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

Strategies for Structuring Project Contracts Ancillary to the PPA

MONDAY, SEPTEMBER 14, 2020

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

Today's faculty features:

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

Kristen Thall Peters, Partner, **Cooper White & Cooper LLP**, San Francisco

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Renewable Energy Facilities

- Wind
- Solar
- Geothermal
- Biomass and Biofuels
- Municipal Waste and Landfill Gas
- Compressed Natural Gas (CNG)

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Wind

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

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Geothermal

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



Solar

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

Ancillary Agreements

- Land Contracts
- Permits, Authorizations and Approvals
- Security Agreements

Land Contracts

- Purchase and Sale Agreement
- Site Lease
 - Real property interest
 - Ability to obtain title insurance/lender security
- License
 - Personal property interest
 - Sublease or sublicense
 - Often used for tax purposes
- Access, Rights of Way and Easements
 - Typically non-exclusive
 - Supply
 - Operations

Key Terms and Conditions

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

Resource Supply

- Easements to ensure non-interruption
 - Solar
- Lease or License
 - Landfill gas
 - Geothermal
- Purchase Agreement
 - Biomass
 - Digester gas

Operations

- Operation and Maintenance (O&M) Agreements
- Interconnection Agreements
- Transmission and Distribution Agreements

Engineering, Procurement and Construction (EPC) Agreement

- Scope of Work/Project Schedule
- Compensation
- Terms of Payment
- Warranties
- Indemnification
- Insurance
- Termination and Cancellation
- Completion and Transfer
- Guarantees
- Dispute Resolution

Engineering, Procurement and Construction (EPC) Agreement

- “Turnkey” contracts are for delivery of a completed project from concept through installation
- Contractor is responsible for design, procurement, construction and commissioning of the project
- EPC contract typically includes performance standards that the completed project must meet

Interconnection

- Construction
- Distribution
 - Sending energy directly to utility
 - Sending energy via utility's system to 3P off taker
- Term and Renewals
- Point of Interconnection and Access
- Allocation of Responsibility
 - PUC guidelines/tariff
 - Disconnecting of Unit
- Invoicing and Payment
- Security
- Governing Law

Leasehold vs. Fee Interest

■ Rent versus Purchase

- Deposit if any is less than down payment
- Royalty rent paid once project is going

■ Location may necessitate operation on land owned by other parties

■ Ability to have full control of property

Supply Leases

■ Representations of Lessor

- Does lessor own the supply rights?
- Are there 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

■ Grants of Mineral Rights

- Do mineral rights include the fuel supply?
- Is landfill gas contemplated by a reservation of gas rights?
- Is geothermal heat/steam a mineral that was contemplated by a reservation of mineral rights?
- Resolution using quitclaim 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 Leases

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

Supply Leases

■ Contingencies and Timelines

- Financing
- Execution of PPA
- Granting of permits
- Granting of any consents that may be required

■ What are the remedies and default rights?

Facility Lease

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

Lease vs. License

■ Lease is a real property interest

- Can be secured by a leasehold mortgage
- Eligible for leasehold title insurance
- Notice of lease can be recorded

■ License is a personal property interest

- Contractual right only
- Can be secured by UCC lien

Sublease

- Sublease is unusual for a supply lease
- Sublease is typical for a facility lease
 - Large areas of land for wind and solar may be owned by federal, state or local governments
 - Small facility may occupy or share an existing structure to keep costs down
 - If sharing space, options are a direct lease with facility, sharing agreements or sublease

Access and Easements

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

Notices of Land Rights

- Constructive notice to all subsequently recorded lienholders and interest owners
- Cannot be sold out if junior lienholder forecloses
- Foreclosing lienholder takes property subject to senior recorded rights

Design, Permitting and Construction Risks

- Will equipment and/or technology fail?
- Is the site suitable for construction and operation of the facility?
- Will EPC contractor fail to complete construction?

Security

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

Security Relationships

■ Ensure 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
- UCC Liens
- Parent Guaranties
- Letters of Credit

Security Agreement

- 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 (UCC)
- What other permitted sales or assignments are allowed?
 - What notices must be given by the parties if certain actions are taken?
- Must be perfected by filing a UCC lien

Mortgage or Deed of Trust

- Can be granted on any real property interest
 - Fee ownership
 - Leasehold interest
 - Easement or right of way
- Underlying interest must be recorded in official records to encumber

Guaranty

- Can be granted by any third party to encourage entering into a contract
 - Parent of single purpose entity
 - Shareholder of corporate entity
- What are the limits of the guaranty?
 - What if a 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 included

Permits and Approvals

- Building Permits
- Conditional Use Permits (CUPs) and Limited Use Permits (LUPs)
- Environmental
 - Special disposal requirements
 - Emissions
 - Generator

Building Permits

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

Conditional Use Permits

- Is the collection system, facility, pipeline permitted in zoned area?
- What conditions can the project live with?
- How long will it take to get the permit?
- Are obtaining permits conditions of the lease, power purchase agreement or loan agreement?

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
- Why does the lessor/seller/grantor want to contract with you?
 - Royalty
 - Recipient of Clean Energy
- Initial Stage of Development vs. Established Facility
- What is the offtaker?
 - IOU
 - Local power company
 - Private user

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Kristen Thall Peters

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

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

(404) 407-3642

Email: greg.chafee@thompsonhine.com

Website: www.thompsonhine.com

