



**RENEWABLE ENERGY  
PROVISIONS IN POWER  
PURCHASE AGREEMENTS:  
A PRIMER**

The regulatory and legislative focus on promoting renewable energy, including through potential state and federal portfolio requirements, has made it increasingly important that systems take these issues into account in negotiating, renegotiating or litigating power purchase agreements (PPAs). From changing state renewable portfolio standards, to new requirements governing energy efficiency and demand side management, to looming national climate change legislation,<sup>1</sup> maintaining flexibility with respect to PPA renewable energy provisions is very important to your future. While the type of PPA being contemplated (and the form of contract used as a starting point)<sup>2</sup> will obviously affect the type of renewable energy provisions needed, we identify here some generally applicable concepts that should be kept in mind when working with these agreements.

**1. Defining the “Green Attributes” of Power**

Whether purchasing only renewable power, or a slice of system that includes or even *may* in the future include power produced from renewable energy resources, it is a crucial first step to ensure that all of the “green attributes” of that power purchase are fully defined in the contract. Generally, Green Attributes are those resulting from the environmentally-beneficial nature of the power being produced, including renewable energy credits and greenhouse gas emissions reductions. The definition should be phrased broadly, so as to try to capture attributes that may in the future be quantified under a regulatory regime, such as carbon offsets under federal cap and trade legislation. This type of anticipatory language is important because, as we have seen over the past decade,

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<sup>1</sup> Both the Obama and McCain campaigns have professed their commitment to some form of cap and trade regulation of carbon emissions, but the details are far from clear in either case. Moreover, the current economic crisis may force consideration of other alternatives (such as renewable portfolio standards), or of a cap and trade system that will have less “bite” in the initial years. Whatever the direction, however, it appears likely that the legislative work to hammer out the details will begin in earnest soon after the election results are known.

<sup>2</sup> For example, the Edison Electric Institute (EEI) and Western Systems Power Pool (WSPP) form contracts raise particular concerns.

previously-identified resource attributes can be acknowledged, treated separately, and associated with an independent payment in the years after a

PPA is executed. Green Attributes do not usually include tax benefits or other financial credits, such as the federal renewable energy production tax credit, which are traditionally reserved for the entity financing the construction of the renewable generation facility.

## **2. Title and Costs Related to Green Attributes**

As important as defining Green Attributes in a PPA is ensuring that they, and their associated costs, are fully and clearly allocated between the contracting parties. When PPAs include the sale (or the potential for the sale) of renewable power, parties must negotiate whether title to the Green Attributes of that power will remain with the seller or be passed to the buyer along with title to the power itself. Green Attributes represent a tangible financial benefit; if they do not pass to the buyer with the sale of the power, the contract price should reflect the loss of that financial benefit.<sup>3</sup> Alternatively, if the sale of renewable power does include the sale of the Green Attributes of that power, it is important to include provisions detailing how title to those Attributes will be transferred from seller to buyer. Not only should the point of title transfer be specified, but a general provision should require the seller to take whatever steps are necessary to convey clear title to Green Attributes that may be better defined in the future.

## **3. Compliance with Renewable Portfolio Standards**

If renewable power is purchased in order to comply with a state Renewable Portfolio Standard (RPS) already in effect, the contract should ensure the sale will meet the requirements of that statute, and that the seller will provide all information necessary to the buyer in order to ensure the sale “counts” under the established regulatory regime. However, it is also important to include provisions recognizing that the state RPS itself may change, or that it may be superseded by a federal RPS or repealed entirely and replaced with a different regulatory regime (such as carbon trading). Once it is clear that the buyer is paying for specific attributes, the Seller should be required to adapt the provision of data regarding the power sold under the contract to meet any new regulatory standards.

Occasionally, utilities will purchase power from a renewable facility that does not include the Green Attributes in the sale, for example, if the power without the

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<sup>3</sup> Federal Energy Regulatory Commission case law supports this concept: in *Golden Spread Electric Cooperative, Inc.*, 123 F.E.R.C. ¶ 61,047 (2008) a utility that passed the costs of renewable power to its customers through a fuel adjustment clause was also required to pass through the fuel clause credit for the proceeds from the sale of any renewable energy credits associated with that power.

Green Attributes is itself economically viable or the buying utility is not currently subject to a renewable purchase mandate. In these circumstances it is again important to recognize the changing regulatory landscape and, if possible, leave the option open to begin purchasing the Green Attributes of the power if an RPS – either state, federal or local – does become applicable to the buying utility.

#### **4. Anticipating Greenhouse Gas Reduction Programs**

While initiatives requiring the reduction of greenhouse gas emissions are either still in development (such as federal and state legislation) or in their infancy (such as the Northeast's Regional Greenhouse Gas Initiative), contracts for the purchase of power should attempt to anticipate the enactment of some type of Greenhouse Gas Reduction Program (GGRP) in the future. As noted above, legislation that would create a national carbon emissions cap and trade program has been introduced in the House and Senate, and both presidential candidates have made a commitment to some form of carbon emissions cap and trade regime. However, basic questions remain very much up in the air – for example, whether the generator or end-user of power would be responsible for the cost of emissions allowances. In this uncertain atmosphere, the first key steps to drafting a contract that anticipates a changed regulatory landscape are ensuring that, as discussed above, the Green Attributes of the power purchase are defined broadly enough to include any greenhouse gas emissions reductions or offsets and that the seller is obligated to timely provide information needed to meet the criteria that may be established under a GGRP.

#### **5. System Purchase Contracts**

Because system purchase agreements, including full requirements contracts, are typically supplied from the seller's entire portfolio of resources, system purchase contract buyers should make it clear that their purchases include a proportional amount of renewable energy, unless the buyer crafts the contract to provide adequately for its own supply of renewable power. For example, if the supplier's portfolio of resources include 5% renewable generation, the system purchase should be deemed to be sourced from 5% renewable generation facilities. In principle, the Green Attributes associated with that 5% renewable purchase should become the property of the buyer when title to the energy itself is transferred – after all, it is assumed the price paid includes *all* attributes of the purchased power. This, however, is often a sticking point in negotiations.

Full requirements contracts present additional considerations regarding both RPS and GGRP requirements because such agreements, by their nature as full requirements contracts, generally limit the buyer's ability to purchase power from suppliers other than the seller. Therefore, the full requirements seller must agree to either take responsibility for meeting the buyer's RPS or GGRP obligations (if

or when they become applicable) or permit the seller to go outside the full requirements PPA and purchase power to meet any such obligations. If the PPA places responsibility for meeting RPS or GGRP requirements on the seller, any penalties imposed on the buyer for failure to meet those obligations should also be the seller's responsibility. If the buyer takes on the obligation to meet RPS or GGRP requirements, power purchases made to comply with those obligations should displace power that would be purchased from the seller under the requirements PPA (for example, such purchases should be deducted from the contract's "monthly billing demand"). Blended approaches are also available in full requirements contracts, for example giving the seller a right of first refusal to supply the buyer with renewable power necessary to meet RPS or GGRP requirements. If the seller declines the right, the buyer then would be free to make purchases outside of the PPA as necessary to meet its statutory obligations taking into account the realities of such purchases, such as the need to build or buy power in quantities required by the lumpiness of generation design and the need to "grow into" a project.

## **6. Litigation Risks**

As utilities attempt to meet a variety of renewable portfolio standards and markets for tradeable Green Attributes emerge, ownership of Green Attributes is becoming an increasingly prominent aspect of litigation and settlement proceedings. One of the thornier issues that clients often face is determining how to adapt PPAs that pre-date the advent of Green Attributes to changing circumstances. Given the evolving benefits of renewable power supplies under various regulatory regimes and the potential costs associated with a carbon emissions cap and trade program, we expect continuing litigation over how to allocate the costs and benefits of Green Attributes, particularly as they relate to prior contractual arrangements. Alternatively, renegotiation of specific contractual provisions as part of a just and reasonable settlement is likely to be essential, and in any case the settlement must both fairly reflect cost allocation and anticipate potential future changes in legislation or policy related to GGRP or RPS.

## **7. Drafting the Contract**

Clearly, rapidly changing policy standards require the prudent buyer or seller to be prepared with flexible contract provisions that recognize and attempt to anticipate the potential for dramatic regulatory change. Knowledge of how particular contract problems have been solved by other similarly situated customers can be valuable, and an overall understanding of the direction of regulatory reform is vital. The Spiegel & McDiarmid renewable energy and climate change group would be pleased to assist with any questions or issues you may face.

**FOR FURTHER INFORMATION, PLEASE CONTACT:**

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