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“Boilerplate” Clauses in Wind Lease and Easement Agreements

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“BOILERPLATE” CLAUSES IN WIND LEASE AND EASEMENT AGREEMENTS

by

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I. INTRODUCTION

Although all wind lease and easement agreements (“**wind leases**”) contain general boilerplate provisions (*e.g.*, entire agreement, governing law, partial invalidity, counterparts, severability etc.), this paper will address other various provisions that may not necessarily be unique to wind leases but are customarily included in all wind leases and have become “boilerplate” therein.¹

The paper will set forth examples of certain provisions found in wind leases that make the project financeable or protect the interests of the lessee or the equity participants. The paper will also include examples of certain provisions that are included for the landowner’s protection. The paper will not address provisions related to commercial terms (rent, damage payments, royalties, etc.) as these provisions will differ greatly among leases.

II. LENDER PROTECTIONS

Wind projects are extremely capital intensive and expensive to construct and install. Consequently, a developer will usually finance the construction of the wind project and will include provisions in the wind lease that are beneficial to, and are expected by, a lender.

a. Lessee’s Express Right to Mortgage.

The lessee under a wind lease will want the express right to mortgage any of its rights under the wind lease or any of the improvements installed by the lessee on the landowner’s property in order to obtain a loan from a lender.²

Example:

Right to Mortgage. Lessee may at any time mortgage, grant or pledge all or any part of Lessee’s rights, title or interest under this Lease, in the Easements, and/or in any Wind Facilities to one or more persons or entities (a “**Lender**”) without Owner’s consent.

b. Notice to Lender and its Right to Remedy a Default of Lessee.

Since the wind leases and improvements will be pledged to secure the payment of the loan, a lender will want to protect against the loss of its collateral. Consequently, in addition to notice to the

*Thanks to my colleague, Charlie Black, for his suggestions to this paper.

¹ These same provisions will also often appear in transmission line and collection line easements that relate to the wind project. However, for convenience, this paper refers to wind leases.

² Please note that the rights granted in such provision do not permit or allow the lessee to pledge more than its leasehold interest (i.e. the landowner’s fee simple interest in the property is not at risk).

lessee of a default under the lease, the wind lease will also require that the landowner send the lender a notice of default. Since the landowner would need to know the address of the lender to send the notice, the wind lease will provide that the lessee will give notice to the landowner of any lender for the wind project, including the lender's address. Also, in the event the lessee is unable to cure a default, the lease will grant a lender additional time to cure a default (and avoid the termination of the lease) on behalf of the lessee.

Example:

Notice to Owner of Mortgage. Following the granting of a mortgage as contemplated herein, Lessee or the Lender will give notice of the same (including the address of the Lender for notice purposes) to Owner; provided, however that the failure to give such notice shall not constitute a default or breach under this Lease but rather shall only have the effect that Owner shall not be required to recognize or be bound by such mortgage, grant or pledge (and all notice and other requirements benefiting such Lender shall accordingly be inapplicable) until such notice shall have been given (unless such information is included in an estoppel certificate signed by Owner, in which event notice hereunder shall not be necessary).

Notice of Default to Lender. As a precondition for Owner to exercise any rights or remedies as a result of any alleged default by Lessee, Owner shall give written notice of a default to each Lender concurrently with delivery of any required notice to Lessee, specifying in detail the alleged breach or event of default as required under Article []. If Lessee has failed to cure or commence to cure such default within the initial cure period provided in Article [] of this Lease, then any such Lender shall be entitled to receive an additional notice given in the manner provided in this Lease that Lessee has failed to cure such default and such Lender shall have (i) thirty (30) days in the event of a monetary default to cure any such default, or (ii) sixty (60) days in the event of a non-monetary default to cure such default; provided that such sixty (60)-day period shall be extended for the time reasonably required to complete such cure, including the time required for the Lender to perfect its right to cure such default by obtaining possession of the Property (including possession by a receiver) or by instituting foreclosure proceedings, provided the Lender acts with reasonable and continuous diligence. The time within which Lender must foreclose or acquire Lessee's interest shall be extended to the extent the Lender is prohibited by an order or injunction issued by a court or the operation of any bankruptcy or insolvency law from commencing or prosecuting the necessary foreclosure or acquisition.

Right of Lender to Remedy. A Lender shall have the absolute right, but not the obligation, to do any act or thing required to be performed by Lessee under this Lease, and any such act or thing performed by a Lessee shall be as effective to prevent a default under this Lease and/or a forfeiture of any rights under this Lease as if done by Lessee itself. Owner agrees to accept such payment and performance, and authorizes the performing Lender (or its employees, agents, representatives or contractors) to enter upon the Property to complete such performance with all the rights, privileges and obligations of Lessee hereunder.

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