



TradeWind Energy's 250 MW Smoky Hills Wind Project west of Salina, KS

A Wind Boom in the Sunflower State

By Alan C. Anderson, J. Britton Gibson, Scott White, and Luke Hagedorn

The Kansas state motto, “Ad astra per aspera” (to the stars through difficulty), was adopted 150 years ago by the First Legislature of the State of Kansas. This motto captures the pioneering spirit of the early settlers but could also refer to the early challenges and current boom in wind development in the state. Several factors, such as Kansas’ excellent wind resource, passage of a renewable energy standard with recently-enacted regulations, and plans for expanding the transmission infrastructure, have led to significant activity and a bright future for wind development in Kansas. According to the American Wind Energy Association, Kansas has the second best wind resource and capacity among the states, and it is now in the process of

harnessing that tremendous potential. In fact, while Kansas ranked 14th nationally among states in overall wind installations in 2011, it currently leads the nation with the most wind under construction and is on track to almost double its installed capacity in 2012.

However, despite these recent successes, difficulties and questions remain. In addition to the seemingly endless uncertainty surround the extension of the federal PTC, Kansas wind project developers are forced to ask themselves the following questions:

- Will Kansas repeal or reduce its Renewable Energy Standard?
- How will transmission impact the production and export of the great remaining wind resource?

- What does a recent expansion of the Heart of the Flint Hills moratorium on wind development mean for future wind development in other designated sensitive areas?

- How will a recent Kansas Supreme Court case, in which the court allowed county commissioners to place a moratorium on all wind development in their county, affect project developers in the state?

Abraham Lincoln once said, “If I went West, I think I would go to Kansas.” So far, Kansas’ excellent wind resource and supportive public policies have led wind developers to the same conclusion. The key question is whether they will continue to do so. The answer may depend on the extent to which Kansas can continue to

capitalize on its unique opportunities, and find positive answers to these questions.

Kansas Renewable Energy Standard

Former Kansas Governor Mark Parkinson signed into law Senate Substitute for H.B. 2369 on May 22, 2009, which included a renewable energy standard (RES). This law, which became effective on May 28, 2009, mandates that electric utilities obtain 10% of their energy from renewable sources by 2011, 15% by 2016, and 20% by 2020. This threshold amount can be satisfied through development of projects owned by the utility, through power purchased from third-party developers through Power Purchase Agreements, or through the acquisition and retirement of Renewable Energy Credits (RECs).

The RES threshold in Kansas is somewhat unique because it is based on a utility's generation capacity (measured in kilowatts), based upon the average of each utility's one-hour retail peak

demand for the previous three years, rather than being based retail electric sales like the RES threshold in most other states.

The legislation also set the basic ground rules for the RES, and required that the Kansas Corporation Commission (KCC) establish specific rules and regulations to administer the portfolio standard. After numerous rounds of input from stakeholders, the KCC adopted these regulations on October 27, 2010. The newly adopted regulations covered a number of issues that are significant for renewable project developers. A few of the most significant points are discussed below.

Reporting Requirements.

The Kansas RES regulations establish reporting requirements for Kansas public utilities. Under these regulations, public utilities are required to file annual reports with the KCC that contain information about the utility's utilization of renewable resources, including (a) descriptions of the renewable resources that have been purchased or put into service, (b) the

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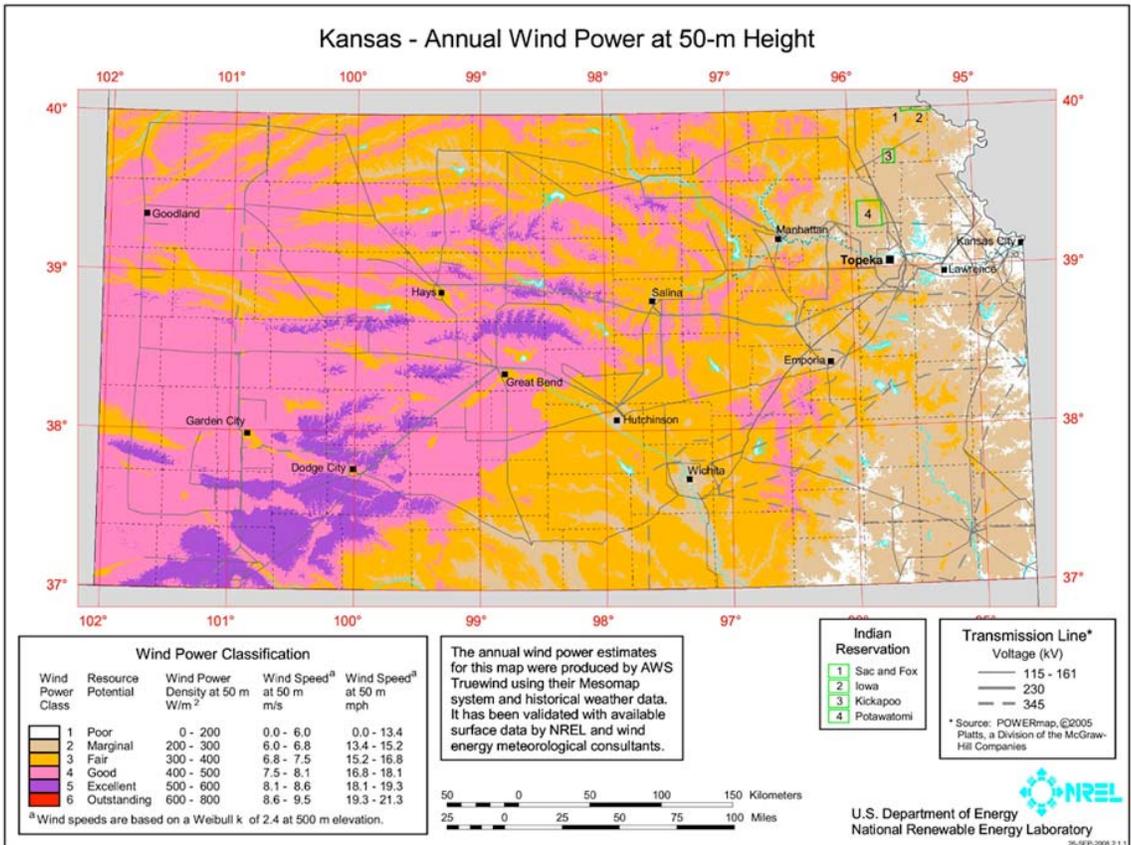
utility's plan for meeting the RES requirements for the upcoming year, (c) the retail one-hour peak demand for each of the previous three calendar years, and (d) the calculated percentage increase in retail rates resulting from compliance with the RES threshold.

The first report was due on or before August 1, 2011, and an annual report is now due on or before August 1 each year. Utilities also must report a retail revenue requirement calculation for each new capacity resource added. As of September 1, 2011, the utilities have reported the generation amounts set forth in Table 1.

Penalties.

As set forth in the regulations, a utility that fails to comply with the renewable energy requirements must

Where the wind blows. Kansas' wind resource ranks second in the nation.



pay a minimum penalty equal to twice the market value of the renewable energy credits (RECs) that would have been required to meet the RES. However, the Kansas RES statute explicitly states that during the 2011 and 2012 calendar years, “the commission is not required to assess penalties if the affected utility can demonstrate it made a good faith effort to comply with the portfolio standards requirement.” Thus, these penalties may vary if the KCC finds that there are mitigating circumstances or evidence of good faith efforts to comply, or if the maximum retail rate impact provisions are implicated.

Calculating Capacity from Purchased Power.

The Kansas RES regulations calculate the capacity of renewable energy generated differently depending on whether the utility is purchasing the renewable energy through a power purchase agreement (PPA) or simply buying RECs, and an advantage is given to energy purchased through a PPA. In the case of a REC used for compliance, the REC must coincide with the actual amount of renewable energy generated. However, in the case of purchased power, if the renewable energy is purchased pursuant to a PPA that is ten years or longer, the capacity used for

Table 1: Kansas Utility Renewable Generation

Utility	RES Requirement	Renewables Reported	Renewables (w/adjustments)	RECs (Purchased or Generated)
Empire	6.5 MW	271 MW	6.5 MW	None
KCP&L	163.6 MW	149.4 MW	70.7 MW (KS allocation)	94.5 MW
KEPCo	41.6 MW	114 MW	114 MW	None
Midwest	30.3 MW	51.3 MW	56.2 MW	None
Sunflower	67.9 MW	129.95 MW	142.42 MW	None
Westar	452.9 MW	301.2 MW	331.3 MW	121.6 MW

compliance is equal to the nameplate capacity minus the auxiliary power.

Kansas RECs.

RECs can be used to comply with the Kansas RES requirements by using the actual capacity factor of a utility's owned renewable generation from the previous year. For the purposes of determining compliance with the RES, each megawatt (MW) of eligible capacity installed in Kansas after January 1, 2000 will count as 1.1 MW. However, in determining compliance years 2011, 2016 and 2020, RECs can be used only to meet a portion of the utility's requirement.

Additionally, RECs used to comply with the Kansas RES must be associated with energy generated from a renewable energy resource that is located in

Kansas or that serves ratepayers in the state. Utilities may purchase or sell RECs without KCC approval, but each REC can be counted only once. In order to prevent double counting or misuse, each REC sold or purchased by any Kansas utility must be reported into an approved registry that tracks the creation, sale, and retirement of every REC. Any unused RECs remain valid for up to two years from the date of generation, but after two years, the REC is permanently retired.

Potential Opposition.

As recently detailed in an excellent article by Kimberly Svaty in North American Windpower, 2012 state legislative session gave rise to two ultimately unsuccessful attempts to restrict the RES. An amendment proposed by State Rep. Forrest Knox, the vice chairman of the State House Energy and Utilities Committee, sought to freeze the RES at 10%, while another amendment proposed by State Rep. Dennis Hedke, sought to tie future increases to the RES to the construction of the Holcomb Power Plant expansion. While both of these efforts ultimately failed, it is important to note that some of the wind industries biggest supporters in the Kansas legislature will be leaving office after the upcoming November elections, and they may well be replaced by a crop of politicians that are opposed to mandates such as the state RES. Long-time wind supporters Mike O’Neal, the Speaker of the House, has announced his retirement and Carl Holmes, a 28-year member of the legislature and chairman of the Kansas Electric Transmission Authority, was defeated in the primary.



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Transmission

The Kansas “V-Plan.”

Through the RES and the corresponding regulations, Kansans are taking active steps to encourage the development of renewable energy projects in the state, but this development is only effective if there are sufficient transmission lines to transport that energy. A number of transmission projects have been undertaken to address this need, but the Kansas “V-Plan,” the northern portion of the Southwest Power Pool’s (SPP’s) “X-Plan,” is particularly noteworthy.

The “V-Plan” envisions a high-voltage transmission line that connects eastern and western Kansas to improve electric reliability and enable energy developers to tap into the transmission grid, further establishing a competitive energy market in the state.

This project is one of SPP’s “Priority Projects” – a group of high voltage electric transmission projects designed to relieve grid congestion, improve the delivery of power to customers, facilitate the addition of new renewable and non-renewable generation to the electric grid, make more efficient use of the transmission system, and maintain electric reliability.

The “V-Plan” was originally anticipated to be constructed at a voltage of 765 kV. However, in April 2010, the SPP found the proposed 345 kV lines showed a positive cost/benefit ratio, and so the plan was modified to utilize 345 kV lines instead of 765 kV lines. Incorporating this change, the SPP issued “notices to proceed” in June 2010.

Two companies, ITC Great Plains (ITC) and Prairie Wind Transmission, LLC (Prairie Wind), a joint venture between Westar Energy and Electric Transmission America, submitted proposals. After examining the merits of the two competing proposals, in July 2009, the KCC approved a settlement in which ITC would construct and own two sections of the project, and Prairie Wind would construct and own a third section of this 180-mile-long line.



On March 1, 2011, Prairie Wind filed an application with the KCC for a siting permit for a similar double-circuit 345-kV line from a Westar Energy substation located near Wichita, Kansas, to a to-be-constructed substation located near Medicine Lodge, Kansas, and then south to the Kansas/Oklahoma border. With the Commission's approval, Prairie Wind broke ground on the high-capacity line on August 1, 2012, and the project is expected to be completed in December 2014.

Additionally, on March 15, 2011, ITC filed an application with the KCC for a siting permit allowing it to build a new, approximately 120-mile, double-circuit 345-kV high-capacity transmission line from the Sunflower Electric Power Corporation Spearville Substation near Spearville, Kansas, to a new substation in northern Clark County near Bloom, Kansas, and then east to a new substation east of Medicine Lodge, Kansas, which the Commission approved. ITC is currently obtaining the easement and land rights necessary to build the project, and expects to begin construction next year with the final project completed in 2014.

The Kansas Electric Transmission Authority.

The Kansas Electric Transmission Authority (KETA) was created in 2005, and its mission is to ensure reliable operation of the electrical transmission system, diversify and expand the

Kansas economy, and facilitate consumption of Kansas energy through improvements in the state's electric transmission infrastructure.

KETA has the authority to plan, finance, construct, develop, acquire, own, and dispose of transmission facilities. KETA functions as a public entity and has the power to contract for the operation and maintenance of transmission facilities. KETA also has the power to enter into contracts with the Kansas Development Finance Authority to issue bonds and provide financing for projects. It also can recover costs through SPP tariffs and obtain additional cost recovery through KCC assessments on all retail customers. If KETA identifies a transmission project to be built, it provides notice of that project, and private entities then have 3 months to notify KETA that they will build the project. If the project is not started within 180 days, KETA may construct the transmission line on its own.

Over the last several years, KETA has identified multiple transmission projects providing the greatest benefits to Kansas, and it has worked with outside parties to commit to the construction of these transmission lines. These projects include the Spearville-Knoll-Axtell transmission line being built by ITC, among others. More recently, KETA has expanded its discussions with SPP to augment the efforts of Kansas utilities and the KCC to ensure that the state's economic and

energy needs are factored into regional transmission system planning. KETA also has explored the need for “collector” transmission lines to facilitate movement of wind-generated electricity to customers.

Grain Belt Express Clean Line.

In addition to the lines currently under construction, Clean Line Energy is in the process of developing another extremely interesting project across the state, the Grain Belt Express Clean Line, a 500-600 kV extra high voltage transmission line starting in Kansas and running east through Missouri. On Dec. 7, 2011, the KCC unanimously approved Grain Belt Express Clean Line's application to conduct business as a public utility in Kansas. Though the final route has not yet been determined, this line is currently planned to originate in western Kansas near Sunflower's Spearville substation, will traverse east across the state into Missouri, and will interconnect with the AC grid in southeastern Missouri. The Grain Belt Express line will be approximately 700 miles in length and will deliver renewable energy to the Midwest ISO market.

Expansion of the Heart of Flint Hills Moratorium and Inclusion of Other Conservation Focus Areas

In early January, former U.S. Senator Sam Brownback was sworn in as Governor of Kansas and immediately pledged support for the development of Kansas' wind resources. Shortly after, Governor Brownback told leading legislators and wind energy developers that the informal Heart of the Flint Hills Wind Development Moratorium may be expanded to more closely track the boundaries set forth by the U.S. Fish and Wildlife Services (USFWS).

The original moratorium was established approximately eight years ago by then Governor Kathleen Sebelius to protect development in areas designated as “pristine prairie.” That moratorium was never codified in



law, but this multi-county area, known as the “Heart of the Flint Hills” become out-of-bounds for wind development.

In May of 2011 Governor Brownback released his “Road Map for Wind Energy Policy” in which he provided a formal policy extending the tallgrass prairie area in the Flint Hills from commercial wind development now to be known as the “Tallgrass Heartland”. This expanded Tallgrass Heartland is intended to more closely track the geologic area indentified by the USFWS as a conservation area, and now incorporates an extended area to the Oklahoma border.

What wind developers should continue to follow is the three additional areas identified by the USFWS as Conservation Focus areas in Kansas: Smoky Hills, Red Hills and Playa Lakes. Although these areas do not likely have the collateral political will or interest from potential interveners that were raised for the Heart of the Flint Hills moratorium, the USFWS' reasons for conservation in these new areas are similar to those put forth for the Flint Hills. With the history of the Tallgrass Heartland, an understanding of the current status of this area is prudent.

County Action to Prohibit Wind Development.

In October of 2011 the Kansas Supreme Court issued a much anticipated ruling on a case involving a number of key issued for wind developers. The case, Zimmerman v. Board of County Commissioners of Wabaunsee County, revolves around a dispute between the Board of County Commissioners of Wabaunsee County (Board) and a group of landowners in Wabaunsee County who had entered into easement agreements to with wind developers for utility scale projects on the landowners' property.

In November of 2002, the Board passed a temporary moratorium on the granting of conditional use permits (CUP) for wind development projects in the county. A CUP is required for constructing a project so the impact of this moratorium was a prohibition on wind development in Wabaunsee County. While this temporary moratorium was in place, the Plaintiffs and the Plaintiff Intervenor entered into agreements which they contend severed the wind rights from the ownership of the underlying property and transferred the ownership of those wind rights to the Plaintiff Intervenor.

The Plaintiffs filed suit in the Wabaunsee District Court, asking that the Board's decision be declared void and requesting damages under a number legal theories. Among the arguments made, the Plaintiffs stated the County's actions diminished the economic value of their wind rights in their own property, and therefore amounted to a taking of their property interest in violation of their Constitutional rights under the Fifth Amendment.

On October 30th, 2009 the Kansas Supreme Court issued a decision in favor of the Board for the majority of the issues presented, with a few notable exceptions. Among other things, the Supreme Court decided to table the issues of whether the Board's

amendment violated the Takings Clause of the United States Constitution.

These issues remained tabled until October 21, 2011, when the Court issued a ruling on, among other things, the Takings Clause arguments advanced by the Plaintiffs and Plaintiff Intervenors.

Essentially, the Court noted that in order to prevail on a takings claim a party must first establish that a vested interest exists in the property in question. "Vested interest" has been defined by the Court in the past as a right that "is not dependent on any future act, contingency or decision to make it more secure." Here, the Court found that no such vested interests exist, as all of the Plaintiffs' and Plaintiff Intervenors' interests are conditioned upon the Board's discretionary issuance of a CUP. Thus, because there were no vested property interests, there can be no taking under any of the various legal theories advanced by the parties.

How will further wind development be impacted now that the Kansas Supreme Court has ruled that, prior to all the removal of all contingencies or decisions, including permits, a county could prohibit all wind development without compensation to landowners or wind developers?

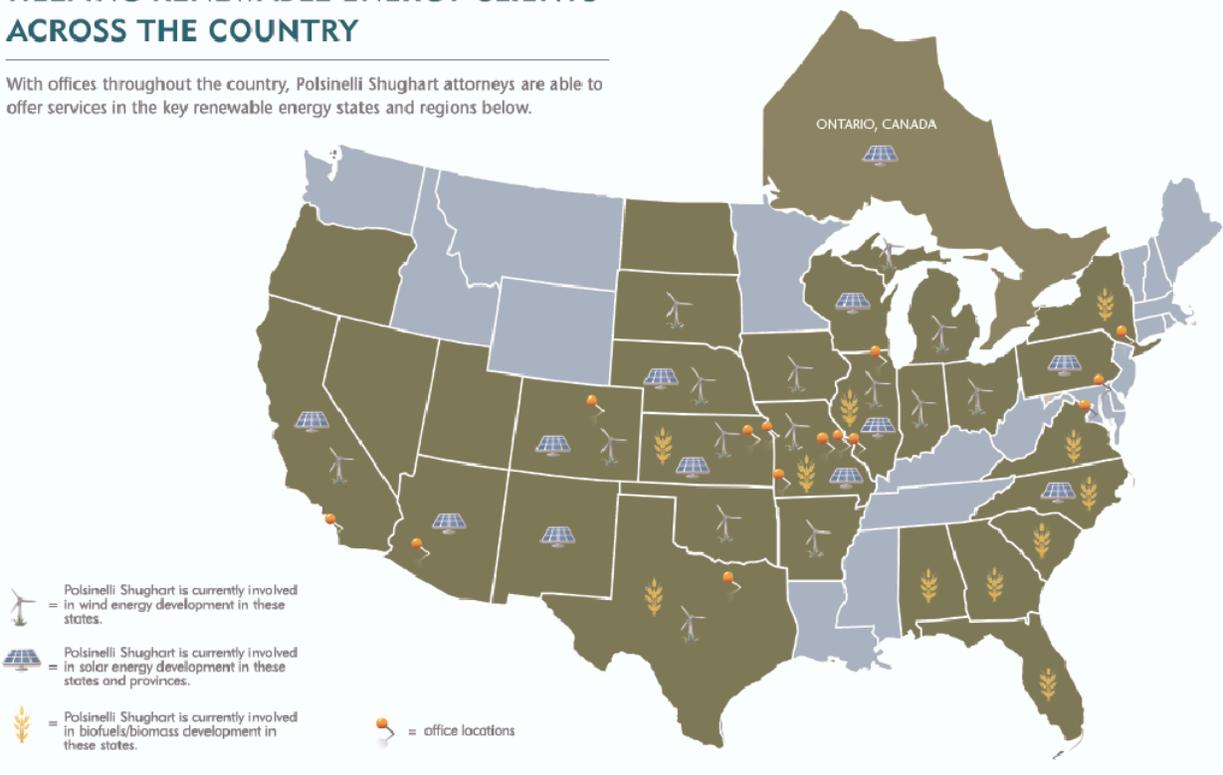
Regulatory Certainty is Vital

With the adoption of its RES and the ongoing development of a robust transmission grid, Kansas has made tremendous strides in capitalizing on its unique access to wind resources. In order to continue reaping the benefits of this excellent opportunity, it is vital that wind developers and project financiers feel confident that they can predict the regulatory scrutiny and treatment that a potential project might experience. Ultimately, the unprecedented growth and successes of the past few years notwithstanding, the future of Kansas' wind energy industry may well depend upon the state's ability to provide a stable, predictable regulatory environment for future projects.

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