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Locke Lord QuickStudy: UPDATE: Messing with Texas: Texas ?Legislature ?Proposes to Establish Permitting ?Framework for ?New and ?Expanded Wind and Solar Projects

Locke Lord LLP

WRITTEN BY

M. Benjamin Cowan | Jordan A. Rodriguez

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Texas has long been known for its light-touch regulatory regime, particularly towards the energy industry, but in the current legislative session state lawmakers are debating legislation that would require state permits for the construction and operation only of wind and solar energy projects. S.B. 624 would require new and expanded wind and solar energy facilities in Texas to apply for permits from the Public Utilities Commission ("Commission"), subject to far-reaching notice, environmental assessment, and public meeting requirements. The bill previously passed the Senate and on May 8 was referred to the House Committee on State Affairs. The version of the bill that passed the Senate was modified from its original version to remove some (but not all) of the most onerous requirements, most notably its application to existing projects and the expansive property owner notification requirements, but it would still impose burdensome and unprecedented restrictions on the development of new wind and solar energy facilities in the state. The authors of the bill claim that this seismic shift in Texas' approach to regulation of the energy industry is necessary due to the public interest in balancing private property rights, the need to increase electric generation, and the need to mitigate impacts of renewable energy generating facilities on wildlife, water, and land in the state.

Permit Applications and Approval

The proposed legislation would require project proponents to obtain a permit from the Commission before interconnecting any new wind or solar facility with a capacity of 10 MW or more to a transmission line in the state. In addition, an already interconnected wind or solar facility would be required to obtain permit if the amount of electricity the facility generates will increase by 5 MW or more, or if the facility's placement will "materially change." In other words, virtually all new utility-scale solar and wind projects, as well as proposed expansions of existing projects, will be subject to this new permitting regime.

The permit application would need to contain a host of information about the project, such as an environmental impact review ("EIR") prepared by TPWD, copies of the land leases for the project site, other evidence demonstrating compliance with Chapters 301 and 302 of the Public Utilities Code (which require removal of all project facilities at the conclusion of the lease and financial assurance for the same), and "any other information

required by commission rule."

To implement the EIR requirement, the proposed legislation would create a new Section 12.0012 of the Texas Parks and Wildlife Code, directing the Commission to adopt a system for TPWD to provide EIRs to renewable energy permit applicants. That system would need to establish a process for requesting an EIR and criteria for the TPWD to evaluate the environmental impact of the proposed facility. The criteria must include conservation of natural resources, continuous use of the land for agricultural and wildlife purposes, and agricultural best practices. The system must also include a method for establishing an "environmental impact score" for the facility based on the above criteria, and fees to cover the TPWD's costs for preparing the EIR. Notably, the proposed legislation does not provide for funding to establish a division within the TPWD with the personnel and expertise needed to prepare or process EIRs.

Public Notice and Meeting Requirements

The bill would require the Commission to provide public notice of a proposed permit or permit amendment to the county judge of each county located within 25 miles of the project boundary, and hold a public meeting to obtain input on the proposed permit or amendment. The Commission also must set a time and place for a public meeting, and provide public notice in a newspaper of general circulation in each county in which the facility will or is located. The notice must also contain a link to a publicly available website that provides information about the facility and the public meeting. The Commission may not act on an application for 30 days after the date of initial public notice, whether or not any person has requested a hearing.

The bill would allow the Commission to approve an application to *amend* a permit without requiring a public meeting if the applicant is not seeking to "significantly increase the amount of electricity generated under the permit" or "materially change the placement of the renewable energy generation facility." The Commission also must determine that the applicant's compliance history "raises no issues regarding the applicant's ability to comply with a material term of the permit." Because the bill does not define what constitutes a "significant increase" in electric generation, a "material[] change [in] the placement" of a facility," or what "issues" might indicate an applicant would be unable to comply with a "material term of the permit," it is impossible to determine how many applications to amend an existing permit would be exempt from the public meeting requirement. If the bill becomes law, the Commission would be tasked with defining these critical phrases through formal rulemaking, subject to public notice and comment.

Standard for Permit Issuance

The bill would allow the Commission to approve an application only if it finds that issuance or amendment of the permit would not violate any state or federal law or rule or interfere with the purpose of the legislation (*i.e.*, to protect the state against the impacts of renewable energy generation facilities). This "otherwise lawful" provision would appear to give the Commission authority to ensure compliance with any law regardless of its relationship to the Commission's own powers and duties.

Permit Conditions

Setback Requirements

Permit holders would be required to ensure that solar projects are set back at least 100 feet from any property line, unless the permit holder obtains a written waiver from a property owner within the 100-foot radius. Solar projects must also be set back 200 feet from any "habitable structure" unless a waiver is obtained from each owner thereof. A far more onerous setback requirement would apply to wind projects, which must be set back at least 3,000 feet from any property line, absent a waiver from a property owner within the 3000-feet radius.

Monitoring and Reporting

The bill would authorize the Commission, in coordination with TPWD, to issue rules requiring a permit holder to monitor, record, and report environmental impacts created by, and conduct wildlife assessments around, the permitted facility. The facility must then adapt its operations based on information obtained from such environmental monitoring and wildlife assessments, and minimize impacts on bats, birds, and other wildlife. Notably, this provision is not limited to bats, birds and other wildlife that are listed as threatened or endangered under federal or state law, but on its face would apply to all wildlife regardless of status. Finally, the Commission may require "other information" about the operation of the permitted facility. The nature of this "other information" is not specified and thus would be left to the discretion of the Commission.

New Conditions

Significantly, the bill would allow the Commission, on its own motion after reasonable notice and hearing, to impose new or additional conditions on any previously issued permit to ensure compliance with any rules adopted by the Commission under the permit program. This lack of certainty regarding the conditions under which a permitted facility can operate could be a serious obstacle to the investment in and financing of new wind and solar facilities.

Environmental Impact Fee

Each permit holder would be assessed an annual environmental impact fee. In setting the amount of this fee the Commission could consider the facility's efficiency, area and size, and environmental impact score, and the expenses necessary to implement the permit program. Environmental impact fees collected would be deposited into a new "renewable energy generation facility cleanup fund," which would be a dedicated account in the state's general revenue fund. The fund could be used by the Commission solely for the purpose of implementing the permit program.

Implications of the Proposed Legislation

Texas has long prided itself on a regulatory climate that is business-friendly and encourages, rather than stifles, economic development. This approach has led to Texas becoming the national leader in installed wind energy generation by a large margin, and the fastest growing state for new solar generation. The proposed legislation represents a radical departure from that approach and would create a regulatory regime that would have been nearly inconceivable in Texas even a few months ago.

While many other states have power siting boards to regulate new energy generation facilities—and there is certainly justification for energy facility siting rules generally—the creation of a regulatory regime out of whole cloth

in a state that lacks the regulatory infrastructure to implement such a program would create major new challenges and complexities for the Commission, the TPWD, and companies developing or operating wind and solar projects in the state. It would take a significant amount of time for the Commission to develop the regulatory framework necessary to implement the new permit program, and for the TPWD to develop a state NEPA process to prepare EIR's for every proposed wind and solar project, as well as major expansions of existing projects, in the state.

In the meantime, development of new projects could entail significant risk, and once in place the requirement for an EIR for every permit application is likely to be a massive bottleneck in the permitting process. Further, the setback requirements, especially those for wind energy facilities, would be extremely onerous and limiting for new projects, while the unspecified environmental impact fees and the lack of certainty resulting from the Commission's ability of the Commission to impose new conditions in permits already issued, would significantly complicate if not stifle development of new renewable energy generation in Texas. It also would have a chilling effect on the financeability of new projects.

The Texas Senate passed S.B. 624 on April 24, 2023 by a vote of 21 to 9. The Texas House of Representatives received the bill on April 25, and it was referred to the House Committee on State Affairs on May 8. To reach the governor's desk before the final day of the legislative session, May 29, 2023, S.B. 624 will need to receive a hearing and be voted favorably out of that committee (with or without amendments), and then be sent to the House floor for consideration, potential proposed amendments, and a final vote.

With S.B. 624 continuing to advance through the legislative process, renewable energy developers, lenders and investors should make their voices heard while there is still time to influence the proposed legislation, and should also consider encouraging their landowners and local partners to do the same.

For more information or to discuss the issues raised by this proposed legislation, please contact the authors.

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