

Landowner Track

Land Leases

And

Power Purchase Agreements

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BRYAN CAVE

The logo for Bryan Cave consists of the words "BRYAN CAVE" in a bold, blue, sans-serif font. A thick, green, curved line sweeps across the bottom of the text, starting under "BRYAN" and ending under "CAVE".

Structures

1. Landowner leases land to developer; developer builds, owns and operates the facility; landowner buys the power from the facility from developer
2. Landowner leases land to developer; developer builds, owns and operates the facility; developer sells the power from the facility to a third party
3. Landowner hires developer to build the facility; landowner owns the facility; landowner sells the power from the facility to a third party

Land Leases from Landowner Perspective

1. Form - Lease (with early termination right) vs. Option to Lease vs. Easement. Factors:
 - a. Rights Granted– including under state law
 - b. Bankruptcy
 - c. Tax

Scope needs to cover (in addition to rights to main land):

 - a. Access easements for construction and maintenance; and
 - b. Unobstructed access to sun

Land Leases from Landowner Perspective

2. Term

- a. Development term – varies. Developer puts together needed land, environmental reports, check solar availability, get permits and other activities
- b. Construction term – varies
- c. Operation term (20-50 years) (often base term plus renewal options)

Land Leases from Landowner Perspective

3. Concurrent Use – What rights, if any, are retained by the landowner to use the land not used by the array?

Land Leases from Landowner Perspective

4. Rent

a. Fixed-

- Base rent for the use of the land
- Rent increases over time? Inflation?
- If landowner is buying the power from the facility, the base rent may be nominal and the price paid for the power lower

b. Percentage of revenue from sale of power if developer is selling power to a third party?

c. Who pays taxes?

d. Who pays increased taxes caused by the improvements?

Land Leases from Landowner Perspective

5. Tenant Credit Enhancement— what happens if your developer goes away or otherwise defaults
 - a. Financial wherewithal of tenant (i.e. the developer) to insure developer performance
 - b. Enhancement
 - i. Letter of credit
 - ii. Parent guaranty
 - iii. Cash escrow

Land Leases from Landowner Perspective

6. Allocation of Risks and Benefits Generally
 - Who bears what risks? Generally standard landlord/tenant issue (Reps, covenants, indemnity)
 - Allocation of Benefits—
 - Environmental Attributes
 - SREC's

Land Leases from Landowner Perspective

7. Environmental Liability – Brownfield – Allocation of Risk
 - a. Baseline environmental assessment
 - b. Known issue and know who caused issue?
 - c. Unknown issue or not know who caused the issue?
 - d. Developer covenants regarding not disturbing or making situation worse
 - e. Ongoing compliance obligations with remediation plan – whose responsibility?

Land Leases from Landowner Perspective

8. Decommissioning/Restoration

- Extent of work
- Who bears the cost?
- Bond required?

Land Leases from Landowner Perspective

9. Lender Provisions

- a. Consent to lien of developer's lender
- b. Notice/cure rights
- c. Estoppels
- d. SNDA's if landowner has placed a lien on the property

Land Leases from Landowner Perspective

10. Assignment Restrictions – Can the lessee assign the land lease?
 - a. Assignment limitations
(creditworthiness? competitor?)
 - b. Change of control?

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner
buys the power from the Developer)

1. Term
 - a. Length? 20 plus renewals? Long enough to amortize debt; not too long to violate tax rules
 - b. Tie to lease term
 - c. Landowner right of first offer to buy the facility at end of term at FMV?

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

2. Power Purchased

- a. All. Landowner buys all power generated by the facility whether or not landowner can use the power
- b. Net Metering. Landowner can often make arrangements with local utility that any power generated by the facility in excess of amount used by landowner and will be paid for by the local utility.

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

3. Price

- a. Negotiated – Developer construction costs and costs of capital
 - Who gets the SRECs?
- b. Compare to price otherwise paid by landowner for power
- c. Take into account rent to be paid for the land (FMV or discounted)
- d. Include tax analysis and tax equity if any

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

4. Guarantees— output and performance
 - a. Equipment Performance
 - b. Solar Shortfall – Insurance?
 - c. Liquidated Damages – both delay and performance

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

5. Risk Allocation – Who bears what risk :

– e.g., Change in Law?

Change in Taxes (rates and/or credits/deductions)?

Decommissioning?

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

6. Credit Enhancement– to insure performance by developer

- a. Financial wherewithal of developer
- b. Enhancement
 - i. Letter of credit
 - ii. Parent guaranty
 - iii Cash escrow

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and
Landowner buys the power from the Developer)

7. Lender Provisions

- a. Consent to lien
- b. Notice/cure rights
- c. Estoppels
- d. SNDA's from lenders to landowners?

Power Purchase Agreement from Buyer of Power Perspective

(Assumes Developer builds, owns, and operates the facility, and Landowner buys the power from the Developer)

8. Assignment – Can developer assign the PPA in connection with sale of facility?
 - a. Assignment limitations (creditworthiness? competitor?)
 - b. Change of control?

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and Landowner will sell the power to a third party – PPA between landowner as seller of power and third party as buyer of power)

[Note – If developer builds, owns and operates the facility and developer sells the power to a third party, landowner has little interest in the PPA, other than landowner should get paid a portion of the revenue as rent, and thus that situation is not addressed in this presentation regarding PPA's.]

1. Term

a. Length? (20 year with 5-year renewal?)

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and **Landowner will sell** the power **to a third party** – PPA between landowner as seller of power and third party as buyer of power)

2. Price

- a. Return on Investment
- b. Prices from competitor suppliers of power

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and **Landowner will sell** the power **to a third party** – PPA between landowner as seller of power and third party as buyer of power)

3. Guarantees– Landowner (Seller) wants to minimize risk
 - a. Equipment
 - Tie to EPC and Operations and Maintenance Agreement – try to push off risk to others
 - b. Solar shortfall – Insurance?
 - c. Liquidated Damages – both delay and performance

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and Landowner will sell the power to a third party – PPA between landowner as seller of power and third party as buyer of power)

4. Coordination with EPC

- Guarantees
- Term
- COD– commercial operation date
- Force majeure definition

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and **Landowner will sell** the power **to a third party** – PPA between landowner as seller of power and third party as buyer of power)

5. Credit Enhancement

- a. Financial wherewithal of the buyer of the power
- b. Enhancement
 - i. Letter of Credit
 - ii. Parent Guarantee
 - iii. Cash escrow

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and Landowner will sell the power to a third party – PPA between landowner as seller of power and third party as buyer of power)

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Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and **Landowner will sell** the power **to a third party** – PPA between landowner as seller of power and third party as buyer of power)

7. Assignment – Can the buyer of the power assign the PPA?
 - a. Assignment limitations (creditworthiness?, competitor?)
 - b. Change of control

Power Purchase Agreement from Seller of Power Perspective

(Assumes Landowner hires developer to build the solar facility, Landowner will own the facility, and **Landowner will sell** the power **to a third party** – PPA between landowner as seller of power and third party as buyer of power)

8. Utility Regulations – Landowner, as seller of power, would need to comply with Federal and State utility regulations

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