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Renewable Energy Case Law Update

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I.

Introduction[1]

As renewable energy becomes more widespread, litigation has increased, and, as a result, every year more and more case law becomes available. In particular, due to the dramatic growth of the wind industry over the last decade, cases involving wind farms have become more and more common. As in the past, the largest number of cases involves the siting of wind farms, from nuisance claims to environmental challenges, and even national security concerns. This paper provides an update on select renewable energy cases of interest from 2013; however, in no way is this meant to be a comprehensive collection of case law. Rather, the following are some highlights of conflicts that have arisen and judicial holdings that provide valuable lessons learned for renewable energy developers, owners, and their attorneys.

II.

Wind Facility Sites and National Security: An Update[2]

***Ralls Corp. v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d 71 (D.C. Cir. 2013)**

***Ralls Corp. v. Committee on Foreign Investment in the United States*, 2013 WL 5583847 (D.D.C. October 10, 2013)**

***Ralls Corp. v. Terna Energy USA Holding Corp*., 920 F. Supp. 2d 27 (D.D.C. 2013)**

One of the most noteworthy cases of the past year is *Ralls Corp. v. Committee on Foreign Investment in the United States*, which involved a potential threat to national security. In September of 2012, the Ralls Corporation, a wind-farm developer owned by Chinese nationals,

[1] Select portions of this paper include excerpts from TEXAS WIND LAW (LexisNexis Matthew Bender 2013). Reprinted with the permission of LexisNexis. The authors would also like to thank Ms. Lindsay Blumenthal, the research assistant for the forthcoming 2014 edition of *Texas Wind Law*, for her research assistance, which also contributed to this paper.

[2] This section includes excerpts from Billy Vigdor, Dave Johnson & Jeremy Marwell, *New, Stark Reminders of CFIUS' Power*, V&E CFIUS and National Security Review E-communication (October 15, 2013), http://www.velaw.com/resources/pub_detail_print.aspx?id=23265 and Billy Vigdor, John Elwood & Jeremy Marwell, *Chinese Energy Developer Sues Committee on Foreign Investment in the United States (CFIUS) for Blocking Oregon Wind-Farm Investment on National Security Grounds*, V&E CFIUS and National Security Review E-communication (September 17, 2012), http://www.velaw.com/resources/ChineseEnergyDeveloperSuesCFIUSBlockingOregonWindFarmInvestment.aspx.

sued the Committee on Foreign Investment in the United States ("CFIUS"), raising statutory and constitutional challenges to CFIUS orders that effectively required Ralls to unwind its acquisition of four wind-farm projects in Oregon. This matter was described in detail at last year's conference while it was pending, but in the past year it has seen several important developments that deserve careful attention.

A. Background on CFIUS review

The Defense Production Act authorizes the President of the United States "to suspend or prohibit any covered transaction that threatens to impair the national security of the United States."[3] National security reviews of foreign acquisitions of U.S. businesses are conducted through CFIUS, an inter-agency committee with jurisdiction to review "covered transactions," a term defined to include transactions "by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." Under the CFIUS authorizing statute, the parties to a transaction may, but are not required to, submit a joint written notice to the Committee before closing the transaction. If CFIUS determines that a notice involves a "covered transaction," it must determine "the effects of the transaction on the national security of the United States."

If CFIUS identifies a national security concern, the parties will often agree to take measures to resolve the concern, including entering into formal, contractual "mitigation agreements" with the government. If CFIUS and the parties are unable to negotiate mitigation measures or otherwise address the concern, the Committee has statutory authority to refer the matter to the President. The statute further authorizes the President to "take such action for such time as [he] considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States," and provides that the President's findings and actions "shall not be subject to judicial review."

B. CFIUS, President Obama, and the Ralls Acquisition

In March 2012, Ralls acquired from Terna Energy USA Holding Corporation membership interests in four companies involved in the development of a wind-farm project in Oregon. Ralls did not file a voluntary notice with CFIUS before completing the transaction. After the transaction, the U.S. Navy, which operates a military base near the project sites, expressed concerns about Ralls's foreign ownership, prompting CFIUS to ask Ralls to file a "voluntary" notice of the transaction at CFIUS. A month after Ralls filed the notice, CFIUS issued an order requiring mitigation of Ralls's foreign ownership. Two months after that, President Obama issued an order superseding CFIUS's order that, among other things, required Ralls to divest itself of the newly acquired companies.

Ralls filed suit in the U.S. District Court for the District of Columbia, alleging that the President had exceeded his authority under the Defense Production Act, that it had been deprived of property without due process, and that it had been denied equal protection.[4] The court ruled that the statutory provision stipulating that presidential actions and findings "shall not be subject to judicial review" barred a consideration of Ralls' *ultra vires* and equal protection claims, but

[3] 50 U.S.C. app. § 2170.
[4] *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F.Supp. 2d 71 (D.C. Cir. 2013).

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