

## LANDOWNER COMPENSATION

1. Factors That Impact Compensation.
  - A. Size of project.
  - B. Size of turbines.
  - C. Location.
    - i. Cropland versus pasture.
    - ii. Land values and geography.
    - iii. Proximity to transmission facilities and substations.
  - D. Power Purchase Agreement and rates.
  - E. Wind profile.
  - F. Financing and capital availability (projects may be bundled for financing and landowner payment levels mandated by lenders).
  - G. Availability of land and freedom from prior options.
  - H. Realistic expectations by landowners. (Be careful about comparing compensation with developers of projects that are never completed.)
  - I. Local regulatory issues.
  - J. Grant and tax credit programs.
2. “Cash rent v. Crop Share”. Compensation based upon production is becoming rare:
  - A. Individual turbines perform differently.
    - i. Wind variations.
    - ii. Down time for repair and maintenance.
  - B. Risks to landowner.
    - i. Repair & Maintenance – parts availability.
    - ii. Fluctuations in wind.
    - iii. Wake effect.

- iv. Curtailment – (up from 2% in 2009 to 5% in 2010 in this region) – demand is not necessarily when the wind blows.
  - v. Inconsistency of payment amounts compared to flat rate. (Consistency between landowners within a project is important.)
- C. No matter how compensated, very likely you won't know how many turbines or roads or other improvements will be located on a particular tract when you sign up.

### 3. Compensation Terms.

- A. Option Phase – pre-development. Generally a lump sum plus a small amount per acre until either construction or operation of project. Be careful of any developer that tries to sign up landowner with no compensation until project built. Flat fee varies along with per acre fee – larger flat equals lower fee per acre.
- B. Meteorological Tower flat fee – usually one time payment.
- C. Construction payment – may receive a one-time payment per turbine upon commencement of construction – usually equal to what the annual payment is to be per operating turbine.
- D. Annual turbine payment – may be based upon size of turbine (X amount per megawatt of capacity) or may be flat rate per turbine. May be adjustment if larger turbine installed later.
- E. Escalator or inflation adjustments are common, usually a small percentage increase per year during term of agreement.
- F. Reimbursement for crop loss or damage.
- G. Payment for loss of production for any roads installed. May be applicable only if no turbine is built on a particular parcel.
- H. Payment location of operations building, substation or other structure. Often agreements will give developer a purchase option for location of these structures and may also include the “lay down” area.
- I. May include payments for cable and collection lines – usually on a per acre basis.

### 4. Ethics and Professionalism.

- A. Confidentiality of Information – Rule 1.6 – client preferred I not share fee structure or documents.

**Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by, and except as stated in paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (4) to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used; or
- (5) to comply with other law or a court order.

B. Communication with person represented by counsel – Rule 4.2 – what about dealing with land agents of wind developers?

**Rule 4.2. Communication with Person Represented by Counsel.**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Or

Unrepresented person – Rule 4.3 – I am careful to make sure landowners, etc. know I work for the developer.

**Rule 4.3. Dealing with Unrepresented Person.**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are to have a reasonable possibility of being in conflict with the interests of the client.