

The Need for North Dakota to Recognize Correlative Rights in Wind Energy Development
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Chairman Wardner and Committee members, thank you for the opportunity to testify on the issue of wind rights. I am testifying as an officer of Spring Valley Township in Dickey County. And to avoid any misunderstanding, let me state for the record that I testify as someone strongly in favor of wind energy, who has spent years working on and promoting public policies in the state and regionally for large-scale wind energy development, and who has committed all the land on his ranch to a 30-year easement for a wind project under development in Dickey and McIntosh Counties.

As many members of this Committee know, our township of 32 residents developed the state's first zoning ordinance for commercial wind farms in 2005. We zoned to protect the commercial wind rights of individual landowners and wind developers—rights threatened by the proposed siting of turbines by Florida Power and Light right along the property lines and upwind of landowners not participating in the project. The affected landowners, and their wind developer, enXco, which held the rights to develop the bordering properties, would have lost all economic use of that land for future wind development—without consultation or compensation.

Subsequently, a similar situation emerged again here in Barnes County, this time with Florida Power and Light and a different wind developer, RES America. Bill Brudvig, the lawyer for RES America, warned members of this Committee before the last legislative session that failure by the Legislative Assembly to protect landowners' rights to their wind resource would result in a taking and a constitutional violation of their rights.

The reason is simple. Wind turbines create wind wakes that diminish the wind resource of nearby turbines, if improperly sited, much like an upwind sailboat steals wind from boats downwind. Designing wind farms to reduce wind wake effects is standard operating procedure for commercial wind developers. In our Township's case, FPL would have provided for well over 2,000 feet of distance between their *own* turbines from northwest to southeast—but as little as 150 feet for the neighbors outside their project.

North Dakota law already clearly recognizes a landowner's private property interest in wind. Unlike Bill Brudvig, I am not an attorney, but I can read plain English. SB 2239, passed three sessions ago, states that a "wind easement means a right . . . executed by or on behalf of an *owner* of land or

airspace A property owner may grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property.”

The situation we encountered is not unique to wind development. The early days of oil and gas development in North Dakota saw similar conflicts over correlative rights—the rights of one resource owner relative to those of another. That’s why the North Dakota Industrial Commission today regulates the establishment of spacing units for oil and gas pools, and section 38-08 of the North Dakota Century Code requires that all resource owners within an established unit receive royalty compensation on a formula basis when development affects their shared resource.

I have worked with a number of your colleagues for years to pass legislation that would recognize and protect the correlative rights of landowners on the perimeter of wind projects. As a board member of the North Dakota Alliance for Renewable Energy, I most recently worked with representatives of NDARE’s member utilities, agricultural organizations, conservation and environmental groups and others, to reach consensus on legislation that would require the Public Service Commission to establish setbacks to protect the wind rights of nonparticipating landowners, but leave determination of the specifics of those setbacks to the PSC’s own rulemaking process. NDARE members supported HB [] introduced by Representative Mueller, but it failed by two votes in the House.

While I still believe that such legislation is urgently needed, I come today with a proposal that would also protect correlative wind rights and perhaps prove more acceptable to all involved. We should take a page from our successful experience with oil and gas development and simply require formula compensation for all wind turbines in a project on the basis of their wind wake or wind resource footprint.

Let me explain. Each landowner decides in negotiation with a developer to be part of a given project and signs a lease or easement agreement, meaning that they are willing to have wind turbines and/or associated infrastructure on their property. Then, the developer compensates the landowner who hosts the turbine at an agreed base rate—say 25 percent of the annual turbine payment. The remainder of the annual compensation for that turbine is then distributed on a pro rata basis to all affected landowners whose land falls within the established wind wake, whether they are participating in the project or not. In other words, each landowner would be compensated proportionally for the acres of wind resource that they contribute to a given turbine. No landowner would be forced to accept a turbine on their land, unless they agreed to sign an easement with a developer. However, adjacent landowners not participating in a project would still be compensated if their land and wind resource

was affected by the siting of turbines within the project—just as is done today with oil and gas development.

This proposal would in no way affect the total amount of compensation that a developer would pay to landowners, just the allocation of that amount among affected landowners. For example, FPL recently offered \$4,000 per megawatt for turbine compensation under their Roughrider contract in North Dakota. Under this proposal, every landowner hosting a turbine would receive 25 percent or \$1,000 per MW. The remaining \$3,000 per MW would be distributed proportionally to all owners of the wind resource within the established wind wake of the turbine. That might be just one landowner, or it could be several.

The marketplace and negotiations between developers and landowners would appropriately continue to determine the *level* of compensation. The State would merely stipulate the formula by which it is distributed. I propose a 25-75 percent formula, but a different formula could be chosen by legislators based on consultations with wind developers, landowners and others. The principal is what is important: all parties holding correlative rights would be recognized and compensated, rather than the winner takes all situation that prevails today in North Dakota.

This proposal would also address another looming equity problem that all of us have neglected, myself included. Until now, the public debate has been about affected landowners adjacent to a wind project, but not participating in it. However, we also need to be concerned about landowners within a project. Most wind contracts in North Dakota today pay substantially more to landowners who host a turbine or turbines than to landowners within a project who do not. Payments for other non-turbine infrastructure or serving as a buffer in a project are usually substantially less than for turbines, yet many of these landowners without turbines are contributing their wind resource to the benefit of the overall project.

enXco, for example, has established the precedent in the current Merricourt Project of making generous payments to participating landowners without turbines, but this not yet the standard. By contrast, the same FPL Roughrider contract I mentioned commits landowners to 99-year easements at very unequal levels of compensation *within* a wind farm. Here's the risk: the lucky landowners who host the turbine(s) get the lion's share of the cash, and other landowners in the project are left to live with the wind farm and its impacts, while enjoying much less compensation. This situation will sow the seeds for inter-generational resentment between neighbors and risks souring landowner goodwill toward the industry over time. We need only look at the example of how poorly crafted easements decades ago have soured generations of North Dakota farmers on wetlands conservation.

Finally, this proposal would be simple to administer for the State and make life much easier for developers. While wind wakes vary in an engineering sense based on local topography and other conditions, they can be defined for public policy purposes simply by drawing a circle around a turbine with an agreed radius—say five rotor diameters. All acreage falling within that circle would be subject to the formula compensation. Acciona, one of the largest renewable energy companies in the world and operator of the 200 MW Tatanka wind farm in North and South Dakota, actually had their legal team draft a wind easement agreement that incorporated this wind resource compensation formula to discuss with landowners in my Township.

My conversations with wind developers suggest that this proposal would be attractive to them. They have a long-term business interest in fostering the perception among landowners that the industry operates in a transparent and equitable manner. The State has a similar interest. We will only realize our full economic potential of wind energy—which is many times greater than the present level of wind development—if we are able to site thousands of turbines on the landscape. And that will only happen with robust landowner support.

When we first brought the issue of wind rights and landowner equity to the Legislature over six years ago, North Dakota's first large wind farm was just under construction. Our concerns and predictions of conflict at the time were largely dismissed. Hopefully, it should now be readily apparent that there is a real risk that landowner opposition and resentment could destroy the economic promise of wind energy, even in energy development friendly North Dakota. You and your colleagues took an important and laudable step last session to address some of the worst problems with wind leases and easements in the state. I urge you now to take the next step and meaningfully protect established wind rights before we have poisoned the well with conflict and litigation. We have a wind industry with a bright future in this state and important role to play in America's energy security, and we all have an obligation to safeguard its potential.

Thank you for this opportunity to testify.