

LEGAL CONSIDERATIONS OF WIND POWER GENERATION

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INTRODUCTION

Legal issues can arise concerning the location of wind generators and wind farms or the subsequent construction of other structures that could rob the wind from existing generators, particularly in an urban environment. Historical precedent is instructive. Built close together, conflict arose between the owners of a smock mill and a post mill in County Suffolk, England. After construction it was noticed that one of them was “robbing” the wind from the other, generating a legal contest.

A miller in Kent, England, went to court complaining that the construction of a railroad shed built close to his mill created adverse wind turbulence at his mill to the point of breaking a sail. He set a bonfire to prove his point with the smoke from the fire curling and bending as it moved toward his mill’s sails. He lost his case and had to raise his mill higher on a new base to avoid the turbulence.

Abuses of land contracts can occur with the taking of second mortgages on the leased land by the operators of wind farms and neglecting provisions for removal and land restoration in the case of non-use and at the end of the wind turbine operational lifetime [1].

EMINENT DOMAIN

Energy and agriculture intersect in that power lines upgrade and extensions to wind farm locations may have to go through agricultural land. It turns out that landowners do not totally control whether the power lines would go through their property or not. In fact, the power line utility does not have to get the landowner’s permission to build through his land. However, negotiations can lead to more convenient and safer placement of the associated structures.

Power lines as well as pipelines are considered as publicly regulated utilities and possess the power of eminent domain to condemn the right of way necessary for their lines if needed. Landowners must keep sight of that situation and not just refuse to negotiate because it is likely to occur anyway in spite of their opposition.

As an example, the Illinois Commerce Commission (ICC) considers any utility construction through private property, and determines that it is in the public interest. It conducts a public hearing that culminates in the majority of cases in the issuance of a Certificate of Public Convenience and Necessity.

A landowner refusing to negotiate, causing the utility company to hit a brick wall, forces it to condemn the property after obtaining an order from the ICC giving it the right to exercise eminent domain. The utility company must make further proof at a hearing that there are negotiating in good faith to acquire an easement by voluntary acquisition.

The easement terms between the utility company and the landowner are negotiable within some limits. The utility company would have the general route

identified, but they can be convinced to move it sideways to remain away from some existing structures to avoid electromagnetic interference from the power line with electronic equipment or the possible effects of electromagnetic radiation with the dwellers in homes or work places. The construction of fences and the clearing of trees along the path of the power line can also be negotiated.

There exist opportunities to negotiate the access that the utility company will have for construction and maintenance so as not to disturb any planting or grazing operations. The landowner can also negotiate the type of structures used for the power line. A single pole power line would affect usage of the ground under it less than a double pole power line.

The agreement granting the easement as a general rule must be reviewed by legal counsel before being agreed upon and signed. It would be too late to negotiate once the easement is signed.

The utility company is required to contact the Illinois Department of Agriculture (IDOA) and negotiate an agreement and terms that they will try to negotiate an agreement that is intended to mitigate the adverse effects of the construction of the power line on agriculture. The IDOA has developed guidelines, a set of established standards, examples of agreements and terms that could be used as minimum requirements in different situations. These guidelines set the floor for minimizing the adverse effects on agriculture, and the landowner may be able to negotiate more stringent protections, which is what occurs in most situations.

An example of what might be negotiated is the use of single rather than double poles for the power line. Another negotiable matter is to require the utility to chisel plow to a depth of 18 inches the cropland that could have been affected by compaction from the access of heavy construction machinery.

The IDOA guidelines do not specify the minimum compensation for the landowner. The amount of compensation paid to the landowner is also negotiable with adequate legal representation by an attorney with expertise in such an area of negotiation and cognizance of the existing compensation norms. Tradeoffs may be available in this area: the landowner may obtain a single upfront payment for the easement, or ask to be paid a yearly rent compensation that is adjusted for inflation over the duration of the existence of the power line.

CONTRACT ABUSES, SECONDARY MORTGAGES

Abuses of land contracts have been reported and suggest the need for a careful reading of their provisions by legal experts before signing them by landowners. In Livingston County, Illinois, USA, some of the wind turbine companies were accused of taking out second mortgages on the farmland that contained their leased plots and wind turbines [1].

The second mortgage severely limited the farmer operator from obtaining a needed production loan for his operation. The denial of the production loan resulted from the situation that the land value would not cover the primary mortgage, secondary mortgage and a production loan.

In addition, before signing such lease contracts, provisions must be included for removal of the wind turbines with their associated massive concrete and steel

foundations, the electrical cabling, and the access roads in the case of non-use and at the end of a turbine lifetime.

CONTRACT DURATION

Wind farm agreements between developers, operators and landowners are long term contracts over the life time of the wind turbines of 20-30 years. Landowners must be careful to categorically refuse any perpetual contracts; forever being a long time. They ought to carefully review and analyze the fine print in the contract, so to say to dot the i's and cross the t's.

One important issue is the lifespan of the companies developing or operating the wind farm, not just the lifespan of the turbines. Any wind farm contract affects the usage of the property it is built on for the duration of the project. The limitation could be transferred to the heirs and to future owners of the land reducing its value to future investors.

Wind farm establishment may have a long term impact on the property unless provisions in the contract are included to first avoid them, to mitigate their impact and eventually to correct their impact at the end of the project. Consideration should be given to both the short term and long term implications of an agreement. In the end, a law establishment with experience in wind generation must be asked to provide review and guidance for such transactions to provide the best deal for all concerned parties. We discuss the considerations that such contracts must take account for.

LOCATION DEFINITION

On a given parcel of land, a specified location must be designated for the wind farm project excluding all other parts of the property. The land can be divided into parcels. In the county records a parcel can be subdivided to have the wind farm on it, and another parcel would encompass the rest of the farm.

ASSESSMENTS AND REAL ESTATE TAXES

The location specification affects the tax rates on the different parcels according to their usage and classification. Real estate assessments differ from county to county. Once agricultural land has a wind turbine built on it, it could be classified as commercial, industrial or remain agricultural, depending on the county boards. This has major implications as concerns the property taxes. A standard does not exist for the situation among county assessors. The Farm Bureau, representing farmers has been trying to create some future statute that would uniformly reassess agricultural land with wind generation established on it. The responsibility of the different parties regarding the payment of the real estate taxes must be specified.

REVENUE OPTIONS

Various income and revenue options must be specified in the contract. These include a fixed annual lease, a lump sum up-front payment, revenue sharing, or royalty

share. Combinations of these options can be arranged.

GOVERNMENT AND STATE PROGRAMS

Coordination with the Farm Service Agency (FSA) is needed once the parcels are determined since this could impact the eligibility and the continuing participation in different government and state farm programs.

COORDINATION WITH LENDERS

Another contact is needed with the lender holding the mortgage to the farm property such as any commercial bank, insurance company or the Farm Credit Service (FCS) or the Federal Land Bank for the particular district.

EASEMENT PROVISIONS

An easement agreement is entered between the developer or operator of a wind farm and the landowner. It entitles the entities holding the easement to specific uses of the land. The easement does not only cover the location of the turbine but includes the access roads and the locations of the step-up transformers on the ground and the cabling underground.

An access easement gives the developer the authority to build and maintain the access roads. It must be specific and limited as to what kind and size of heavy equipment are allowed during the construction period, and later for repair and maintenance.

A maintenance easement must specify the party responsible for maintaining the infrastructure necessary for wind power productions. Maintenance will be needed for the structural towers and their foundations, the access roads and their associated paving, gating and drainage, small outbuildings, transformer stations, and underground cabling.

DAMAGES TO CROP PRODUCTION

The presence of the turbines can cause damages to the grown crops in case of icing, the generation of missiles or turbulence. The salting of the access roads to prevent icing in the winter can affect the existing trees or crops. Any spillage of oil from the transformers can damage the surrounding ground. The presence of the turbines could attract curious onlookers on all-terrain vehicles, four-wheel vehicles or snowmobiles damaging the surrounding land through compaction, generation of rill erosion or even invite acts of vandalism if the property is not fenced.

The drainage system including the existing tiling and any terraces or waterways included for erosion control will be affected by the construction of the turbine foundations and the access roads. The adjacent landowner land can be affected if any change in the topology of the land causes water channeling to occur causing potential conflicts in a common drainage system. The easement contract must specify the party responsible for correcting such possible problems.

Any generated soil compaction caused by the presence of heavy equipment must eventually be corrected for the continuation of crop production.

Provisions for compensation must be included for both the construction and operational as well as decommissioning periods.

RESTORATION AND DECOMMISSIONING

One important issue is the lifespan of the companies developing or operating the wind farm, not just the lifespan of the turbines.

The easement agreement must contain a termination date. A termination date can be specified at any time wind power generation on the property has been inactive or the developer has opted for bankruptcy protection for a certain amount of time, restoring the landowner rights.

In the case of contract termination, the party responsible to restore the area to its initial agricultural state must be specified.

It is not sufficient to specify that the developer or operator must decommission and restore the ground at the termination of the contract, since these entities may get into bankruptcy with the bond holders and the banks having the priority of allocation of the available resources and funds of a defunct company. The remedy is the establishment of a performance bond or an escrow account with a reputable well established and conservative bank. With an initial payment or a specified fraction of the gross value of the electrical energy produced such as 1 cent/kW.hr deposited regularly and earning interest over the project lifetime to cover the decommissioning and restoration costs.

The developer must be expressly prohibited from the practice that some farmers adopt by burying the remains of old brick, stone, concrete and steel structures such as old barns on their properties. Some unscrupulous ones conveniently bury the disposed-of material not on their own land, but on the neighbor's land, especially if they are renting it or crop share it. Such an unpleasant experience has been met by the writer and led to strained relations with the offending neighbor, with the buried structures still remaining in place.

Since the buried structures are underground, they are initially invisible and unnoticeable, but eventually the land subsists causing water ponding. The buried parts eventually pop out of the ground in the long term through freezing and thawing and cause surface depressions and water ponding at the burial locations. The escrow funds must be specified to revert to the landowners at the termination of the project or the demise of the developer or operator.

INSURANCE

Insurance must be provided for the construction, operation and decommissioning periods. A blanket policy covering the liability of the landowners and developers must be provided in collaboration with the landowner and the developer insurance agencies.

ARBITRATION PARTIES

An important provision is the persons or entities for determining the extent of the damages, should they occur. Arbitrators that both parties to the contract are comfortable with must be specified as impartial third parties such as extension agents, attorneys or

insurance adjusters. The method and the time of payment of any damages must be specified with further damages and interest payment if the damages are not paid on time.

CASE STUDY: THE GRAVENEY WIND FARM

We consider a legal and political situation of international dimension that arose in December of 2006 in the UK concerning the Graveney wind farm off the English coast. At this time, the Graveney offshore wind farm was considered as the world largest wind farm. Britain trailed Spain, Germany and Denmark in producing electricity from wind sources. The London Array would generate power for 750,000 homes, or ¼ of the UK's capital London needs, and meet 10 percent of the UK government's clean energy goal

The wind turbines are positioned offshore and are barely visible from the coast. They would generate 1,000 MWe of electricity, overtaking the 735 MWe Horse Hollow Wind Energy Center in Texas in the USA as the largest wind farm in the world.

The legal battle pitted the town of Graveney against the Royal Dutch Shell Plc oil company from La Hague, The Netherlands, E.ON AG component manufacturing company from Dusseldorf, Germany and Horsholm, Denmark based Dong Energy A/S which planned to bring the associated power cables ashore near Graveney.

Graveney is a village that is renowned to have been the site of the last combat on English soil in World War II, when the British forces fought and captured the crew of a German bomber that crash-landed in the marshes outside Graveney in September 1940.

Beyond a row of blue and white beach huts, the seascape already is dotted with turbines from a smaller wind farm and offshore gun platforms dating back to World War II.

The local council, acting on behalf of the town's 473 residents, refused to permit a transformer substation for the \$1.5 billion London Array, which would construct 271 wind turbines in the estuary of the River Thames. The town contended that there could be other places for the emplacement of the substation, whilst the developers said that this was the only place that they could place it in a green field.

The London Array is central to the UK government's goal of producing 1/10 of the UK's electricity from clean sources of energy such as wind and solar power to cut CO₂ emissions affecting global warming in compliance with Kyoto Treaty. Prime Minister Tony Blair was trying to recapture the green vote from the Conservative leader David Cameron, who planned to erect a windmill on the roof of his home.

An onshore transformer substation was needed to connect the windmills to the national power transmission grid in the UK. The proposal was to construct it on Graveney's Cleve Hill, 800 meters or 900 yards away inland from the shore, with the tallest part 12 meters high.

The Swale Borough Council refused to grant the planning permission in June, 2006, contending that the structure would stain the rural landscape and increase traffic along country lanes during construction. The project developers planned to appeal the decision at a public inquiry held by the government Planning Inspectorate in early 2007.

The local residents formed the Graveney Rural Environment Action Team to campaign against the construction of the transformer substation. It warned that as many as 60 large trucks might trundle through the village each day. The project developers countered that traffic would average two trucks a day for five years during the

construction period, peaking at 16 during the busiest three months. The actual situation is that trucks and construction equipment would have to wind through narrow lanes, cross a Victorian brick railway bridge and pass Graveney Primary School. The citizens group is not opposed to wind farms, it just does not want a substation that may lead to: “Creeping industrialization” in an area bordering a nature reserve.

After the council's rejection, the developers Shell, E.ON, and Dong Energy revised the substation design and suggested ways to reduce traffic. They sweetened the deal by offering 850,000 pounds sterling or \$1.7 million in community and conservation funds and student scholarships.

Many residents rejected the overture, which they considered as an attempt to bribe them. The developers contended that its purpose was that while in planning terms the impacts may be acceptable, no matter what it did in terms of mitigation it would still leave some residual effect, particularly during construction. The offer did not persuade Swale Borough Council Leader Andrew Bowles, who runs a family farm in Graveney: “Traffic mitigation is welcome, but quite clearly the view of the community is they'd still rather not have the money and not have the transformer station and traffic.”

Village campaigners say industrial sites along the north Kent and east Essex coasts, such as the Isle of Grain and a power station at Richborough, were not fully considered as alternatives.

The developers insisted that Graveney is the best choice, given its proximity to the sea, the small number of people affected, cabling routes, shipping lanes and the voltage rating of nearby transmission lines. In reality cost was probably the deciding factor since agricultural land was cheap to acquire for the transformer station.

The Trade and Industry secretary in the UK government, Alistair Darling, said in a statement that he wanted to streamline planning rules for large energy projects. Some offshore wind farms, including one near Blackpool, have been delayed to allow time for studies on the impact on marine bird populations. Large offshore wind turbines are blamed for blocking shipping lanes and interfering with radar navigation.

In this confrontation, the ultimate decision rested with the UK's Secretary of State for Communities and Local Government Ruth Kelly who, on the basis of public interest, most probably was expected to overrule the result of the public inquiry. In such a legal and political situation, communities can negotiate the best possible terms concerning location and operation and extract suitable compensation, but not stand in the way of the power of eminent domain.

REFERENCES

1. Bill Harriman, “Queries about Advisers, Wind turbine Contracts,” FarmWeek, p. 16, June 26, 2012.