

Renewable Energy Projects: Negotiating Ancillary Agreements for the Real Estate Facility

Strategies for Structuring Project Contracts After Negotiating the Terms of the PPA

WEDNESDAY, DECEMBER 5, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific



Today's faculty features:
Kristen Thall Peters, Partner, **Cooper White & Cooper**, San Francisco



Gregory D. Chafee, Partner, **Thompson Hine**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-819-0113** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the word balloon button to send

Renewable Energy Facilities

- Wind
- Solar
- Geothermal
- Biomass
- Biofuels
- Municipal Waste/Landfills

Wind Projects

- Real estate issues with wind projects are often complex
- Large projects may involve thousands of acres and many landowners
- Documentation begins with options to secure ground leases to conduct appropriate feasibility studies
- Securing rights from neighboring landowners, access to roads and rights to transmission lines and substations

Geothermal Projects

- Ground leases may be required from numerous landowners and cover large areas
- Construction and operation of a central plant
- Projects are often developed in phases and involve shared facilities agreements between the project companies

Solar Projects

- Real estate issues are usually less complicated than other renewable energy projects
- Facilities can be in remote areas where issues of interference with existing and neighboring land uses can arise, including solar exposure
- Rooftop projects may be with ground lessors or landowners

Ancillary Agreements

- Land Contracts
- Permits

Land Contracts

- Purchase & Sale Agreement
- Site Lease
 - Real property interest
 - Ability to obtain title insurance/lender security
 - Leasehold Mortgage/Fixture Filings
- License
 - Personal property interest
- Sublease or sublicense
 - Often used for tax purposes
- Access, ROW and Easement Agreements
 - Typically non-exclusive
 - Supply
 - Operations
- Security Agreements

Key Terms

- Access
- Assignment
- Casualty and Liability
- Condemnation
- Default
- Environmental
- Indemnification
- Insurance
- Interconnection
- Maintenance and Performance
- Mineral Rights
- Operations
- Permits
- Rent
- Taxes

Supply

- Solar & Wind are Free
 - Easement to ensure non-interruption
- Lease or License
 - e.g. landfill gas, geothermal
- Purchase Agreement
 - e.g. biomass, digester gas

Operations

- Construction Agreements
- Operation Agreements
- Maintenance Agreements
- Interconnection Agreements
 - <http://www.ferc.gov/industries/electric/indus-act/gi/small-gen/agreement.doc>
- Transmission/Distribution Agreements

Leasehold vs. Fee Interest

- Rent versus Purchase Price
 - Deposit, if any, is less than down payment
 - Royalty rent paid once project is going
- Location may necessitate operation on others' land
- Ability to have full control of property

Supply Leases

Representations of Lessor

- Does lessor own the supply rights?
- Are there other similar rights granted to others?
- Are those rights exclusive?
- Is there litigation involving the rights?
- Is the lessor contemplating bankruptcy?
- Does lessor know of any legal prohibitions?

Supply Leases

- Effects of Grants of Mineral Rights
 - Do Mineral Rights include fuel source?
 - Is landfill gas the gas that was contemplated by a reservation of gas rights?
 - Is geothermal heat/steam a mineral that was contemplated by a reservation of mineral rights?
 - Resolution using Quit Claim deed

Supply Leases

- Representations of Lessee/Developer
 - Is developer a knowledgeable operator of this type of renewable energy project?
 - Will developer assume risk of practicability and possibility of performance?
 - Does developer own the technology rights?
 - Does developer have financing?

Supply Lease

- What are obligations regarding quality and quantity of fuel source?
 - Can agreement or certain obligations be terminated?
 - Obligations to ensure quality or quantity?
 - Force majeure

Supply Lease

- Contingencies/Timelines
 - Financing
 - Execution of PPA
 - Granting of permits
 - Granting of any consents that may be required
- What are remedies or rights if not met?

Facility Lease

- Secures the location of the generating facility
 - Solar and wind generating facilities typically require too much land to buy
 - Exclusive?
 - Landfill gas, biomass, digester gas, geothermal generating facilities are typically smaller and may be bought or leased depending on location

Lease vs. License

- Lease is real property interest
 - Can be secured by a leasehold mortgage
 - Eligible for leasehold title insurance
 - Notice of lease can be recorded
- License is personal property interest
 - Contractual right only
 - Can be secured by UCC lien

Sublease vs. Lease

- Unusual for a Supply Lease
- More typical for a Facility Lease
 - Large areas of land for wind and solar may be owned by federal government
 - Smaller facility may occupy/share existing structure to keep costs down
 - If sharing space, options are direct lease with facility sharing agreements or sublease

Access, ROW and Easements

- Real property vs. personal property
- Typically non-exclusive
- Supply
 - Non-interruptive easements for solar, wind
 - ROW for pipelines to transport gas, steam
- Operational
 - Access to leased or owned generating facility is critical regardless of type of fuel

Notices of Land Rights

- Constructive Notice to All Subsequently Recorded Lienholders/interest owners
- Can't be sold-out if junior lienholder forecloses
- Foreclosing lienholder takes property subject to senior recorded rights

Security

- Ensures payment
 - Rent
 - Royalty
 - Loan Payment
- Ensures performance
 - Indemnification Obligations
 - Insurance Obligations
 - Completion

Security Relationships

- Ensures obligations of:
 - Borrower to lender
 - Tenant to landlord
 - Licensee to licensor
 - Buyer to seller
 - Easement grantee to easement grantor

Types of Security

- Security Agreements
- Deeds of Trust and Mortgages
- UCC Liens
- Parent Guaranties
- Letters of Credit

Security Agreements

- Contract that governs the relationship between parties to a secured transaction
- Personal property in which a secured interest is owned is the “collateral”
- Collateral can only be personal property, not real property
 - Stock, membership or partnership interest
 - Licenses, contracts
 - Equipment

Security Agreements

- Governed by contract wording and Uniform Commercial Code aka UCC
 - What further permitted sales or assignments are allowed?
 - What notices must be given by the parties if certain actions are taken?
- Must be perfected by filing UCC lien

Mortgage or Deed of Trust

- Can be granted on any real property interest
 - Fee ownership
 - Leasehold interest
 - Easement/ROW
- Underlying interest must be recorded in Official Records in order to encumber

Guaranty

- Can be granted by any third party to encourage the entering into of a contract
 - Parent of single purpose entity
 - Shareholder of corporate entity
- What are limits of guaranty?
 - What if project is sold or expanded?
 - What if underlying agreements are changed?

Letter of Credit

- Issued by a financial institution
- Typically irrevocable for a period of time, but may be automatically renewed
- Form of demand typically attached

Permits

- Building Permits
- CUPs/LUPs
- Environmental
 - Special Disposal Requirements
 - Emissions
 - Generator/USTS

Building Permits

- Ministerial or Discretionary?
- What is the timeline that is involved?
 - Do timelines match those of leases, power purchase agreements and loan documents?
- Is public hearing required?
 - Necessary to gain support of community?

Conditional Use Permits

- Is collection system, facility, pipeline, etc. permitted in zoning?
- What conditions can you or will you have to live with?
- How long will it take to get them?
- Are the permits conditions of the leases, power purchase or loan agreements?

Environmental Permits

- Special Disposal Requirements
 - Condensate
- Emissions
 - Greenhouse Gases
 - Title V Air permits
- Generator/USTS

Negotiating Strategies

- What is the Market for Renewable Energy?
 - RPS and other Required Standards
 - Green Building/LEED Certification
 - Voluntarily Green
- Why does the lessor/seller/grantor want to contract with you?
 - Royalty
 - Recipient of Clean Energy
- Initial Stage of Development vs. Established Facility
- Who is the Off taker? And will Off taker help you?
 - IOU
 - Local power company
 - Private User

Renewable Energy Projects: Negotiating Ancillary Agreements for the Real Estate Facility

December 5, 2012

Kristen Thall Peters, Esquire

Cooper, White & Cooper LLP
201 California Street, 17th Floor
San Francisco, California 94111

(415) 433-1900

Email: KTPeters@cwclaw.com

Website: www.cwclaw.com

Gregory D. Chafee, Esquire

Thompson Hine, LLP
Two Alliance Center Center
3560 Lenox Road, Suite 1600
Atlanta, Georgia 30326

(404) 407-3642

Email: greg.chafee@thompsonhine.com

Website: www.thompsonhine.com