

# SOLUTIONS

NEWSLETTER | THIRD QUARTER 2007

## WIND POWER DEVELOPMENT IN RHODE ISLAND

Rising energy costs, concerns over global warming and insufficient supply of power to meet growing regional demands have increased the prospect for the development of wind power as a new, clean and renewable energy source in Rhode Island.

On April 20, 2007, the "RIWINDs Phase I: Wind Energy Siting Study" was released. This study was initiated by the Rhode Island Governor's Office to help promote the development of wind power for the benefit of citizens of Rhode Island. The goal of the RIWINDs program is to provide

enough wind-generated energy to meet at least 15% of the state's annualized average electric

The RIWINDs study evaluated the locations in Rhode Island, including offshore waters, in an effort to identify the spots most economically and environmentally capable of supporting the development of wind energy. It identified eleven potential sites: ten offshore and one onshore. Significantly, the study concluded that the cost of developing wind energy appears to be competitive with the projected cost of electricity in Rhode Island over the next 20 years.

**THE RIWINDS STUDY CONCLUDED THAT  
THE COST OF DEVELOPING WIND ENERGY  
APPEARS TO BE COMPETITIVE WITH  
THE PROJECTED COST OF ELECTRICITY.**

demands, or approximately 450 megawatts (MW) of wind energy capacity in production and use.

The RIWINDs Study outlined several remaining challenges that must be assessed as developers and investors explore

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## TAX CREDITS MAKE RHODE ISLAND A MOVIE MECCA

With the adoption of new legislation offering tax credits to television and movie companies, Rhode Island hopes to become a premier destination for the film and TV industry. This new legislation makes Rhode Island competitive with other states that have similar tax incentives, as well as with Canadian markets such as Vancouver, Montreal and Toronto, all of which offer similar rebates. Since the Motion Picture Production Tax Credit bill was signed into law in 2005 and amended in 2006, there has been an influx of major production companies filming in the Ocean State. Adler Pollock & Sheehan is fortunate to work with most of the major studios in analyzing amendments to the legislation and the certification and transfer of the tax credits.

Under the Rhode Island Motion Picture Production Tax Credit laws, a motion picture production company may

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# ATTORNEY SPOTLIGHT: SARAH T. DOWLING



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“I HAVE TRULY  
COME TO APPRECIATE  
THAT ADLER POLLOCK  
AND SHEEHAN IS A  
SINGLE COHESIVE  
UNIT...THIS PERMITS  
THE FIRM TO OFFER FULL  
AND SEAMLESS SERVICE  
TO OUR CLIENTS.”

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Sarah “Sally” Dowling has been a partner in the firm’s Corporate Department for thirty years. She has a multifaceted transactional practice in which she regularly advises privately held businesses and their shareholders on a variety of complex commercial matters. Her areas of specialization include health care and commercial finance.

Sally decided to attend law school a few years after graduating from Wellesley College and starting a family. She received her law degree from Northeastern University and an L.L.M. in taxation from Boston University Law School in 1982. Upon graduating from Northeastern in 1977, she took firm founder Bernie Pollock up on his offer of employment and has been with Adler Pollock & Sheehan ever since.

Sally’s early legal training involved a substantial amount of commercial financing work for the now defunct Hospital Trust as well as various other lenders, borrowers and letter-of-credit issuers in addition to business acquisitions, divestitures and financings.

Over time, Sally has also developed a substantial health care practice. Being a part of a prominent Rhode Island medical family provided her with a background and familiarity with the field of medicine, which has helped her advise and counsel individual providers and practice groups and facilities on a wide range of regulatory matters, practice management and practice transition. According to Sally, this aspect of her practice is not only the closest to home, but in many ways the most challenging. She notes that “the dramatic change in the health care regulatory climate and increasing complexity of each health care transaction is the biggest difference in my practice over time.”

She also spends a great deal of time counseling high-net-worth individuals and families and their privately held corporations and business entities in virtually every facet of law. “In the course of this work, I have truly come to appreciate that Adler Pollock and Sheehan is a single cohesive unit. At the drop of a hat, I can – and do – respond to a client’s call with a team of firm lawyers, each with a distinct expertise, be it tax, labor, litigation or real estate. This permits the firm to offer full and seamless service to our clients.”

Sally has served as head of the firm’s Corporate Department and on the Executive Committee. She remains heavily involved in civic and community affairs. From 1998 until 2003, Sally served as chair of the Rhode Island Board of Governors for Higher Education and has served in several other appointed positions, including chairing the Rhode Island Supreme Court Ethics Advisory Panel and the Criminal Justice Oversight Committee. Her longest-standing community interest is Providence’s Trinity Repertory Company. Although she is a former chairperson and trustee, she has been involved with Trinity Rep since prior to law school. She also served as vice chair of the Providence Charter Review Commission, chair of the Providence Salary Review Commission and a member of the Providence School Board Salary Review Commission. As a result of her extensive nonprofit work, Sally has often been called upon to advise nonprofit corporations on tax issues, the creation of endowments and the implementation of charitable-giving campaigns.



## WIND POWER DEVELOPMENT IN RHODE ISLAND *(continued from page 1)*

the feasibility of making wind generation development in Rhode Island a reality. For example, there is currently insufficient available electric transmission in place to bring the power from where it is produced (offshore) to where people actually need power (where the “load” exists) at their homes and businesses. The study also notes that investors will be loathe to invest in a capital-intensive project like a wind farm without guaranteed returns on investment, in the form of long-term power purchase contracts from buyer(s) of the energy. This is complicated by the fact that energy produced by wind farms is intermittent – meaning it is produced when the wind is blowing and not always when the power is needed.

Presently, government incentives, tax credits and required renewable energy portfolios are driving investment in wind energy. At the same time, developers and investors in wind projects face a host of challenges, such as tax issues, regulatory and permitting requirements, interconnection, and power purchase agreements and business structure issues.

**Tax Issues and Governmental Programs Affecting Wind Power Projects.** Investing in a wind power project triggers the opportunity to take advantage of numerous federal, state and/or local tax credits and incentives. To encourage renewable energy projects, the federal government allows a “production tax

credit” against federal income for electricity produced from wind energy. Federal tax laws also allow developers to deduct the initial capital costs of a project. Together, the value of these federal tax incentives alone can be substantial and may approach more than 60% of the revenue benefits available to projects to significantly offset the up-front costs associated with these capital intensive investments. Rhode Island also provides several state tax benefits, such as a Renewable Energy Sales Tax Exemption.

**Permitting and Regulatory Concerns.** Wind power projects raise many local land use and coastal management use issues similar to those raised by other commercial developments. At the same time, wind power projects raise unique challenges, depending on location. The permitting process will vary depending on whether the site requires new transmission facilities, the nature of land ownership, and the relative jurisdiction of various environmental and coastal agencies. As for offshore developments, the Coast Guard and the U.S. Minerals Management Service have established certain requirements focused on navigation issues. Environmental reviews are triggered when federal agencies are required to review the construction of projects on federally managed lands or waters with concerns such as impacts to birds caused by the spinning turbines. The project will need to examine whether to obtain authorizations from the

Federal Energy Regulatory Commission (FERC) as an exempt wholesale generator (exempting the project from extensive regulatory oversight) and for authorization to charge market-based rates, as allowed by the Energy Policy Act of 2005.

For state lands and state waters, the Department of Environmental Management and the Coastal Resources Management Council will exert jurisdiction and require certain regulatory approvals for the construction and operation of a wind power project and the State Energy Facility Siting Board has permitted authority over the construction of energy facilities in Rhode Island. Local zoning and permitting authorizations will also play a role if the project will impact municipal property. As seen with the Cape Winds project in Massachusetts, the permitting process can be controversial, depending on the level of local opposition. Developers and investors need to undertake a thorough assessment of the range of specific permits and government authorizations required, depending upon location.

**Transmission, Interconnection Arrangements and Power Purchase Agreements.** Developers and investors in wind energy projects must negotiate agreements to interconnect with the National Grid transmission system that supplies electricity to customers in Rhode Island. Typically, lenders will demand that these interconnection and transmission agreements be completed as a condition of

## TAX CREDITS MAKE RHODE ISLAND A MOVIE MECCA *(continued from page 1)*

receive tax credits worth 25% of the company's total state-certified production costs. All pre- and post-production costs associated with the motion picture, such as the costs related to editing or sound, are included in the total production budget, but the costs associated with promoting or marketing the motion picture are not. The tax credit is limited, however, to costs that relate to the filming and production activities occurring within the state of Rhode Island.

Before a company is eligible for the motion picture production tax credit, the Rhode Island Film and Television Office must determine that the motion picture qualifies for the credits pursuant to the statute and provide an initial and final state certification. For a motion picture to qualify for the tax credit, the production company must establish that the primary locations for filming the picture are in Rhode Island and that the production company responsible for producing the picture is formed under the laws of this state. The minimum production budget necessary to qualify for the credit is \$300,000.

The Rhode Island film tax credits are especially attractive to motion picture production companies because the credits are transferable to other persons or entities with Rhode Island state tax liability. A production company may transfer or sell any of its earned credits to another Rhode Island taxpayer. Unlike the credits offered by Illinois and New York, where individual taxpayers have difficulty accessing the state's tax incentives because of the statutory restrictions imposed upon the credit transfer, the Rhode Island credits can be applied against any Rhode Island corporate tax, bank tax, insurance company tax or personal income tax. Any unused credits may be carried over for three years, and any proceeds a production company receives through the credit transfer or sale are exempt from Rhode Island tax.



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financing the project. FERC also requires that these agreements meet certain standards and thresholds, which developers will need to take into consideration.

Project developers and investors must also identify an appropriate power purchase agreement (PPA) that best satisfies the financing goals of the project. PPAs will need to reflect how much power is contracted for delivery and the consequences for power not delivered. Certain security and guarantee arrangements will also need to be negotiated

in a PPA to account for responsibilities in the event of nonperformance. The price and terms of the PPA may also be dictated by FERC or the PUC, and the term of the PPA will typically need to be lengthy in order to produce enough revenues to cover the initial capital investments.

**Land Use and Environmental Reviews.** If private land is utilized for the wind power project, there is typically a wind power lease agreement that will establish the terms of the lease of land, the purposes for the use of the land, the amount and method of lease payments, insurance concerns and other

important provisions to be negotiated. Certain contract elements tend to be more contentious, such as how much property is required by the

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### DEVELOPERS AND INVESTORS IN WIND PROJECTS FACE A HOST OF CHALLENGES, SUCH AS TAX ISSUES, REGULATORY AND PERMITTING REQUIREMENTS, INTERCONNECTION, AND POWER PURCHASE AGREEMENTS AND BUSINESS STRUCTURE ISSUES.

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development for construction, maintenance and operation of the wind turbines. There may also be surveys and title issues to address that should be reviewed prior to formalizing the land use arrangement.

**Business Structuring and Corporate Concerns.** The owners will need to set up the proper corporate structure that will hold the important business assets associated with a

wind power project, such as the acquired or leased real property, permits, intellectual property, equipment, vehicles, and other tangible and intangible forms of assets. Important corporate decisions include what type of corporate structure to establish – whether a corporation, partnership, limited liability company is preferred – and whether a subsidiary will need to be formed. Decisions will need to be made regarding tax issues, and how tax credits will be applied, as well as how corporate losses and risks of liability for debts will be allocated. All these considerations will help determine the best corporate structure for a wind power project.



**Alan M. Shoer** is chair of the firm's Energy and Telecommunications Practice Group. He is also a member of the Corporate Law, Technology and Environmental Groups. He represents various energy, telecommunications and other public utility entities on a variety of issues emanating from the restructuring of the energy industry and the emergence of new competition in the telecommunications industry.

# TRADEMARK APPLICATIONS INCREASING WITH ELECTRONIC FILING



In January of this year, the U.S. Patent and Trademark Office (PTO) accepted its one-millionth online trademark application. Electronic submission of trademark applications has greatly eased the entire application process, enabling many more small businesses to take full advantage of their intellectual property rights. Ten years ago the PTO saw just 200,000 applications per year; in 2006 it received more than 350,000 applications.

In addition to filing trademark applications through its Web interface, the PTO now permits electronic filing of virtually all documents in many proceedings, including trademark oppositions – where a person

or company challenges the registration of a trademark by another. Using the electronic interface has kept fees low and decreases the baseline legal costs for individuals and companies dealing with the PTO. Indeed, the PTO maintains a separate schedule of fees with reduced rates for electronic filings. For example, a traditional paper application for trademark currently costs \$375, while the same application submitted electronically costs just \$325. The PTO further reduces the costs for individuals and small businesses (what the PTO calls “small entities”) by cutting the fees for filing, issuance and maintenance of trademarks in half.

The bottom line for all individuals and businesses is that the federal trademark system continues to provide effective protection of intellectual property rights at a very modest cost. Registering a trademark at the federal level constitutes notice to the world that the trademark is being used by the registrant, and this can be a critical tool in preventing others from trading on goodwill that has taken years to develop.



**Jeffrey K. Techentin** is a shareholder in the Litigation Group whose practice covers the full range of commercial litigation, focusing on intellectual property, complex contract and business torts claims, insurance coverage disputes and unfair competition litigation.

## U.S. SUPREME COURT UPHOLDS FAIR LABOR STANDARDS ACT EXEMPTION FOR HOME HEALTH CARE WORKERS

In a recent decision, the United States Supreme Court held that home health care workers who render “companionship services” to those who are elderly and infirm and who are employed by an employer or agency other than the family using their services are exempt from the mandatory minimum wage and maximum work hours provisions of the Fair Labor Standards Act of 1938 (FLSA). *Long Island Care at Home Ltd. v. Coke* concerned two conflicting regulations issued by the secretary of labor. The first regulation defines “domestic service employment” as “services of a household nature performed by an employee in or about a private home...of the person by whom he or she is employed.” The second regulation, known as the “third-party regulation,” exempts from the FLSA’s minimum wage and overtime requisites

companionship workers “who are employed by an employer or agency other than the family or household using their services.”

After noting the inconsistency in these two statutory provisions, the Court held that the third-party regulation controls. The Court reasoned that because “the sole purpose of the third-party regulation is to explain how the companionship services exemption applies to persons employed by third-party entities,” it was the more specific of the two provisions. The Court also expressed a reluctance to adopt an interpretation of the FLSA that would render the mandatory minimum wage and maximum work hours provisions inapplicable to a variety of other domestic servants.

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# U.S. SUPREME COURT UPHOLDS FAIR LABOR STANDARDS ACT EXEMPTION FOR HOME HEALTH CARE WORKERS *(continued from page 4)*

This case is significant for two reasons. First, it settles the inconsistencies in the two federal regulations and upholds the validity of both regulations. Second, it exempts from the FLSA companionship workers who are employed by third-party agencies rather than their elderly or infirm clients. Thus, under federal law, companionship workers, whether employed by agencies or the household of elderly or infirm clients, are not entitled to be compensated based on the minimum wage and overtime pay requirements of the FLSA.

The fallout from this decision has already begun in at least one jurisdiction. The Massachusetts secretary of labor and workforce development issued a press release reminding the public that notwithstanding this case, under Massachusetts state law, homecare workers and those who serve as “companions” remain qualified for overtime pay for hours worked in excess of forty (40) in a workweek. We expect that other states will address this issue in the near future.



**Miss Almeida** is a shareholder in the Litigation, Labor and Employment, and Health care groups. She serves as vice chairperson of the Rhode Island Health Services Council, the advisory board to the director of the R.I. Department of Health, which regulates, among other things, home health care businesses.

Adler Pollock & Sheehan’s *Solutions* is published as a service to our clients and friends. The articles provide general information and are not intended to provide legal advice.

Please address any comments or inquiries to

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