



REPORT TO THE MINNESOTA LEGISLATURE WIND PROPERTY INTEREST TERMINATION ISSUES

Pursuant to Laws of Minnesota 2008, Chapter 296, Article 1, Section 31

Background

In 2007, Minnesota Statutes Section 500.30 was amended to require termination of a wind easement seven years after its execution if no wind facility to which the easement applies has begun commercial operation. This termination requirement was adopted in response to concerns raised by some landowner advocates that passage of Minnesota's renewable energy standard earlier in the 2007 legislative session might spark a wave of speculation in wind rights - that is, the securing of a wind easement not with the intent to develop a wind project, but to sell the easement right for profit at a future date. In consequence, development of a wind facility on that land might be delayed for years. As most wind easements are structured to provide relatively modest compensation to a landowner prior to commercial operation of a wind facility, such a delay could deprive a landowner of the timely realization of substantial value from his or her wind asset. In addition, speculators would likely concentrate on high-value wind resource sites, thereby impeding the most cost-effective potential development.

Many wind developers have argued that the date-certain termination requirement itself creates a greater impediment to wind development. Transmission constraints, MISO queue delays, turbine shortages and other factors that have hindered recent wind project development could prevent projects that are being responsibly developed with due haste and diligence from meeting the seven year deadline required by law. In such a case, a developer might have invested millions of dollars, yet be entirely at the mercy of the landowner to derive any value from that investment. Some industry members have cited the risk of a date-certain termination as a factor in deciding not to develop wind projects in Minnesota.

Legislative Charge

In response to the concerns raised about the easement termination requirement, the legislature repealed that requirement in Laws of Minnesota 2008, Chapter 296, Article 1, Section 25. However, the effective date of that repeal was delayed until June 1, 2010 and, under Section 31, the Office of Energy Security (OES) was required to:

1. Convene a work group of interested parties to mediate differences concerning the termination of property interests related to wind energy systems developments; and
2. Investigate and determine whether there is a factual basis for concerns that wind energy development may be hindered if termination of those property interests is not required by law if development has not occurred over some specified period of time.

Wind Property Interest Mediation Work Group

OES consulted with Legislative staff to invite work group participation that would provide both a balance of viewpoints on the termination issue and broad knowledge of the wind development industry. Eight industry members agreed to volunteer their time and expertise:

Katie Nordahl
Attorney
Fredrickson & Byron

Paul White
President
Project Resources Corporation

Thom Petersen
Legislative Director
Minnesota Farmers Union

Lisa Daniels
Executive Director
Windustry

Dan Juhl
President
Juhl Wind

Mike Bull
Regional Policy Manager
Wind on the Wires

Erik Swanson
Attorney
Winthrop & Weinstine

Greg Burger
President
Minnewst Bank Luverne

Other interested parties have also provided valuable input to discussions of termination issues and possible solutions. Work group members have provided OES with information and views on easement issues in Minnesota and in other states. At present, members are reviewing a proposal developed through discussions among Wind on the Wires members that would require wind easements to contain provisions modeled on delay rental or shut-in payments¹ common to oil and gas leases. The proposal provides for:

- A predevelopment period of 7 years from the date an easement is executed and recorded to allow time for predevelopment activities;
- Mutually-agreed to milestones that the lessee must meet after the 7 year predevelopment period;
- A mutually-agreed to plan for the lessee to make annual payments to the landowner in the event that the developer fails to meet the specified milestones;
- A mutually-agreed to basis for such annual payments, which may be per acreage and include an ability to “shed” acreage; and
- Termination if the agreement is breached by the lessee.

¹ A delay rental payment is a yearly payment made to allow an oil or gas lessee to delay drilling operations. A shut-in payment allows a lessee to maintain a lease for a well that is capable of but not producing oil or gas.

While still under discussion and negotiation, reaction to this proposal has been positive. It is OES' guarded hope that consensus agreement can be reached on the basis of this proposal. Upon such agreement, OES will provide draft legislation to the chairs and ranking minority members of the committees with primary jurisdiction over energy issues.

Factual Basis of Concerns

OES staff investigated concerns raised in Minnesota and other states and requested documentation from work group members and other interested parties to support claims of speculative activity. While continuing concerns about speculation were raised, no evidence to support those concerns, beyond hearsay, was offered. In answer to the legislative charge, no factual basis for concerns about speculation could be found. However, as the absence of evidence cannot be taken as proof of the fallacy of a claim, we do not conclude that speculation is not occurring. Given the similarities between wind lease rights and oil and gas lease rights, and the well-documented history of speculation in the latter, a reasonable person might well be concerned that such speculation could also arise in wind leases. OES believes that, if industry members and landowner advocates can agree on proposed measures to inhibit speculation, the present lack of proof that speculation is occurring should not dissuade the legislature from considering that proposal.