligations of Lessee provided in this Lease, Lessee shall perform the special obligations in favor of Lessor as set forth in Section 12.9.

**4. Reservations By Lessor.** Subject to Section 8.6 and the other rights of Lessee under this Lease, Lessor reserves the right to use the Property and conduct activities on the Property for any

purpose (including, but not limited to, farming, ranching, grazing, conservation, hunting, and oil, gas and other mineral exploration and development), and to lease the Property and grant easements and other rights on, over, under and across the Property to other persons, entities and governmental authorities (each, a "**Person**") for such purposes (and any income derived by Lessor therefrom shall belong entirely to Lessor); provided, however, that such uses, activities, leases, easements and rights shall not include wind energy development or the installation or use of any facilities related to wind energy development or generation, the right to which is exclusively granted to Lessee herein. Any such leases, easements and other grants of rights entered into after the Effective Date shall expressly provide that they are subject and subordinate in all respects to this Lease and to the rights of Lessee hereunder.

**5. Term.** This Lease shall initially be for a term (the "**Development Term**") commencing on the Effective Date and ending on the sooner to occur of (a) ten (10) years after the Effective Date or (b) the date on which the Extended Term commences. Lessee shall have the right and option (the "**Lease Extension Option**") to extend the term of this Lease for a single period that shall expire on the date that is thirty five (35) years after the Effective Date of this Lease (the "**Extended Term**"), by giving Lessor written notice of such extension at any time prior to the expiration of the ten (10) year period described above, whereupon the Extended Term shall commence (and the Development Term shall end) on the date specified in such notice, which date shall in any event not be later than the expiration of such ten (10) year period (the "**Extended Term Commencement Date**"). For purposes of this Lease, if the Extended Term Commencement Date does not fall on January 1<sup>st</sup>, the first year of the Extended Term shall be the remainder of the calendar year in which Lessee exercises the Lease Extension Option (with Rent and all other annual payments being prorated during such partial year to include prorated credit for Development Term Rent for the remainder of such partial year) and the first full calendar year thereafter (with Rent and all other annual payments being made for such first full calendar year of the Extended Term and every year thereafter as provided in Section 6.2 below). If Lessee so requests, the Parties shall promptly execute and record a supplemental memorandum of this Lease setting forth the expiration date of the Extended Term. Notwithstanding Section 2, Lessee shall not be permitted to commence construction of any Wind Power Facilities on the Property (other than anemometers, meteorological towers, and wind measurement, monitoring and recording equipment and facilities) unless and until Lessee has exercised the Lease Extension Option.

**6. Payments.** Lessee shall pay or tender the following amounts to Lessor (collectively, the "**Rent**"):

**6.1 Development Term Rent.** Commencing on the Effective Date, and thereafter within fifteen (15) days after each anniversary of the Effective Date during the Development Term (unless this Lease is earlier terminated), Lessee shall pay to Lessor, annually in advance, an amount equal to the Total Acreage multiplied by the amount shown on the following table for the applicable Lease year (the "**Development Term Rent**"):

Lease year	Development Term Rent (per acre)
1-3	\$
4	\$
5	\$
6	\$
7	\$
8	\$
9	\$
10	\$

The first payment of Development Term Rent shall be made within thirty (30) days after the Effective Date. Any Development Term Rent payable for less than a full year shall be prorated by Lessee on the basis of a 365-day year.



6.2 Extended Term Rent. If Lessee exercises the Lease Extension Option, then the following shall apply:

6.2.1 For each calendar year during the Extended Term until this Lease expires or is earlier terminated, Lessee shall pay to Lessor the greater of the amounts resulting from the calculations in the following subsections (a), (b) (c) and (d) of this Section 6.2.1 and in the manner as set forth in this Section 6.2 (the "**Extended Term Rent**"):

(a) an annual amount as shown on the table below for each acre of the Total Acreage:

Extended Term year	Extended Term Rent (per acre)
1-10	\$
11-20	\$
21+	\$

(b) an annual amount as shown on the table below per Megawatt of Generating Units on the Property (as defined in Section 6.2.4 below):

Extended Term year	Extended Term Rent (per Megawatt)
1-10	\$
11-20	\$
21+	\$

(c) an annual amount as shown on the table below:

Extended Term year	Extended Term Rent (minimum payment)
1-10	\$
11-20	\$
21+	\$

or (d) a percentage, as shown on the table below, of the Gross Revenues (as defined below) actually received by Lessee during such year:

Extended Term year	Extended Term Rent (percent of Gross Revenues)
1-10	%
11-20	%
21+	%

6.2.2 The per-acre amount set forth in clause (a) of Section 6.2.1, and the per-Megawatt amount set forth in clause (b) of Section 6.2.1 and the minimum payment set forth in clause (c) of Section 6.2.1, shall be calculated and the greater thereof paid quarterly in advance (which amount shall be divided by four (4) for such purpose), with each quarterly installment being due and payable in advance within fifteen (15) days after the first day of the applicable calendar quarter.

6.2.3 Within sixty (60) days after the end of each calendar year during the Extended Term, Lessee shall (a) conduct a “true-up” to determine the amount (if any) by which the sum calculated under clause (d) of Section 6.2.1 for such calendar year exceeds the sum paid to Lessor under clause (a), (b), or (c) of Section 6.2.1 (as applicable) for such calendar year (an “**Excess Amount**”) and (b) deliver to Lessor a statement reasonably showing the basis for the computation of such “true-up”. If such “true-up” establishes that there is an Excess Amount, then Lessee shall, within such sixty (60) day period, pay the Excess Amount to Lessor. Such statement shall show (i) the meter readings of the Generating Units located on the Property during the applicable calendar year, as measured at such Generating Units, (ii) the aggregate meter readings of all of the Generating Units in the project during the applicable calendar year, as measured at such Generating Units, (iii) the aggregate meter readings for the electricity delivered to the substation from all of the Generating Units in the project during the applicable calendar year, as measured at such substation, and (iv) the Gross Revenues for the applicable calendar year.

6.2.3.1 **Audit.** Lessor shall have the right to demand, in writing, an audit of the computation of the Extended Term Rent payable under clause (d) of Section 6.2.1 (the “**Computation**”), which audit shall be performed by an independent certified public accountant that is mutually agreeable to Lessor and Lessee (an “**Accountant**”). All of the costs associated with such audit shall be paid by Lessor; provided, however, that if such audit establishes that there has been an underpayment equal to or greater than five percent (5%) of the Extended Term Rent that in the aggregate should have been paid to Lessor for the calendar year which is the subject of such audit, then Lessee shall reimburse Lessor for all of its reasonable and verifiable out-of-pocket costs incurred in such audit. If such an audit is not demanded within twelve (12) months following the date of the statement sent to Lessor under Section 6.2.3 for a particular Computation, then Lessor shall conclusively be deemed to have waived its right to an audit with respect to such Computation and shall forever thereafter be precluded from bringing any legal action or proceeding to compel an audit of such Computation or to recover any underpayment of Extended Term Rent associated with or forming the basis of such Computation.

6.2.4 As used herein, the phrase “per Megawatt of Generating Units on the Property” means the number of megawatts of capacity of the Generating Units (based on the nameplate capacity thereof) that are actually installed and existing on the Property (i.e., construction thereof has been completed, and until their physical removal from the Property); in each case as of the first day of the applicable calendar quarter and regardless whether or not said Generating Units are operating.

6.2.5 As used herein, the term “**Gross Revenues**” means the aggregate total revenue actually received by Lessee, during the applicable calendar year, from the sale by Lessee to the purchaser of the electricity, of electrical energy generated and sold from Generating Units located on the Property. However, the term “Gross Revenues” does not include revenues received: (a) from parasitic or other loss (i.e., electrical energy used to power Wind Power Facilities or Wind Operations, or lost in the course of transforming, shaping, transporting or delivering the electricity); (b) from sales of electrical energy for which payment is not received (including because of a default by the purchaser thereof); (c) as reimbursement or compensation for wheeling costs or other electricity transmission or delivery costs; or (d) from production tax credits or other tax benefits, or from renewable, pollution, environmental or similar credits or benefits. Except as provided above in this Section, Gross Revenues shall be calculated without offset for any costs of producing, gathering, storing, transporting, marketing or otherwise making electricity ready for sale.

6.2.6 Any Extended Term Rent under clause (a), (b), or (c) of Section 6.2.1 that is payable for less than a full calendar quarter shall be prorated by Lessee on the basis of a 91-day quarter, while any Extended Term Rent payable under clause (d) of Section 6.2.1 for less than a full calendar year shall be calculated based on the Gross Revenues actually received during such partial calendar year. If any Development Term Rent is prepaid for any part of the Extended Term, then Lessee may credit a prorated portion of said Development Term Rent against any Extended Term Rent then or thereafter due to Lessor hereunder, as determined by Lessee.

6.2.7 If Lessee executes additional wind energy leases with any landowners whose property constitutes a portion of Lessee’s proposed wind energy project in Gratiot County, Michigan, (each a “**Project Lease**”), and if any Project Lease contains Extended Term Rent amounts or percentages that are more favorable than those contained in Section 6.2.1 of this Lease, then Lessee shall offer to Lessor to amend Section 6.2.1 of this Lease to match such more favorable Extended Term Rent amounts or percentages contained in such Project Lease (as applicable, a “**Rent Increase**”). Lessor shall not be entitled to receive a Rent Increase if Lessor fails or refuses to execute an amendment (that only contains the Rent Increase, and no other terms) within thirty (30) days after Lessee delivers a draft of such amendment to Lessor.

6.3 Installation Fees. In addition to Extended Term Rent, Lessee shall make the following additional one-time lump-sum payments, if applicable: (a) if any Generating Units are installed on the Property, Lessee shall pay to Lessor a one-time lump-sum amount equal to **Two Thousand Dollars (\$2,000.00)** for each such Generating Unit; (b) if any overhead transmission lines are installed on the property, Lessee shall pay to Lessor a one-time lump-sum amount equal to **Two Dollars (\$2.00)** per linear foot of overhead transmission line installed; and (c) only in the event there are no Generating Units (i) then located on the Property, or (ii) planned to be located on the Property within one (1) year after the commencement of construction, if a Corridor (defined in Section 6.5.6 below) is installed on the Property, Lessee shall pay to Lessor a one-time lump-sum amount equal to **Two Dollars (\$2.00)** per linear foot of Corridor installed. Each such payment made pursuant to this Section 6.3.1 is hereinafter called an “**Installation Fee**” and collectively, “**Installation Fees**” and shall be made prior to the commencement of construction of the applicable facility.

6.4 Temporary Facility Payments. In addition to Extended Term Rent, if any temporary storage yards, laydown areas, construction compounds, concrete batch plants or similar temporary facilities (each a “**Temporary Facility**”) are installed on the Property, Lessee shall pay to Lessor a lump-sum amount equal to **Six Thousand Dollars (\$6,000.00)**, plus an additional **Two Thousand Dollars (\$2,000.00)** per acre for each acre in excess of **three acres** of the Property footprint under which a Temporary Facility is actually constructed, with the total acreage of the footprint for any one Temporary Facility not to exceed **twenty-five (25) acres**, for each consecutive 12-month period such Temporary Facility is used. Each Temporary Facility payment shall be made prior to the commencement of construction of such Temporary Facility.

6.5 Additional Annual Payments. In addition to Extended Term Rent, Lessee shall pay to Lessor an annual payment (each an “**Additional Annual Payment**” and collectively, “**Additional Annual Payments**”) for certain Wind Power Facilities actually constructed on the Property (the “**Additional Payment Facilities**”), but only as follows:

6.5.1 For overhead electrical transmission, distribution or communications lines with a voltage of 34.5kV or less, the amount shown on the table below per linear foot of the overhead line corridor:

<b>Extended Term year</b>	<b>Additional Payment (per linear foot)</b>
1-10	\$
11-20	\$
21+	\$

6.5.2 For overhead electrical transmission, distribution or communications lines with a voltage greater than 34.5kV, the amount shown on the table below per linear foot of the overhead line corridor:

<b>Extended Term year</b>	<b>Additional Payment (per linear foot)</b>
1-10	\$
11-20	\$
21+	\$

6.5.3 For each permanent meteorological tower (which may use up to 3 acres of land), the amount shown on the table below:

Extended Term year	Additional Payment
1-10	\$5
11-20	\$5
21+	\$5

6.5.4 For each substation (which may use up to 5 acres of land), the amount shown on the table below:

Extended Term year	Additional Payment
1-10	\$5
11-20	\$5
21+	\$5

6.5.5 For each permanent operations, maintenance or administration building with associated storage yard (which may use up to 5 acres of land), the amount shown on the table below:

Extended Term year	Additional Payment
1-10	\$5
11-20	\$5
21+	\$5

The first Additional Annual Payments shall be prorated and paid prior to construction of the corresponding Additional Payment Facilities and thereafter each Additional Annual Payment shall be made no later than January 15 of the applicable calendar year.

6.5.6 In the event that (a) there are no Generating Units (i) then located on the Property, or (ii) planned to be located on the Property within one (1) year after construction of the roads and underground facilities contemplated in clause (b) below, and (b) Lessee constructs any roads or underground electrical transmission, distribution or communications facilities on the Property, which, when construction is completed, shall be contained within one or more 25-foot wide corridor or corridors (each 25-foot wide corridor containing roads and/or underground facilities, a “Corridor”), then Lessee shall pay to Lessor, in addition to Basic Extended Term Rent, an annual payment per linear foot of each Corridor within which such roads or underground facilities are actually installed on the Property in the amount shown on the table below (the “Corridor Payment”):

Extended Term year	Corridor Payment (per linear foot)
1-10	\$5
11-20	\$5
21+	\$5

Lessee shall use commercially reasonable efforts during construction to limit construction traffic and activity for the Corridor to a 100-foot construction corridor. The first Corridor Payment shall be prorated and paid to Lessor within 30 days after the completion of construction of such road(s) or underground facilities on the Property and thereafter each Corridor Payment shall be made no later than January 15 of the applicable calendar year. The number and location of such Corridors, and the roads and underground facilities to be constructed therein, shall be determined by Lessee in Lessee’s sole discretion. In the event a grouping of installed roads or underground facilities contemplated by this Section exceeds 25 feet in width, such event shall not constitute a default under this Section, but shall be

deemed to be multiple Corridors of 25 feet each as necessary to contain such grouping of roads or underground facilities.

6.5.7 For purposes of this Section 6.5, if the Extended Term Commencement Date does not fall on January 1<sup>st</sup>, the first year of the Extended Term shall be the remainder of the calendar year in which Lessee exercises the Lease Extension Option (with any Additional Annual Payments being prorated during such partial year) and the first full calendar year thereafter (with any Additional Annual Payments being made for such first full calendar year of the Extended Term and every year thereafter as provided in this Section 6.5).

6.6 Increase in Certain Payments. During the Development Term, the per-acre amount set forth in clause (a) of Section 6.2.1, the per-Megawatt amount set forth in clause (b) of Section 6.2.1, the minimum amount set forth in clause (c) of Section 6.2.1, as well as the Installation Fees provided in Section 6.3, the Temporary Facility payments in Section 6.4, and the Additional Annual Payments provided in Section 6.5, shall automatically (without notice or demand) escalate to reflect any increases in the CPI Index (as hereinafter defined) commencing as of **January 1, 2009** and ending on December 31 for the year immediately preceding the Extended Term Commencement Date (the "**Calculation Date**"), on which date all such payment amounts shall become fixed and shall no longer escalate with further increases in the CPI Index. For purposes hereof, "**CPI Index**" shall mean the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor. All such adjustments will be determined by multiplying each such payment amount referenced in this Section 6.6 by a fraction, the numerator of which is the CPI Index number for the Calculation Date and the denominator of which is the CPI Index number for **January 2009**.

6.7 Reimbursement for Damage. In addition:

6.7.1 If any of Lessor's or Lessor's tenant's structures or improvements are materially damaged or destroyed as a result of Wind Operations, then Lessee shall promptly repair or replace such structures or improvements.

6.7.2 If any of Lessor's or Lessor's tenant's livestock are damaged or destroyed as a result of Wind Operations, then Lessee shall promptly reimburse Lessor for the fair market value of such livestock.

6.7.3 If any of Lessor's or Lessor's tenant's growing crops are materially damaged or destroyed as a result of Wind Operations, then Lessee shall promptly pay to Lessor a one-time lump-sum amount equal to the greater of (a) the actual out-of-pocket costs theretofore incurred by Lessor in planting, irrigating and fertilizing such crops, (b) the harvested fair market value of such crops at the time of such damage, destruction or removal, or (c) the contract price for such crops pursuant to a futures contract that is in existence at the time of such damage and relating to such crops for the then-current harvest. Lessee may request that Lessor not grow crops within a reasonable area around Wind Power Facilities and thereafter no crop damage payments will be payable with respect to such areas. Notwithstanding the foregoing, if the growing crops that are materially damaged or destroyed as a result of Wind Operations are perennial crops that are not re-seeded seasonally or annually, including, without limitation, hay, clover, and alfalfa, then Lessee shall pay to Lessor a one-time lump-sum amount equal to Four Hundred Percent (400%) of the then-current harvested fair market value of such crops at the time of such damage, destruction or removal.

6.7.4 If Lessee's Wind Operations on the Property damage Lessor's drainage system(s), including, but not limited to, drain tile and other aboveground or underground facilities used to manage drainage and irrigation of the Property ("**Drainage System**") existing on the Property during the term of the Lease, then Lessee shall make or cause to be made such repairs to the Drainage System as are necessary to return the Drainage System to a condition substantially similar to the condition that existed immediately prior to the point in time when such damage occurred. Such repairs shall be completed in a timely manner to Lessor's satisfaction by a local contractor that is familiar with drains in [REDACTED] County and is mutually agreed upon by Lessor and Lessee. Furthermore, upon either parties request,

Lessor or Lessor's appointed representative shall, in a timely manner, make himself or herself present to witness any repair of the Drainage System and, upon completion of said repair, confirm in writing as to whether or not such repair was made to Lessor's satisfaction. Upon Lessor's request Lessee shall provide to Lessor a map generally depicting the location of such repairs. Any underground utility lines installed by Lessee shall be trenched in or directionally bored and, to the extent that Lessor's Drainage System is buried less than five (5) feet below the surface, Lessee shall install any such underground utility lines below such Drainage System. Upon completion of construction of any Wind Power Facilities on the Property, Lessee shall return surface drainage of the Property to substantially the same condition or functional equivalent as existing prior to commencement of construction of such Wind Power Facilities.

6.7.5 If Lessee's Wind Operations cause soil compaction on the Property that inhibits the ability to grow crops on the Property within such compacted area, Lessee shall, no later than 30 days after the completion of the initial construction or subsequent construction activities of the Wind Power Facilities on the Property, pay to Lessor a single, one time payment equal to Four Hundred Percent (400%) of the current fair market value of the crop then planted or anticipated to be planted (based upon past usage) within the Soil Compaction Area at the time of the initial construction of the Wind Power Facilities (the "**Soil Compaction Area Payment**"). For purposes of this Section 6.7.5, the "**Soil Compaction Area**" shall be defined as the area of Construction Impact Zone shown on the Site Plan (each as defined in Section 12.10) that was actually compacted less the area used for permanent Wind Power Facilities. Lessee shall provide to Lessor a map, created by its surveyor, delineating the Soil Compaction Area that shall serve as the basis of Soil Compaction Area Payment. In the event that the Lessor does not agree with the Soil Compaction Area delineated on the initial map, the Parties will work in good faith to agree upon a revised map delineating the Soil Compaction Area. Lessee shall make a commercially reasonable effort to de-compact all soil within the Soil Compaction Area within one year after the completion of construction on the Property.

6.8 Reimbursement for CRP Losses. If Lessor is a party to a Conservation Reserve Program ("**CRP**") contract with the U.S. Department of Agriculture (the "**USDA**"), Lessor shall provide Lessee with a copy of such CRP contract, together with all amendments and modifications thereto; and if applicable, Lessee shall reimburse Lessor for (a) any rental payments that Lessor would have received under the CRP contract but for the construction of Wind Power Facilities on the Property and (b) the penalties and interest, if any, assessed by the USDA as a result of the construction of Wind Power Facilities on the Property; provided, however, that (i) such reimbursement obligation shall not apply to any extension or renewal of such CRP contract or to any subsequent CRP contract, (ii) no portion of the Property that is being utilized or that Lessee anticipates utilizing for Wind Power Facilities shall be bid into the CRP after the Effective Date and (iii) Lessor shall cooperate with Lessee in completing and submitting applications for any exemptions allowed under the CRP for Wind Power Facilities.

6.9 Payment of Rent. All payments of Rent may be made by check deposited in the United States mail, first-class postage prepaid, addressed to Lessor at Lessor's address for notice purposes set forth in Section 12.1. If sent as above provided, the applicable Rent payment shall be deemed tendered to Lessor three (3) days after such check is so mailed. If at any time during the term of this Lease Lessor owns less than one hundred percent (100%) of the fee title interest in the Property, then the Rent payable to Lessor hereunder shall be reduced proportionately. **[Lessor hereby directs Lessee to make all payments of Rent that are due to Lessor under this Lease \_\_\_\_\_ percent ( \_\_\_%) to \_\_\_\_\_ at [Payee's address] and \_\_\_\_\_ percent ( \_\_\_%) to \_\_\_\_\_ at [Payee's address] (collectively, "Payee"). Unless otherwise specified by Lessor in writing to Lessee, Lessee shall continue to make any and all payments of Rent to Payee and not Lessor. Lessor acknowledges that the payment of Rent by Lessee to Payee shall be in full satisfaction of any obligations of Lessee to pay Rent pursuant to this Lease.]**

6.10 No Representation Regarding Wind Power Facilities. Lessor acknowledges that (a) Lessee has made no representation or warranty as to the likelihood that Wind Power Facilities will be constructed on the Property, or, if constructed, that they will not be removed from the Property, and (b) any expression by Lessee to Lessor as to the expected number or type of Wind Power Facilities to be



constructed on the Property, or the Rent to be derived by Lessor therefrom, is and was purely an estimate based on the information available to Lessee at the time and is not a covenant or guarantee that any such construction will occur. Further, nothing expressly stated or implied in this Lease or indicated to Lessor shall be construed as requiring Lessee to (i) undertake construction, installation or operation of any Wind Power Facilities on the Property or (ii) cause such Wind Power Facilities to remain on the Property; and the decision if, when and to what extent to construct or remove Wind Power Facilities shall be solely in Lessee's discretion.

## **7. Covenants By Lessee.**

7.1 No Construction Liens. Lessee shall keep the Property free and clear of all liens and claims of lien for labor and materials resulting from its Wind Operations; provided, however, that Lessee shall have the right to contest any such liens and claims by legal proceedings, which may be brought in the name(s) of Lessor and/or Lessee where appropriate or required. Lessor shall in all respects cooperate with Lessee in such contest, and shall be reimbursed for such cooperation as provided in Section 8.3, including, without limitation, for reasonable out-of-pocket attorneys' fees.

7.2 Lessee's Obligation to Pay Taxes. Lessee shall pay when due all real and personal property taxes and assessments levied against Lessee's Wind Power Facilities (including any temporary facilities) on the Property or against Lessee's leasehold estate in the Property. Lessee shall also be responsible for any increase in real or personal property taxes levied against the Property during the term of this Lease as a direct result of Lessee's Wind Operations on the Property. However, Lessee shall not be liable for taxes or assessments attributable to improvements or facilities installed by Lessor or others on the Property, or to the underlying value of the Property itself, which taxes and assessments shall be paid by Lessor. Lessee shall have the right to contest by legal proceedings (which may be brought in the name(s) of Lessor and/or Lessee where appropriate or required), the validity or amount of any taxes or assessments for which it is responsible hereunder. Lessor shall in all respects cooperate with Lessee in such contest, and shall be reimbursed for such cooperation as provided in Section 8.3. If Lessor receives a tax bill that Lessor believes Lessee is partially responsible for pursuant to this Section, Lessor shall, within thirty (30) days after receipt of such tax bill provide a copy of such tax bill and written notice to Lessee specifying the amount of taxes that Lessor believes to be Lessee's obligation under this Section.

7.3 Lessee's Obligation to Carry Insurance. Prior to commencing Wind Operations on the Property, Lessee shall obtain, and thereafter keep in force during the term of this Lease, (a) a policy of commercial general liability insurance covering property damage and liability for personal injury or death on or about the Property, with limits in the amount of **One Million Dollars (\$1,000,000)** per occurrence and in the aggregate and (b) an umbrella or excess liability policy in the amount of **Four Million Dollars (\$4,000,000)**; provided, however, that such coverage may be provided as part of a blanket policy that also covers other properties. Additionally, (a) Lessee shall cause Lessor to be named as an additional insured in such policies and (b) Lessee shall deliver a certificate of such insurance to Lessor.

### 7.4 Lessee's Obligation To Restore the Property.

7.4.1 Within six (6) months after completion of construction of Lessee's wind project, Lessee shall restore the surface of such portions of the Property to a condition reasonably similar to its condition as of the Effective Date, except for any parts of the Property that Lessee determines it needs for continuing Wind Operations in accordance with Section 12.10.

7.4.2 Within twelve (12) months after the expiration, surrender or termination of this Lease, Lessee shall (a) remove from the surface of such portions of the Property any Wind Power Facilities owned or installed by Lessee thereon and (b) restore the surface of such portions of the Property to a condition reasonably similar to its condition as of the Effective Date; provided, however, that with regard to any Wind Power Facilities located beneath the surface of the Property, including footings and foundations, Lessee shall only be required to remove the same to a depth of four (4) feet below the

surface. Lessee shall have a continuing easement to enter the Property for such purpose during such twelve (12) month period. At Lessor's request, Lessee will leave portions of the Property in their "as is" condition upon the expiration or termination of this Lease.

7.4.3 Commencing on the tenth (10<sup>th</sup>) anniversary of the Extended Term Commencement Date, or any time thereafter, if Lessor reasonably determines that (a) the Generating Units on the Property are nearing the end of their useful lives, or (b) the cost of performing Lessee's obligations under Section 7.4.2 exceeds the salvage value of the Wind Power Facilities on the Property, then Lessor may, by written notice to Lessee, require Lessee to obtain and deliver to Lessor a letter of credit, bond, or such other reasonable means of security as determined by Lessee (the "**Security**"), in an amount (the "**Property Restoration Amount**") sufficient to ensure performance of Lessee's obligations under Section 7.4.2. If the Parties cannot agree upon the Property Restoration Amount, then the Property Restoration Amount shall be determined by an independent engineer mutually selected by the Parties, or, if the Parties cannot agree upon such independent engineer, then by an independent engineer selected by the presiding justice of the county in which the Property is situated; and the decision of such independent engineer (however selected) shall be binding and conclusive on the Parties. Lessee shall keep such Security, or replacement Security, in force throughout the remainder of the Extended Term. If Lessee so elects, it may obtain a blanket Security that covers both the Property Restoration Amount and the cost of restoration of other lands in Lessee's wind project, so long as Lessor has the right to draw on such Security up to the Property Restoration Amount. Notwithstanding the foregoing, Lessee shall not be required to deliver the Security to Lessor if Lessee is in the process of repowering or otherwise redeveloping some or all of the Generating Units on the Property with new Generating Units, or intends to do so within one year after Lessee's receipt of Lessor's written notice requiring Lessee to obtain and deliver the Security.

7.5 Lessee's Obligation to Comply with Law. Lessee shall comply in all material respects with all laws, statutes, ordinances, regulations, decrees, orders and decisions of or issued by any governmental authority that are applicable to Lessee's Wind Operations on the Property ("**Law**" or "**Laws**"). Lessee shall have the right to contest by legal proceedings (which may be brought in the name(s) of Lessor and/or Lessee where appropriate or required), the validity or applicability of any such Law. Lessor shall in all respects cooperate with Lessee in such contest, and shall be reimbursed for such cooperation as provided in Section 8.3.

7.6 Hazardous Materials. Without limiting the generality of Section 7.5, in conducting its Wind Operations on the Property, Lessee shall comply in all material respects with any Law (each, an "**Environmental Law**") governing the generation, manufacture, production, use, storage, release, discharge, transportation or presence of any substance, material or waste which is now or hereafter classified by any such Law as hazardous or toxic (each, a "**Hazardous Material**"). Further, Lessee shall promptly clean up, remove or take other legally-authorized remedial action as required by Environmental Law with regard to any contamination or damage to soil or ground water on or in the Property caused by any Hazardous Material brought onto the Property by Lessee, and for which clean up, removal or remedial action is required pursuant to Environmental Law.

7.7 Indemnification of Lessor. Lessee shall indemnify, defend and hold harmless Lessor against claims, liability, losses, damages, costs and expenses (collectively, "**Liability**") arising out of (a) physical damage to property and physical injuries or death to Lessor, Lessor's property or the public, (b) the presence or release of Hazardous Materials in, under, on or about the Property, or (c) the violation of any Environmental Law; in each case only to the extent proximately caused by Lessee's Wind Operations on the Property, and except to the extent such Liability is caused or contributed to by the gross negligence or willful misconduct of Lessor or Lessor's employees, agents, contractors or invitees. Notwithstanding the foregoing, (i) Lessee's liability for any damage or destruction of structures, improvements, livestock and crops shall be governed by Section 6.7, and not by this Section 7.7 and (ii) Lessee's liability under this Section 7.7 shall not include losses of income, rent, business opportunities, profits or the like that may result from Lessor's loss of use of portions of the Property by reason of Wind Operations (for which Lessor will be compensated solely through the provisions of



Section 6). Lessee's obligations set forth in this Section 7.7 shall survive the expiration or earlier termination of this Lease.

## **8. Covenants By Lessor.**

8.1 Quiet Enjoyment. During the entire term of this Lease, (a) Lessee shall have peaceful and quiet enjoyment of the Property, without hindrance or interruption by Lessor or any other Person and (b) Lessor shall protect and defend the right, title and interest of Lessee hereunder from any other rights, interests, title and claims of or by any Person. Without limiting the generality of the foregoing, if any Encumbrance, as defined below (including any mortgage against the Property or the lien of property taxes) provides for payment or performance of any obligations by Lessor, then Lessor shall, prior to delinquency, make such payment and perform such obligations.

8.2 Encumbrances. If any recorded or unrecorded lien, encumbrance, covenant, condition, reservation, restriction, easement, lease, sublease, occupancy, tenancy, mineral right, option, right of first refusal or other matter (each, an "**Encumbrance**") is found or claimed to exist against the Property or any portion thereof (regardless whether such Encumbrance existed as of the Effective Date or was created thereafter), and Lessee determines that such Encumbrance might delay, interfere with or impair Wind Operations, the exercise of any of Lessee's other rights under this Lease or the financing of any project, then Lessee shall be entitled to obtain a subordination, non-disturbance agreement, consent or other agreement (in a form and containing provisions reasonably requested by Lessee) from the holder of such Encumbrance. Lessor shall fully and promptly cooperate with Lessee's efforts to obtain the same, and Lessor shall be reimbursed for such cooperation as provided in Section 8.3. Lessor represents and warrants to Lessee that there are no unrecorded Encumbrances against the Property or any portion thereof that have not been disclosed to Lessee in writing prior to the Effective Date, including any unrecorded agricultural, grazing or mineral leases.

8.3 Permitting; Cooperation; Further Assurances. Lessee may process and obtain any permits, entitlements, approvals, licenses, variances or other rights (including any zoning change, land divisions, conditional or special use permit and tax-incentive or tax-abatement program approval) from any governmental authority or other Person in connection with Wind Operations (each, an "**Approval**"). Lessor shall fully support and cooperate with Lessee in the conduct of Wind Operations and the exercise of Lessee's rights hereunder, in providing any further assurances requested by Lessee, and in carrying out and otherwise giving full force and effect to the purpose and intent of this Lease, including in Lessee's efforts to obtain any Approval or financing; and Lessor shall, without demanding additional consideration therefor, (a) execute any map, application, waiver, estoppel certificate, consent and other document that is reasonably requested by Lessee in connection herewith or therewith and (b) return the same to Lessee within ten (10) days after Lessor's receipt thereof. Without limiting the generality of the foregoing, (i) if requested by Lessee, Lessor shall participate, in support of Lessee, in any hearings, appeals or regulatory proceedings respecting the Wind Power Facilities and (ii) in the event that the location of any Wind Power Facilities to be installed or constructed on the Property or any adjacent properties along or near property lines is limited or restricted by any private agreements, Encumbrances or Laws (including any setback requirements), Lessor (1) hereby waives enforcement of such agreements, Encumbrances and Laws, (2) shall assist Lessee in obtaining waivers or variances from the same and (3) shall execute all documents evidencing Lessor's agreement to the waiver or elimination of such requirements. Lessee agrees to reimburse Lessor for Lessor's reasonable out-of-pocket expenses incurred in providing such cooperation to Lessee.

8.4 Ownership of Wind Power Facilities. The Parties acknowledge and agree that (i) any Wind Power Facilities constructed on the Property shall at all times remain the property of Lessee and shall not be deemed to be fixtures and (ii) Lessor shall have no ownership, lien, security or other interest (including any lien that might otherwise be implied by law) in any Wind Power Facilities installed on the Property, or in any profits or income derived therefrom.

8.5 Grant of Easements. Upon Lessee's request from time to time, Lessor shall grant to Lessee or to any other Person reasonably designated by Lessee, one or more easements for Access Rights and Transmission Facilities on, over and across the Property, in such locations as may be designated by Lessee and approved by Lessor pursuant to Section 12.10. Each such easement shall (a) provide for the payment to Lessor of consideration equal to the applicable amount provided in Section 6.5.1 or Section 6.5.2, (b) be separate and apart from this Lease, and for a **thirty-five (35) year** term (notwithstanding termination of this Lease) for so long as the grantee of the easement pays such consideration to Lessor, (c) be memorialized in a recordable form reasonably designated by Lessee, which contains all of the rights and privileges for Access Rights and Transmission Facilities as are set forth in this Lease and (d) run with the land, be binding on and inure to the benefit of the grantee and Lessor and their respective successors, and assigns.

8.6 No Interference. Neither Lessor nor any of its tenants, licensees, contractors, invitees, agents, assigns or anyone else obtaining rights from Lessor (collectively, "**Lessor Parties**") shall, currently or prospectively, interfere with, impair, delay or materially increase the cost of any of Lessee's Wind Operations (whether conducted on the Property or elsewhere), or the undertaking of any other activities or the free enjoyment or exercise of any other rights or benefits given to or permitted Lessee hereunder. Without limiting the generality of the foregoing, neither Lessor nor anyone obtaining rights from or acting with the permission of Lessor shall (a) interfere with or impair the free, unobstructed and natural availability, flow, speed or direction of air or wind over or across the Property (whether by planting trees, constructing structures, or otherwise), or the lateral or subjacent support for the Wind Power Facilities or (b) engage in any other activity on the Property or elsewhere that might cause a decrease in the output, efficiency or longevity of the Wind Power Facilities.

8.7 Indemnification of Lessee. Lessor shall indemnify, defend and hold harmless Lessee against Liability arising out of (a) the presence or release of Hazardous Materials in, under, on or about the Property, or (b) the violation of any Environmental Law; in each case only to the extent proximately caused by Lessor or any of the Lessor Parties, and except to the extent such Liability is caused or contributed to by the negligence or willful misconduct of Lessee or Lessee's employees, agents, contractors or invitees. Lessor's obligations set forth in this Section 8.7 shall survive the expiration or earlier termination of this Lease.

8.8 Land Divisions. To Lessor's actual knowledge with no duty to investigate, Lessor warrants and represents to Lessee that the Property is a "Parent" parcel under the Michigan Land Division Act (MCL §560.101 *et seq.*; the "Act") and that no divisions of the Parent parcel have occurred since 1994, or that if there have been divisions of the Parent parcel, sufficient divisions remain with the Parent parcel for purposes of compliance with the Act, to the extent the requirements of the Act are deemed applicable to this Lease.

9. Assignment and Financing. Lessee and any sublessee of Lessee shall have the absolute right at any time and from time to time, without obtaining Lessor's consent, to: (a) sell, convey, assign, sublease or otherwise transfer to any Person all or any portion of its right, title or interest under this Lease, in the Property and/or in any Wind Power Facilities; and/or (b) encumber, mortgage or pledge (including by mortgage, deed of trust or personal property security instrument) all or any portion of its right, title or interest under this Lease, in the Property and/or in any Wind Power Facilities to any Lender as security for the repayment of any indebtedness and/or the performance of any obligation (a "**Lender's Lien**"). No such sale, conveyance, assignment, sublease or other transfer shall relieve Lessee of its obligations under this Lease unless Lessee assigns its entire interest hereunder, in which event Lessee shall have no continuing liability. Following any assignment of Lessee's right, title or interest in the Property, Lessee shall promptly give notice of the same (including any new contact information) to Lessor. As used in this Lease, the term "**Lender**" means any Person that from time to time provides secured financing or extends secured credit for some or all of Lessee's wind energy projects, Wind Power Facilities or Wind Operations, collectively with any security or collateral agent, indenture trustee, loan trustee or participating or syndicated lender involved in whole or in part in such financing, and their respective representatives, successors and assigns. Following the creation of a Lender's Lien, Lessee or

the Lender shall give notice of the same (including the address of the Lender for notice purposes) to Lessor; provided, however, that the failure to give such notice shall not constitute an Event of Default (as defined below) but rather shall only have the effect of not binding Lessor hereunder with respect to such Lender or until such notice is given or Lessor otherwise has actual notice of such Lender's Lien.

## **10. Default; Remedies; Estoppel Certificates.**

10.1 Default. If a Party (the "**Defaulting Party**") fails to perform its obligations under this Lease in any material respect (an "**Event of Default**"), then it shall not be in Default (as defined below) if it cures such Event of Default within sixty (60) days after receiving written notice from the other Party (the "**Non-Defaulting Party**") stating with particularity the nature and extent of such Event of Default and specifying the method of cure (a "**Notice of Default**"); provided, however, that if the nature or extent of the obligation or obligations is such that more than sixty (60) days are required, in the exercise of commercially reasonable diligence, for performance of such obligation(s), then the Defaulting Party shall not be in Default if it commences such performance within such sixty (60) day period and thereafter pursues the same to completion with commercially reasonable diligence. As used in this Lease, the term "**Default**" means an Event of Default that (a) has not been cured within the time provided herein or (b) as to which the Defaulting Party has not commenced performance of its obligations within the time provided or thereafter has failed to pursue the same to completion with commercially reasonable diligence as provided above.

10.2 Remedies. Subject to Section 11, upon a Default (but not sooner), the Non-Defaulting Party shall be entitled to exercise any and all remedies available to it hereunder, at law or in equity, which remedies shall be cumulative. Such remedies shall include the right in the Non-Defaulting Party to pay or perform any obligations of the Defaulting Party that have not been paid or performed as required herein, and to obtain (a) subrogation rights therefor and (b) immediate reimbursement from the Defaulting Party for the costs of such payment or performance. If Lessor is the Non-Defaulting Party, then, subject to Section 11, its remedies shall include the right to terminate this Lease by giving written notice of such termination to Lessee and to each Lender. If Lessor is the Defaulting Party, then Lessee may (but need not) offset such costs against the Rent or any other amounts due to Lessor hereunder. The covenant of Lessee to pay rent under this Lease shall be dependent upon the faithful performance by Lessor of all of its covenants and obligations under this Lease.

10.3 Estoppel Certificates and Consent. Lessor shall, within ten (10) days after written request made from time to time by Lessee or any existing or proposed Lender, execute and deliver to the requesting Person an instrument (a) certifying that this Lease is in full force and effect and has not been modified (or if modified stating with particularity the nature thereof), (b) certifying the dates to which the Rent has been paid, (c) certifying that there are no uncured Events of Default hereunder (or, if any uncured Events of Default exist, stating with particularity the nature thereof) and (d) containing any other certifications as may reasonably be requested. Any such certificates may be conclusively relied upon by Lessee, such Lender and any Person that is proposing to invest in Lessee or in Lessee's wind project.

## **11. Protection of Lenders.** Notwithstanding any other provision of this Lease to the contrary:

11.1 Lender's Rights. Each Lender shall have the absolute right (but not the obligation) to do the following things: (a) assign its Lender's Lien; (b) enforce its Lender's Lien; (c) acquire title (whether by foreclosure, assignment in lieu of foreclosure or other means) to the leasehold estate created by this Lease (the "**Leasehold Estate**"); (d) take possession of and operate the Property and the Wind Power Facilities or any portion thereof; (e) perform any obligations and exercise any rights of Lessee hereunder; (f) assign or transfer this Lease and the Leasehold Estate to any Person after obtaining the same; and (g) cause a receiver to be appointed to do any of the foregoing. Lessor's consent shall not be required for any of the foregoing; and, upon acquisition of the Leasehold Estate or this Lease by a Lender or any Person who acquires the same from or on behalf of a Lender, Lessor shall recognize the same as Lessee's proper successor, and this Lease shall remain in full force and effect.

11.2 Copies of Notices of Default. As a precondition to exercising any rights or remedies as a result of any Event of Default by Lessee, Lessor shall deliver a duplicate copy of the applicable Notice of Default to each Lender concurrently with delivery of such notice to Lessee, specifying in detail the Event of Default and the required remedy.

11.3 Lender's Cure Rights. The Lenders shall collectively have the same period of time after receipt of a Notice of Default to cure an Event of Default as is given to Lessee under this Lease, plus, in each instance, an additional sixty (60) days; provided, however, that such sixty (60)-day period shall be extended for the time reasonably required by the Lenders to complete such cure, including the time required for the Lenders to obtain possession of the Property, institute foreclosure proceedings or otherwise perfect their right and ability to effect such cure. Each Lender shall have the absolute right to substitute itself for Lessee and perform the duties of Lessee hereunder for purposes of curing any Event of Default. Lessor expressly consents to such substitution, agrees to accept such performance, and authorizes each Lender and its employees, agents, representatives and contractors to enter upon the Property to complete such performance with all of the rights and privileges of Lessee hereunder. Lessor shall not terminate this Lease prior to expiration of the cure periods available to the Lenders as set forth above. Further, neither the bankruptcy nor the insolvency of Lessee shall be grounds for terminating this Lease as long as the Rent is paid by a Lender in accordance with the terms hereof.

11.4 Effect of Proceedings. If any Event of Default by Lessee under this Lease cannot be cured without obtaining possession of all or part of the Property, the Wind Power Facilities and/or the Leasehold Estate, then any such Event of Default shall nonetheless be deemed remedied if: (a) within sixty (60) days after receiving a Notice of Default from Lessor as set forth in Section 11.2, a Lender acquires possession thereof, or commences appropriate judicial or nonjudicial proceedings to obtain the same; (b) the Lender prosecutes any such proceedings to completion with commercially reasonable diligence; and (c) after gaining possession thereof, the Lender performs all of Lessee's other obligations hereunder as and when the same are due. If a Lender is prohibited from commencing or prosecuting the proceedings described above by Law or by any process, injunction or decision of any court, then such sixty (60)-day period shall be extended for the period of such prohibition.

11.5 Performance By Lender. Any Lender that does not directly hold an interest in this Lease, or that holds a Lender's Lien, shall not have any obligation under this Lease prior to the time that such Lender succeeds to absolute title to the Leasehold Estate; and if such Lender succeeds to such absolute title, then such Lender shall be liable to perform obligations under this Lease only for and during the period of time that such Lender directly holds such absolute title.

11.6 Rejection; New Lease. If this Lease is rejected or otherwise terminated pursuant to bankruptcy Law or any other Law affecting creditors' rights, then, so long as a Lender cures any monetary Event of Default by Lessee, Lessor shall, immediately upon written request from a Lender given within ninety (90) days after any such rejection or termination, enter into a new lease in favor of the Lender, which new lease shall (a) contain the same covenants, agreements, terms, provisions and limitations as this Lease (except for any requirements that have been fulfilled by Lessee or any other Person prior to such rejection or termination), (b) be for a term commencing on the date of such rejection or termination, and continuing for the remaining term of this Lease before giving effect to such rejection or termination and (c) contain a grant of a leasehold estate in the Property or such portion thereof as to which the Lender held a Lender's Lien on the date of such rejection or termination; and, until such time as such new lease is executed and delivered, the Lender may enter and use the Property and conduct Wind Operations thereon as if this Lease were still in effect. At the option of the Lender, the new lease may be executed by a designee of such Lender, without the Lender assuming the burdens and obligations of the lessee thereunder. If more than one Lender makes a written request for a new lease pursuant hereto, then the same shall be delivered to the Lender whose Lender's Lien is senior in priority.

11.7 Modifications of Lessee's Obligations. If Lessor has received notice of a Lender, Lessor shall not, without Lessee providing the prior written consent of the Lender: (a) agree to a modification or amendment of this Lease if the same could reasonably be expected to materially reduce the rights or

remedies of a Lender or impair or reduce the security for its Lender's Lien, or (b) accept a surrender of the Property or any part thereof or a termination by Lessee of this Lease. To the extent that there is a Lender under this Lease, Lessee shall provide Lessor with Lender's written consent to a modification or amendment before Lessee requests such modification or amendment from Lessor.

11.8 Amendment. At Lessee's request, Lessor shall amend this Lease to include any provision that may reasonably be requested by any existing or proposed Lender, and shall execute such additional documents as may reasonably be requested to evidence such Lender's rights under this Lease; provided, however, that without Lessor's consent, such amendment shall not materially impair the rights of Lessor under this Lease or extend the term of this Lease beyond the period of time stated in Section 5. Further, Lessor shall, within ten (10) days after written notice from Lessee or any existing or proposed Lender, execute and deliver thereto a certificate (a) to the effect that Lessor will accord to such Lender all the rights and privileges of a Lender hereunder and (b) containing such other provisions and consents as such Lender may reasonably request.

## 12. Miscellaneous Provisions.

12.1 Notices. Any notices, demands, correspondence or other communications required or permitted to be given hereunder (collectively, "**Notices**") shall be in writing and shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, or (c) by overnight delivery service, freight prepaid, to the addresses provided beneath the signatures of the Parties as set forth below. Notices delivered by hand shall be deemed received when delivered. Notices sent by certified or registered mail or by overnight delivery service shall be deemed received upon (i) acceptance of delivery by the recipient or (ii) rejection of delivery by the recipient. Each Party may change its address for notice purposes by giving written notice of such change to the other Party in the manner provided in this Section 12.1, and each Lender may do the same by giving such notice to Lessor.

12.2 Lessee's Right To Surrender; Affidavit of Termination. Subject to Section 11.7 and Section 7.4, Lessee shall have the right to terminate the Lease as to all or any part or parts of the Property at any time, effective upon thirty (30) days' written notice to Lessor and the payment to Lessor of **One Hundred Dollars (\$100.00)**. Upon any such termination by Lessee, the Parties' respective rights and obligations hereunder shall cease as to the Property (or such part or parts thereof, as applicable) as to which such termination applies (except that in the case of a partial termination, the Total Acreage shall not change for purposes of calculating the Rent); but this Lease shall remain in full force and effect as to any remaining parts of the Property. Further, upon expiration or termination of this Lease for any reason, Lessee shall execute and record in the county records an affidavit of termination, evidencing the release of all or part of Lessee's right, title or interest under this Lease. Lessee shall remain obligated to restore the Property as set forth in Section 7.4 following the termination of this Lease.

12.3 Force Majeure. Lessee's obligations under this Lease (exclusive of the obligation to pay Rent) shall be suspended and excused, and the time periods set forth herein shall be extended, while Lessee is prevented or substantially hindered or restricted, by an Event of Force Majeure, from conducting Wind Operations or performing its obligations hereunder. The term "**Event of Force Majeure**" means any of the following, whether actual or potential: strikes, lock outs or other labor disturbances; delays in transportation; the inability to secure labor or materials in the open market; acts of God or the elements; conditions attributable to acts of war, terrorism or civil disturbances; acts or failures to act of Lessor; the effect of any Laws; the failure of a governmental authority to issue any permit, entitlement, approval or authorization within sixty (60) days after Lessee submits an application for the same; or any other matter or condition beyond the reasonable control of Lessee.

12.4 Condemnation. If a Taking (as defined below) occurs, then the compensation payable therefor, whether pursuant to a judgment, by agreement or otherwise, including any damages and interest, shall be distributed as follows: (a) any portion of such compensation attributable to the Taking of this Lease or the Wind Facilities, any cost or loss that Lessee may sustain in the removal and/or relocation of the Wind Facilities, or Lessee's anticipated or lost profits, shall be paid to Lessee; and



(b) any portion of such compensation attributable to the Taking of the fee title, and all remaining amounts of such compensation, shall be paid to Lessor. The term "**Taking**" means the taking of the Property, the Wind Facilities, this Lease or any part thereof, by eminent domain, by inverse condemnation, by severance or for any public or quasi-public use.

12.5 Successors and Assigns. The Property shall be held, conveyed, encumbered, leased, used and occupied subject to the covenants and provisions of this Lease, which shall run with the Property and each portion thereof and interest therein, and shall be binding upon and inure to the benefit of the Parties and any other Person having any interest therein during their ownership thereof, and their respective heirs, executors, administrators, successors and assigns.

12.6 Attorney's Fees. In the event of any litigation for the interpretation, enforcement or termination hereof, or for damages for a Default hereunder, or which in any other manner relates to this Lease, Wind Operations or the Property, the prevailing Party shall be entitled to recover from the other Party its actual and reasonable costs and attorney's fees incurred in connection therewith.

12.7 Construction. This Lease, including any Exhibits attached hereto, contains the entire agreement between the Parties in connection with any matter mentioned herein, and all prior or contemporaneous agreements, understandings and representations are merged herein and superseded hereby. Should any provision of this Lease be held to be invalid, void or unenforceable, the remaining provisions hereof shall remain in full force and effect, unimpaired by such holding. Except with respect to the rights conferred upon Lenders hereunder (which Lenders and their successors and assigns shall be third party beneficiaries hereof to the extent of the Lenders' rights hereunder), the covenants contained herein are made solely for the benefit of the Parties and their respective successors and assigns. This Lease shall not be interpreted as creating any partnership or other relationship between the Parties, other than that of landlord and tenant. Any rule of construction to the effect that ambiguities are to be resolved in favor of either Party shall not be employed in the interpretation of this Lease and is hereby waived. No waiver by a Party of any term or provision hereof shall be deemed a waiver of any other term or provision, and any waiver of rights hereunder must be in writing to be effective. This Lease shall be governed by and interpreted in accordance with the Laws of the state in which the Property is located. The use of the neuter gender includes the masculine and feminine, and the singular number includes the plural, and vice versa, whenever the context so requires. The terms "include", "includes" and "including", as used herein, are without limitation. Captions and headings used herein are for convenience of reference only and do not affect the scope, meaning or intent hereof. This Lease may be executed with counterpart signature pages and in duplicate originals, each of which shall be deemed an original, and all of which shall collectively constitute a single instrument.

12.8 Miscellaneous. This Lease shall not and cannot be modified or amended except by a writing signed by both Parties. Wherever the consent of a Party is required or requested hereunder, such consent shall not be unreasonably withheld, conditioned or delayed. Concurrently herewith, the Parties shall execute and deliver a memorandum of this Lease in the form attached as Exhibit "C", which Lessee may record in the county records. If Lessor consists of more than one Person, then the liability of each such Person shall be joint and several. Notwithstanding anything to the contrary in this Lease, neither Party shall be entitled to, and each Party hereby waives, any rights to recover consequential, incidental, punitive or exemplary damages, however arising, under or with respect to any action or inaction taken in connection with this Lease. If this Lease is not executed by one or more of the Persons comprising the Lessor, or by one or more Persons holding an interest in the Property, then this Lease shall nonetheless be effective, and shall bind all those Persons who have signed this Lease. Each of the Persons signing this Lease on behalf of a Party represents and warrants that he/she has the authority to execute this Lease on behalf of the Party for whom he/she is signing.

12.9 Special Obligations of Lessee. The following are special obligations of Lessee in favor of Lessor:

12.9.1 All costs and expenses of Wind Operations shall be borne by Lessee, and Lessor shall not be chargeable with or liable for any thereof. Lessee shall maintain and operate all Wind Power Facilities actually installed on the Property in a commercially reasonable manner.

12.9.2 Lessee shall not install any Generating Units within a distance from any existing and occupied residence on the Property that is equal to the greater of (a) one thousand (1,000) feet, or (b) the number of feet that is 110% of the height of the Generating Unit (measured from the ground to the tip of a blade at its highest point).

12.9.3 If Lessee constructs any new roads on the Property, upon either the written request of the Lessor or at Lessee's election, Lessee will install reasonably appropriate gates where such roads enter the Property, and, if so installed, Lessee shall furnish Lessor with keys to such gates. Lessee shall post "no trespassing" signs at all gates installed by Lessee unless otherwise directed by Lessor.

12.9.4 After entering or exiting any gate providing access to the Property, Lessee shall close such gate, and, if requested by Lessor, shall lock the same; provided, however, that Lessee may leave such gates open during construction, installation, improvement, replacement, repair and maintenance of the Wind Power Facilities so long as such gates are attended while open.

12.9.5 Lessee shall regularly clean up any litter or refuse deposited on the Property by Lessee.

12.9.6 Lessee shall prohibit its employees from hunting on the Property, bringing on the Property any domestic animals, firearms or alcohol or driving at excessive speeds on the Property.

12.9.7 Lessee shall undertake reasonable measures to stockpile such topsoil that is scraped from the footprint of the Wind Power Facilities on the Property during the construction thereof for use in Lessee's restoration activities described in Section 7.4. Lessee shall not remove any material amount of topsoil from the Property without Lessor's approval.

12.9.8 Prior to the commencement of the initial construction on the Property of Wind Power Facilities and for a period of one year after completion of such construction, Lessee shall employ at least one individual who shall act as the initial point of contact for Lessor for all issues under this Lease (the "**Land Owner Liaison**"). The Lessee shall provide to Lessor the name and telephone number of the Land Owner Liaison as soon as such person has been hired. Lessee agrees that the Land Owner Liaison shall be (i) a person that, during such period, resides within thirty (30) miles of the project area and who is familiar with farming operations in **central Michigan**, (ii) generally available during normal business hours Monday through Saturday, and (iii) capable of being contacted upon short notice for emergency situations that may arise involving this Lease. Lessee may appoint or replace the Land Owner Liaison at its discretion, so long as the foregoing requirements are satisfied.

12.10 Site Plan Approval. The following provisions shall govern site plan approval by Lessor:

12.10.1 The location and development of the Wind Power Facilities on the Property shall be guided by a site plan to be mutually agreed upon by Lessor and Lessee during the Development Term. The site plan will evolve from a preliminary site plan with approximate locations of Primary Wind Power Facilities (defined in subsection 12.10.2), or centerlines thereof, as applicable, and corridors or generally larger areas than actually required for construction of the Wind Power Facilities, to a final version based upon wind resource, permitting and construction considerations that arise during the development process. In modifying the site plan and developing a final site plan, Lessee will coordinate the development of the Wind Power Facilities with Lessor's uses of the Property. Before Lessee may commence construction of any Wind Power Facilities on the Property, Lessee shall submit to Lessor for Lessor's approval a site plan (the "**Site Plan**") showing: (a) the location, footprint or centerline, as applicable, of Primary Wind Power Facilities to be constructed on the Property, (b) the location and design of any fences or gates to be placed on the Property, and (c) the location of the Construction Impact Zones (defined in subsection 12.10.3) on the Property. Once agreed upon by Lessor and Lessee,

the Site Plan shall be attached to and incorporated into the Lease as Exhibit "B" by an amendment to the Lease. After the incorporation of a Site Plan into the Lease, Lessee may from time-to-time make certain changes to the Site Plan, and to the extent such changes are material, Lessee shall submit a revised site plan incorporating such material changes (a "**Revised Site Plan**") to Lessor for Lessor's approval, and Lessor shall have thirty (30) days after receipt of a Revised Site Plan to object to any such material changes ("**Approval Period**"). If Lessor does not notify Lessee in writing prior to the expiration of the Approval Period of any such objections, Lessor shall be deemed to have approved the Revised Site Plan, and the Revised Site Plan shall replace and, for all purposes hereunder, become the Site Plan and be incorporated into the Lease. Should Lessor object in writing to a Revised Site Plan within the Approval Period, Lessor and Lessee shall promptly work in good faith to agree upon a mutually acceptable Revised Site Plan. If Lessor and Lessee, after working in good faith cannot agree upon a Revised Site Plan, Lessee may, at its election, either (i) construct Wind Power Facilities as shown on the Site Plan approved by Lessor, if any, or (ii) not construct any above-ground Wind Power Facilities on the Property and maintain this Lease for wind capture rights, underground facilities, and such other rights granted to Lessee herein.

12.10.2 For purposes of the Site Plan, "**Primary Wind Power Facilities**" shall include: (a) Generating Units (b) substations (c) buildings (d) roads (e) overhead and underground lines, wires and cables associated with electrical transmission and distribution, and communications facilities (which for the purposes of clarification may be represented in the Site Plan by a single centerline so long as said facilities run generally parallel to the centerline), (f) permanent meteorological towers and (g) temporary construction facilities such as concrete batch plants, lay-down yards, temporary storage yards or other similar temporary facilities.

12.10.3 "**Construction Impact Zones**" are defined as (a) a 120-foot wide corridor, 60 feet on either side of the centerline of any linear Primary Wind Power Facilities (e.g., roads, transmission and distribution wires, cables, etc.), (b) a 300-foot radius around Generating Units, and (c) a 100-foot radius from the perimeter of Primary Wind Power Facilities (other than Generating Units or linear Primary Wind Power Facilities described in (a) above).

12.10.4 Once a Site Plan is approved by Lessor, Lessee shall have the right, but not the obligation, to construct Wind Power Facilities on the Property in substantial compliance with the Site Plan or a revised site plan that does not contain material changes to the Site Plan. All Wind Power Facilities shall be constructed within a Construction Impact Zone or as otherwise shown on an approved Site Plan. Nothing in this Section 12.10 shall obligate Lessee to install any facilities or improvements shown on the Site Plan or any preliminary site plan.

12.10.5 For purposes of this Section 12.10, and by way of illustration and not limitation, it is agreed that the following, non-exhaustive list of changes shall not be considered material changes to an approved Site Plan or Revised Site Plan and shall not require additional approval by Lessor: (i) the relocation of any Wind Power Facilities (excluding Generating Units), or the centerline thereof, by more than 50 feet; (ii) the relocation of any Generating Unit by more than 100 feet; or (iv) the relocation of any Construction Impact Zone, so long as such relocation does not cause any Wind Power Facilities to fall outside of said Construction Impact Zone. All measurements described in this subsection 12.10.5 shall be measured from the Site Plan.

## 12.11 Special Michigan Provisions.

12.11.1 The Parties acknowledge their desire for the provisions of this Lease to comply with all applicable Michigan and federal laws. As such, the following provisions are hereby added to this Lease, it being understood and agreed that if such provisions do not cause this Lease to comply in all respects with Michigan and federal law, then this Lease shall nonetheless remain in full force and effect, and shall be amended, in the manner that is fairest to each Party, to cause such compliance to occur; and the Parties agree to execute any amendments to this Lease or a new lease (in such form reasonably requested by Lessee) as may be necessary for that purpose. To the extent there is any question



regarding the validity or enforceability of the Lease due to the effect of any applicable Michigan or federal law relating to wind leases or easements now or hereafter enacted, Lessor hereby agrees, upon Lessee's election, to amend the Lease as set forth above and Lessor hereby waives its rights under any such existing or hereinafter enacted laws.

12.11.2 The Parties agree to cooperate, and Lessor agrees to assist Lessee, at no cost to Lessor, in order to comply with any Federal, State, County or municipal laws, rules or ordinances. Lessor shall fully support and cooperate with Lessee in order to comply with any requirements of Lessee or any Wind Power Facilities pursuant to such existing or hereinafter enacted laws in accordance with the provisions of Section 8.3.

12.11.3 The Parties acknowledge their desire for this Lease not to constitute a "transfer of ownership," as such term is defined in M.C.L.A. 211.27a(6)(g). Unless otherwise agreed to in writing by both Parties, in no event shall the combined length of the Development Term and the Extended Term of this Lease exceed the date that is thirty-five (35) years after the Effective Date of the Lease.

**[SIGNATURES FOLLOW ON SEPARATE SHEETS]**





**EXHIBIT "A"**

DESCRIPTION OF THE PROPERTY

THE FOLLOWING REAL PROPERTY LOCATED IN THE COUNTY OF ,  
STATE OF MICHIGAN:

Having a Street Address of \_\_\_\_\_

Parcel Identification No.: \_\_\_\_\_

**EXHIBIT "A-1"**

MAP GENERALLY DEPICTING THE PROPERTY

**EXHIBIT “B”**

SITE PLAN

To be agreed upon and attached during the Development Term.

**EXHIBIT "C"**

MEMORANDUM OF WIND ENERGY LEASE

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MEMORANDUM OF WIND ENERGY LEASE

THIS MEMORANDUM OF WIND ENERGY LEASE (this "**Memorandum**") is dated as of \_\_\_\_\_, 2008 (the "**Effective Date**") by and between \_\_\_\_\_ ("**Lessor**"), whose address is \_\_\_\_\_, and \_\_\_\_\_, a Michigan limited liability company ("**Lessee**"), whose address is \_\_\_\_\_, with reference to the following recitals:

A. Lessor owns that certain real property (including all air space thereof) described on **Exhibit "A"** attached hereto (the "**Property**"), which Property is located in the County of \_\_\_\_\_, in the State of Michigan.

B. Lessor and Lessee (together, the "**Parties**" and each a "**Party**") have entered into that certain unrecorded Wind Energy Lease dated of even date herewith (the "**Lease**"), which affects the Property.

C. The Parties have executed and acknowledged this Memorandum and are recording the same for the purpose of providing constructive notice of the Lease and Lessee's rights thereunder. Capitalized terms used and not defined herein have the meaning given the same in the Lease.

NOW, THEREFORE, for and in consideration the promises, covenants and agreements of the Parties contained in the Lease and herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Lessor hereby leases the Property to Lessee and its successors and assigns, and Lessee hereby leases the Property from Lessor, upon all of the terms and conditions set forth in the Lease. As more fully provided in the Lease, without limiting the generality of the foregoing, Lessee shall have possession of the Property for the following wind energy uses and purposes (collectively, "**Wind Operations**"), to be conducted in such locations on the Property as Lessee may determine, and whether accomplished by Lessee or a third party authorized by Lessee: (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) developing, constructing, erecting, installing, improving, enlarging, replacing, repowering, relocating and removing from time to time, and using, maintaining, repairing, operating and monitoring the following, whether for the benefit of Wind Power Facilities on the Property or on other lands: (i) wind energy conversion systems and wind power generating facilities, including associated towers, foundations, support structures and equipment (collectively, "**Generating Units**"); (ii) electrical transmission, distribution and control facilities, and communications facilities, including overhead and underground 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 (collectively, "**Transmission Facilities**"); (iii) anemometers, meteorological towers and wind measurement, monitoring and recording equipment and facilities; (iv) roads, bridges, culverts and erosion control facilities; (v) control, maintenance and administration buildings, (vi) laydown areas and maintenance yards; (vii) utility lines and installations; (viii) fences, gates and other safety and protection facilities; and (ix) other improvements, fixtures, 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**"); (c) vehicular and pedestrian ingress, egress and access to and from Wind Power Facilities (whether located on the Property or on other lands), on, over and across the Property, by means of roads thereon if existing (which Lessee may widen, strengthen or otherwise improve), or otherwise by such roads as Lessee may construct from time to time ("**Access Rights**"); and (d) undertaking any other activities that Lessee determines are necessary, helpful, appropriate, convenient or cost-effective in connection with or to accomplish any of the foregoing purposes, including conducting surveys and soils, environmental, biological, cultural and other tests and studies, and clearing vegetation.



2. Among other things, this Lease includes (a) the exclusive right and easement on, over and across the Property for the free and unobstructed flow of wind currents and wind resources, together with the exclusive right to (i) develop, use, convert, maintain and capture such wind, (ii) convert wind energy into electrical energy and (iii) derive and keep all credits and income therefrom (subject to the payment of Rent to Lessor, as set forth below), and (b) the exclusive right and easement to permit the rotors of Generating Units located on adjacent properties to overhang the Property.

3. The Lease shall initially be for a term commencing on the Effective Date and ending on \_\_\_\_\_. Lessee shall have the right and option to extend the term of the Lease for one additional period that will expire on the date that is **thirty-five (35) years** after the Effective Date, upon the terms set forth in the Lease.

4. Any Wind Power Facilities constructed on the Property shall at all times remain the property of Lessee and shall not be deemed to be fixtures and Lessor shall have no ownership, lien, security or other interest (including any lien that might otherwise be implied by law) in any Wind Power Facilities installed on the Property, or in any profits or income derived therefrom.

5. Neither Lessor nor any of its tenants, licensees, contractors, invitees, agents, assigns or anyone else obtaining rights from Lessor (collectively, "**Lessor Parties**") shall, currently or prospectively, interfere with, impair, delay or materially increase the cost of any of Lessee's Wind Operations (whether conducted on the Property or elsewhere), or the undertaking of any other activities or the free enjoyment or exercise of any other rights or benefits given to or permitted Lessee hereunder. Without limiting the generality of the foregoing, neither Lessor nor anyone obtaining rights from or acting with the permission of Lessor shall (a) interfere with or impair the free, unobstructed and natural availability, flow, speed or direction of air or wind over or across the Property (whether by planting trees, constructing structures, or otherwise), or the lateral or subjacent support for the Wind Power Facilities or (b) engage in any other activity on the Property or elsewhere that might cause a decrease in the output, efficiency or longevity of the Wind Power Facilities.

6. The Lease is for the additional purposes, is of the nature, and is subject to the requirements and limitations, set forth therein. The Lease also contains various other covenants, obligations and rights of the Parties, including, without limitation, provisions relating to Rent, termination of the Lease, quiet enjoyment, division of the Lease into separate agreements, conduct of Operations, restoration of the Property, assignment and lender protections.

7. The terms, conditions and covenants of the Lease are incorporated herein by reference as though fully set forth herein. This Memorandum does not supersede, modify, amend or otherwise change the terms, conditions or covenants of the Lease, and this Memorandum shall not be used in interpreting the terms, conditions or covenants of the Lease. In the event of any conflict between this Memorandum and the Lease, the Lease shall control.

8. The Property shall be held, conveyed, hypothecated, encumbered, leased, used and occupied subject to the covenants, terms and provisions set forth in the Lease and herein, which shall run with the Property and each portion thereof and interest therein as equitable servitudes, and shall be binding upon and inure to the benefit of the Parties and each Sublessee and any other person and entity having any interest therein during their ownership thereof, and their respective Sublessees, grantees, heirs, executors, administrators, successors and assigns, and all persons claiming under them.

9. This Memorandum may be executed with counterpart signature pages and in duplicate originals, each of which shall be deemed an original, and all of which shall collectively constitute a single instrument.

**[REST OF PAGE LEFT BLANK; SIGNATURES ON SEPARATE SHEETS]**



IN WITNESS WHEREOF, the Parties have executed and delivered this Memorandum as of the Effective Date.

**LESSEE:**

\_\_\_\_\_ )  
a Michigan limited liability company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

Be it remembered that on this \_\_\_\_ day of \_\_\_\_\_, 200\_, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came \_\_\_\_\_, to me personally known, who being by me duly sworn did say that he is the \_\_\_\_\_ of \_\_\_\_\_, a Michigan limited liability company, and that the within instrument was signed and sealed on behalf of said \_\_\_\_\_ by authority thereof, and acknowledged said instrument to be the free act and deed of said limited liability company for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial seal in the date herein last above written.

My Commission Expires:

\_\_\_\_\_  
[SEAL]

\_\_\_\_\_  
Notary Public in and for said County and State

Print Name: \_\_\_\_\_

**LESSOR:**

\_\_\_\_\_  
Name: \_\_\_\_\_

\_\_\_\_\_  
Name: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

BE IT REMEMBERED, that on this \_\_\_\_\_ day of \_\_\_\_\_, 2008, before me, the undersigned, a Notary Public in and for said County and State aforesaid, came \_\_\_\_\_ and \_\_\_\_\_, **husband and wife**, to me known to be the persons who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal in the date herein last above written.

My Commission Expires:

\_\_\_\_\_  
Notary Public in and for said County and State

\_\_\_\_\_  
[SEAL]

Print Name: \_\_\_\_\_

**EXHIBIT "A"**

DESCRIPTION OF THE PROPERTY

THE FOLLOWING REAL PROPERTY LOCATED IN THE COUNTY OF ,  
STATE OF MICHIGAN:

Parcel Identification No.: \_\_\_\_\_