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WIND LEASE V. SOLAR LEASE

Lisa Chavez

Author Contact Information:

Lisa Chavez

Wagstaff LLP

Abilene, TX

lchavez@wagstafflaw.com

325-677-6291

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WIND LEASE V. SOLAR LEASE

By

Lisa Chavez*

Wagstaff LLP

I. INTRODUCTION

Wind and solar development are the primary renewable energy sources in Texas although other types exist (*e.g.*, hydro, biomass, and waste-to-energy). Texas is the national leader in wind energy and ranks first in the nation in both installed and under-construction wind energy capacity.¹ Texas is also now one of the fastest growing solar energy markets in the nation.

Wind and Solar leases have similar provisions as both types of projects produce energy for commercial purposes. In addition, both types of projects require significant amounts of capital and are expensive to construct and install. Consequently, in simple terms, a developer will often source capital (a) by borrowing money from a financial institution to cover construction and installation costs, and/or (b) through equity capital by selling an indirect interest in the project. Before a financial institution will lend money to finance a solar or wind project or a tax equity participant invests in a project, it will conduct its own thorough due diligence review, which includes an analysis of the provisions of the underlying leases and/or easement agreements related to the project. There are standard provisions found in both solar leases and wind leases that help make the project financeable and protect the interests of the lessee, lender, and/or the equity participants. As such, a solar lease and wind lease will both include these standard provisions. However, solar leases and wind leases differ in certain aspects due to the nature of the installed improvements. Therefore, a wind lease and solar lease will each contain certain provisions that are unique to a wind project and solar project.

This article sets forth examples of certain provisions found in both solar and wind leases and provisions that are unique to each type of lease. In addition, it is important to note that the provisions set forth below are not a comprehensive list of provisions contained in a solar lease or wind lease as both will often include provisions found in any type of surface lease (*e.g.*, indemnity and force majeure) and standard contract provisions (*e.g.*, savings clause, choice of law, notice, entire agreement). Rather, the provisions included in this article focus on provisions included in a wind lease and solar lease that are necessary to build and finance the project. For ease of reference, this article will refer to a solar lease and wind lease as a “Project Lease” except when delineating the differences between each.

II. SUMMARY OF PROVISIONS THAT VARY BETWEEN SOLAR AND WIND LEASES.

A. Necessary Rights for Construction and Operation of a Solar or Wind Project.

First and foremost, a Project Lease must include provisions that grant the developer the necessary land rights for the development of the project. Whether styled as a lease or an easement, these rights will include (a) the right to install, operate, maintain, and replace the wind or solar facilities,

¹ Powering Texas: *Texas America’s Leader in Energy* (February 2019), <https://poweringtexas.com/wp-content/uploads/2019/02/Powering-Texas-R15.pdf>.

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