

10-23-18  
Redline by  
JTC

**ROAD USE AGREEMENT**

STATE OF TEXAS )

COUNTY OF CLAY )

This Agreement for Road Use, Repair, and Improvements (this "Agreement") is entered into between Clay County, Texas (the "County") and Black Angus Wind, LLC (referred to herein as the "Owner") is effective as the date set forth below and is as follows:

Recitals:

A. Owner ~~has been developing~~ is attempting to develop a wind-powered electric generating facility in the County (the "Project").

B. In connection with the potential development, construction, operation, maintenance, and decommissioning of the Project, it will be necessary for Owner, its contractors and subcontractors, and each of their respective agents, employees, representatives, successors, assigns or designees (collectively, "Owner Parties") to: (i) transport heavy equipment and materials over designated haul routes located in the County, which may in certain cases be in excess of the design limits of such roads; (ii) transport personnel, equipment, and materials on such roads; and (iii) widen such roads and make certain modifications and improvements (both temporary and permanent) to such roads to permit such equipment and materials to pass (together, (i)-(iii) of the foregoing recital is "Road Usage").

C. To facilitate more efficient operations by the Owner in building the Project and to protect the public roadways and interests of the County, the parties agree that the Owner Parties may utilize County roads in accordance with this Agreement.

NOW, THEREFORE, in consideration of the premises and the consideration stated in the Agreements, the parties agree as follows:

1. **Road Usage of County Roads; Limitations.** Owner Parties, during the planning and construction phases of the Project, and thereafter during the operation and maintenance phase and decommissioning phase of the Project, until said Project is completely abandoned, may use Access Roads (as defined in Section 3 below) for access and egress to and from the Project subject to the terms of this Agreement. Owner will not use County roads other than the agreed upon Access Roads unless such other roadway is added to the list of Access Roads pursuant to Section 3 below.

2. **Upgrade of Access Roads.** Owner shall, at Owner's sole cost and expense, make improvements ("Improvements") to the Access Roads according to the standards set forth herein, and Improvements for a particular Access Road will be complete prior to any Road Usage of such Access Road. Improvements include, but are not limited to, the strengthening and widening of Access Roads, the strengthening and/or spanning existing culverts and

bridges thereon, and other improvements or other modifications reasonably necessary to accommodate increased traffic and heavy equipment and materials to be transported on the Access Roads. All Improvements by Owner shall be pre-approved by the Commissioner (the person identified in Section 13 below). Owner may conduct geo-technical and other preliminary construction analysis of Access Roads provided Owner promptly repairs any damage caused by such testing. Owner may construct driveways to adjoin County roads, including but not limited to Access Roads, in order to access non-County roads necessary for egress and ingress to the Project provided the location of such driveways is pre-approved by the Commissioner. The following standards shall apply to Improvements made by Owner: (i) strengthening of the roadbed shall consist of the placement of a uniform layer of 1 inch or 1 1/2 inch crushed limestone or other material specified by the Commissioner which shall be not less than 46 inches in depth and the same width as the existing roadbed, and (ii) placement of such paving materials shall not spill into ditches on either side of the roadway and all ditches shall be maintained during construction of the Project so that such ditches drain water from the roadway. Owner agrees that it will not conduct any Road Usage on a particular Access Road until such time as the Improvements made by Owner on such Access Road are approved by the Commissioner.

3. **Access Roads.** Access to the Project will be via the roads designated on the map attached as Exhibit A (the "Access Roads.") The Owner Parties may use the Access Roads between the hours of 6 a.m. and 10 p.m., seven (7) days a week, although the Owner may use the Access Roads during other times with the Commissioner's prior approval. Road Usage of the Access Roads will not be restricted by limitations or regulations of the County except as expressly provided in this Agreement, permitted by applicable law. Prior to commencement of construction of the Project, Owner, at its expense, will conduct an evaluation of the then-current condition of each Access Road (an "Initial Evaluation"), which shall be approved by the Commissioner pursuant to Section 8 below.

4. **Access Road Update.** From time to time, Owner may request that additional roads be included and/or roads are removed as Access Roads for purposes of this Agreement (an "Access Road Update Request") by (A) submitting the Access Road Update Request to the County in writing, accompanied by an updated Exhibit A showing such additional and/or removed roads, and (B) an Initial Evaluation with respect to the additional roads, if any, approved by the Commissioner. Upon Owner's submission of an Access Road Update Request, the Commissioner will consider, and act upon, such request and, if approved by the Commissioner, the additional roadways will be added to and/or roads removed from the list of Access Roads.

5. **Performance Security.**

- a. Except as otherwise agreed by the County, prior to the commencement of any Improvements, Owner agrees to provide the County with a performance bond by a good and sufficient surety or other form of security, in each case in a form reasonably acceptable to the County, in an amount equal to \$250,000 to secure the faithful performance of Owner's obligations as set forth in the Agreement (the "Performance Security"), during the construction of the Improvements. A corporate surety licensed to do business in the State of Texas shall be deemed acceptable by the County. If Owner is required to post security for Repairs in accordance with Sec. 5.b., such security shall meet the requirements for Performance Security set forth above,

although such Performance Security for Repairs will be in an amount equal to the estimated cost of such Repairs, in no case to exceed \$250,000.

- b. County will release the Performance Security for Improvements upon completion of construction of the Improvements and approval of same by the Commissioner, such approval not to be unreasonably withheld. In the event Owner engages in any Repairs (as defined in Sec. 10 below) which requires the transportation of heavy equipment, other than routine types of equipment that typically use such roads, across County roads during the term of this Agreement but after the Performance Security has been released, Owner agrees to post another performance bond or other acceptable security meeting the requirements of the previous Performance Security unless the County agrees that no bond or other security is required and the County agrees to release the Performance Security upon completion of any required repairs to the roads. County will release Performance Security for Repairs, if any, upon completion of such Repairs and approval of same by the Commissioner, such approval not to be unreasonably withheld.

6. **Signs: Notice to Contractors.** Owner shall place signage on any roads within the area of the Projects that are not an Access Road. Such signs shall state "No Wind Farm Access." Such signage will be placed at a location approved by the Commissioner. Such signage shall be removed upon completion of construction of the Project. In the event the temporary relocation of some existing road and/or highway signs is required, the County agrees to cooperate with the Owner in the identification and temporary relocation of such signs. The Owners will inform all contractors, sub-contractors and suppliers of the Project of the access route restrictions and terms of this Agreement.

7. **Dust.** Owner shall use commercially reasonable efforts to minimize the impact of airborne dust arising from the Projects and activities of the Owner Parties on adjacent properties. The Owner Parties will, at all times, comply with any applicable regulations of the Texas Commission on Environmental Quality with respect to dust.

8. **Current Conditions of Roads.** Prior to commencement of construction of the Project, Owner, at its expense, will conduct an evaluation of the then-current condition of each Access Roads (an "**Initial Evaluation**"). The Initial Evaluation will be submitted to the Commissioner for the Commissioner's approval prior to its use as a part of this Agreement. Once approved by the Commissioner, the Initial Evaluation of the Access Roads identified as of the effective date of this Agreement will be attached as Exhibit B to this Agreement and incorporated herein for all purposes.

9. **Liability for Damage to Roads.** If the Parties cannot agree to Repairs as set forth in Section 10(c) or Owner fails to make Repairs to the Access Roads in accordance with this Agreement within fourteen (14) days of a written demand that it do so from the County, the County shall have the right to make Repairs in a timely fashion, in accordance with the County's standard practices for road repairs and any specific needs of Owner that Owner would address if Owner were making the Repairs, and otherwise having due regard for safety, prevailing and predicted weather conditions, and the presence of emergency conditions. If the County makes Repairs in accordance with this Agreement, Owner agrees to reimburse the County for its reasonable and necessary costs in repairing such roads, except to the extent that the Repair is of

damage that results from a pre-existing condition that made or makes the Access Road or appurtenance inadequate for, or would cause it to fail under, normal use, would not be required under the terms of this Agreement to be performed by Owner. The County's cost for such repairs shall be determined using rates that are reasonably in accordance with standard regional construction pricing or as set forth by Texas Department of Transportation for equipment and personnel and the County's actual cost of materials. Owner agrees to pay the cost of such repairs within thirty (30) days of the date that Owner is billed by the County for such services by the County.

10. **Repair and Maintenance.**

- a. During any of Owner's activities, as described in Recital B above, Owner shall, during the construction of the Project, promptly grade and maintain all non-paved Access Roads in accordance with the terms of this Agreement which shall be considered part of the "Repairs" required of Owner pursuant to this Agreement.
- b. If Owner Parties cause damage to an Access Road beyond ordinary wear and tear, Owner shall be responsible for performing work, or causing the performance of work, on an Access Road or related appurtenance (including any bridge, culvert, or other fixture upon such Access Road) in order to repair damage beyond ordinary wear and tear, so as to restore such Access Road or related appurtenance to the condition it was in prior to such damage, as near as is reasonably practicable (such performance of work is referred to herein as "Repairs"). Repairs shall be conducted by the Owner through its employees, agents or contractors and at its sole expense. Owner shall not be responsible for, or required to repair, any damage that is not caused by an Owner Party. Ruts in a roadway caused by vehicles operated by Owner Parties or the transport of materials by Owner Parties to the Project shall not be considered reasonable wear and tear and shall be repaired by Owner. All Repairs shall be approved by the Commissioner.
- c. Owner shall notify the County of damage caused by the Owner Parties that it reasonably believes would require Repairs, and of any other damage noted by Owner, to the Access Roads and request authorization to conduct Repairs from the Commissioner. Owner shall provide the County with reasonable details as to the nature, scope, and schedule of Repairs to Access Roads that Owner desires to perform, and unless the proposed Repairs are not consistent with the type of work typically done on County roads in the vicinity of the roadway on which Repairs are to be conducted, the Parties shall agree upon the manner in which Owner may proceed with such Repairs.
- d. Prior to the commencement of Repairs, a representative for Owner and the Commissioner shall, in response to a request by either Party, meet to review the damage in question in relation to any Initial Evaluation or any more recent subsequent agreed upon evaluation, as applicable, and to discuss the nature, scope, and schedule of Repairs. The Parties shall rely upon the Initial Evaluation or any subsequent agreed upon evaluation, as applicable, as a benchmark by which to determine (i) the condition of Access Roads prior to commencement of construction of the Project and (ii) whether a Repair was required and performed in accordance with this Agreement.
- e. Repairs required of Owner required by this Agreement include the Repairs that are required as the result of any activity by Owner, its agents or representatives, including all activities defined in Recital B above.

11. **Reimbursement of Attorney's Fees.** Owner agrees to reimburse the County for its reasonable and necessary attorney's fees incurred in the negotiation and preparation of this Agreement in an amount not to exceed \$5,000.00. Owner agrees to pay such expenses to the County within thirty (30) days of the date it is billed for such expenses by the County.

12. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. This Agreement shall be binding upon the parties when a counterpart of this Agreement has been properly executed on behalf of each of the parties to this Agreement. A counterpart of this Agreement may be delivered by facsimile or electronic mail by any of the parties to any other party and the receiving party may rely on the receipt of such document so executed and delivered by facsimile or other electronic means as if the original had been received.

13. **Commissioner.** As used in this Agreement, the term "Commissioner" shall refer to the Clay County Commissioner in whose precinct a particular roadway or portion of a roadway which is subject to the terms of any portion of this Agreement is located.

14. **Binding Effect.** All covenants in this Agreement shall be binding upon all successors and assigns of Owner.

15. **Force Majeure.** No party will be in breach or liable for any delay or failure in its performance under this Agreement to the extent such performance is prevented or delayed due to a cause or event that is beyond the reasonable control, and without the fault or negligence, of the party claiming such delay or failure to perform, to the extent such cause or event prevents or delays performance of any obligation of such affected party (other than an obligation to pay money) (a "Force Majeure Event"); provided that the delay in performance will be of no greater scope and of no longer duration than is directly caused by the Force Majeure Event and the party whose performance is delayed or prevented will proceed with commercially reasonable efforts to overcome the events or circumstances preventing or delaying performance. Except when prevented by a Force Majeure Event, any requirement in this Agreement that Owner "promptly" perform an action shall be performed within 3 business days.

16. **Good and Workmanlike Manner.** Notwithstanding any other provision of this Agreement, all work performed by Owner hereunder shall be conducted in a good and workmanlike manner.

17. **Exhibits.** Exhibit B (the Initial Evaluation) once approved by the parties shall be attached to this Agreement and shall be incorporated herein for all purposes.

18. **Authority.** The County warrants and represents to Owner that this Agreement has been approved at a properly called meeting of the County Commissioners Court of Clay County, Texas at which a quorum of the Commissioners were present and which was preceded by proper notice as required by applicable law. The individual signing this Agreement on behalf of Owner warrants and represents to the County that he or she is duly authorized to sign this Agreement on behalf of Owner thereby binding Owner to all terms and conditions of this Agreement and that there is no other agreement or governing document of Owner that prevents the undersigned from executing this Agreement on behalf of Owner.

19. Commencement of Road Usage or Improvements/Termination of Agreement. Owner will not commence Road Usage or construction of any of the Improvements until the following conditions have been satisfied: (1) all funding for the Project has been committed, (2) work on construction of the Project is scheduled to begin within 90 days and (3) those facts are certified by Owner in a written notice to the Commissioner (the "Commencement Date"). If the Commencement Date does not occur prior to December 31, 2020, this Agreement shall terminate.

20. Approval of Agreement Not an Indorsement of the Project. The approval of this Agreement by the County shall not be construed as an indorsement of the Project. This Agreement is entered into by the County in an effort to make and enforce necessary rules for the maintenance of county roads for the benefit of its citizens and the general public, as required by Chapter 252 of the Texas Transportation Code.

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EXECUTED AND EFFECTIVE this \_\_\_\_\_, as of October 29, 2018.

CLAY COUNTY, TEXAS

By: \_\_\_\_\_  
Kenneth Liggett, County Judge

ATTEST:

\_\_\_\_\_  
Shasha Kelton, County Clerk

BLACK ANGUS WIND, LLC

By: \_\_\_\_\_  
Its authorized representative