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November 27, 2023

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via email: opinion.committee@oag.texas.gov

Dear General Paxton:

The Texas Real Estate Commission (the “Commission”) is the state agency responsible for the licensing and regulation of real estate professionals, including real estate brokers, sales agents, and easement or right-of-way agents. The Commission recently received a complaint alleging that an individual employed by a company hired to negotiate a lease for a wind farm development project was engaged in activity that required a Commission-issued license, but did not have one. This complaint was dismissed by the Commission based on lack of jurisdiction. Subsequently, questions have been raised about that dismissal. As a result, the Commission requests your opinion as to whether a person who negotiates a wind lease (*i.e.*, a lease in which a landowner leases the property for the development of a wind project) on behalf of another, for compensation, is required to hold a license issued by the Commission, either as a real estate broker or sales agent or an easement or right-of-way agent.

The Commission’s enabling legislation, otherwise known as The Real Estate License Act, can be found in Chapter 1101 of the Texas Occupations Code (the “Act”). According to the Act, a person must be licensed as a real estate broker or sales agent to, among other things, negotiate the sale or lease of real estate on behalf of another in exchange for compensation. Tex. Occ. Code §1101.002(1)(A) and (7). “Real estate” is further defined as “any interest in real

property, including a leasehold, located in or outside this state.”¹ Tex. Occ. Code §1101.002(5). A person must be licensed as an easement or right-of-way agent to sell, buy, lease, or transfer an easement or right-of-way for another in exchange for compensation, for use in connection with utility. Tex. Occ. Code §1101.002(3-a); §1101.501.

Section 1101.005 of the Act lists individuals and transaction types that are otherwise exempted from licensure requirements under the Act. This includes transactions involving the sale, lease, or transfer of a mineral or mining interest in real property. Tex. Occ. Code §1101.005(9)(A). Historically, the Commission has interpreted “mineral or mining interest” broadly to include other energy sources, like wind, within this exception.² Although some similarities exist, because of the plain language of this exemption and the lack of supportive case law, it seems that a person negotiating a wind lease as described herein *would* need to hold a license issued by the Commission.³

The Commission respectfully requests an opinion on this matter.

If you have any question, please contact the Commission’s General Counsel, Vanessa Burgess, at 512-936-3284 or vanessa.burgess@trec.texas.gov.

Sincerely,



R. Scott Kesner, Chair
Texas Real Estate Commission

cc: Chelsea Buchholtz, Executive Director, Texas Real Estate Commission
Vanessa Burgess, General Counsel, Texas Real Estate Commission

¹ Texas courts have yet to opine on whether wind rights are a separate property interest.

² Of note, this language predates the relatively recent increased utilization of alternative sources of energy, like wind.

³ The Commission is aware that the Texas Legislature recently passed SB 604, which amends Chapter 954, Occupations Code, by defining the “land services” provided by landmen in Texas, and expanding those services to subsume “other energy sources”, including wind. Tex. Occ. Code §954.001(1) and (3).