



2019
MID-YEAR
ENERGY FORUM

Tuesday, October 15, 2019 – Wednesday, October 16, 2019
Renaissance Downtown Hotel • Washington DC

Session A: Drafting and Negotiating a Power Purchase Agreement: A Skills Session

This concurrent session will feature a three-part approach to training lawyers how to negotiate a power purchase agreement (PPA). During the first twenty minutes of the session, an experienced practitioner will layout PPA fundamentals, including a review of definitions and key PPA terms. This will include an overview of fundamental motivations behind the PPA instrument, such as the customer's ability to avoid capital commitments and the developers ability to qualify for preferred tax treatment.

Second, an experienced practitioner will reveal the most current trends in PPAs by introducing and explaining the most hotly negotiated PPA terms.

The last forty minutes of the session will be reserved for a practicum involving a sample PPA and audience participation. Participants will be given a few moments to review the agreement and identify the key terms in response to a questionnaire. The panelists will answer the questions raised in the exercise through a mock negotiation of key provisions and a short question and answer session.

Speakers:

Eric Hurlocker, *Managing Member*, GreeneHurlocker
Florence Davis, *Partner*, Day Pitney
Holly Rachel Smith, Walmart Energy Team



Drafting and Negotiating a Power Purchase Agreement: A Skills Session

Florence Davis, Exelon Corporation

Eric Hurlocker, GreeneHurlocker

Holly Rachel Smith, Walmart Energy Team

Creighton-Elizabeth Boggs, GreeneHurlocker

Sophia Browning, Day Pitney, LLP

Hypothetical Deal: SmartMart Jumps into Solar

- SmartMart is a big box store that has leased real estate to build a new store
- Stellar Solar offers SmartMart's energy person a “great deal”
- SmartMart's energy person enters into a term sheet and then calls her attorney for kudos but finds out she may have missed a few things . . .



Stellar Solar's Counsel and Representative

Discuss the "Up"side of the Deal

- First time this customer has done a solar project. They signed the Term Sheet without any questions!
- They have good credit and a number of facilities we could access in the future.
 - If, for some reason, Steller can't get necessary permits or satisfy other conditions, Steller can simply walk away.
- Timing is great and project should qualify for full 30% ITC.
- The electricity rate is very attractive for Steller and escalates annually. Host customer is required to buy all of the output.
- Steller would still own the RECs.
- Steller has limited its liability for any breach and set LD's for host customer's liability in event of breach.
- Steller will have a lease to site, which should make its tax equity happy.

Introduction



Holly Rachel Smith
Walmart Energy
Team



Eric Hurlocker
GreeneHurlocker



Florence Davis
Exelon Corporation



Creighton-Elizabeth Boggs
GreeneHurlocker



Sophia Browning
Day Pitney, LLP

Interactive Discussion of Term Sheet

(select provisions)

Description of System	<p>The System would:</p> <ul style="list-style-type: none">• Be located at Purchaser’s new retail store, on a newly-constructed building and the parking lots adjacent to such facilities located on West Broad Street in Henrico, as set forth more specifically in Exhibit A hereto.• Have nameplate capacity of approximately 385 kW (DC), and expected first full year electricity production of 485 MWh• Be net-metered in accordance with the local electric distribution company’s net-metering and interconnection requirements
Term	<ul style="list-style-type: none">• The Term of the PPA would be twenty (20) years from the date that the System achieves commercial operation (the “Commercial Operation Date”).• The estimated Commercial Operation Date, assuming a start of installation on or about November 15, 2019, is expected to be February 28, 2020. The Commercial Operation Date will be no later than the opening of Purchaser’s business on West Broad Street in Henrico.• Upon the expiration of the PPA, Purchaser would have the option to:<ol style="list-style-type: none">1. Purchase the System for fair market value;2. Extend the Term of the PPA for one additional five-year renewal term using an energy rate will be calculated using the same escalation as in place for the initial Term of the PPA; or3. Require System Owner to remove the System, at System Owner’s cost and expense.

Interactive Discussion of Term Sheet

(select provisions)

Lease	<ul style="list-style-type: none">• In conjunction with the PPA, the Parties would enter into a lease (“Lease”) to run co-terminus with the PPA (or longer if necessary to account for any obligations that would continue beyond the Term of the PPA). Under the Lease, Purchaser would lease to System Owner the Sites on which the System would be located and provide necessary ingress and egress to/from each such Site.• Lease would include customary provisions preventing obstructions or infringement on access to direct sunlight.
Conditions Precedent	<ul style="list-style-type: none">• The PPA would include customary conditions precedent to be satisfied before System Owner would be obligated to commence installation of the System, including:<ul style="list-style-type: none">• Receipt of all necessary permits and authorizations• Confirmation of eligibility to receive RECs and Tax Credits (including the ITC)• Determination that sites are suitable for the System construction and operation• Establish financing arrangements on satisfactory terms• In the event that the Conditions Precedent are not satisfied within six (6) months following the execution of the PPA, either Party would be entitled to terminate the PPA, without further obligation to the other Party.

Interactive Discussion of Term Sheet

(select provisions)

Operations and Maintenance	<ul style="list-style-type: none">• Following the Commercial Operation Date, System Owner would be responsible for the operation and maintenance of the System, at no additional cost to Purchaser.• System Owner covenants to operate and maintain the System in accordance with prudent operating practice, but does not guaranty a minimum level of production.
Sale of Solar Energy and RECs, Tax Attributes	<ul style="list-style-type: none">• System Owner would sell and Purchaser would purchase all of the electricity produced by the System during the Term.• System Owner would retain ownership of all tax attributes and benefits associated with the ownership of the System and the generation of Solar Energy, including all environmental attributes (e.g. SRECs associated with the System's output).
Energy Rate	<ul style="list-style-type: none">• The price for electricity produced and delivered to Purchaser under the PPA would be \$0.10/kWh in the first year following the Commercial Operation Date and would increase by 2.0% each year thereafter (the "Energy Rate") during the initial 20-year term.

Interactive Discussion of Term Sheet

(select provisions)

Invoicing/Purchaser Data	<ul style="list-style-type: none">• System Owner would issue invoices monthly for the prior month's electricity deliveries; such invoices would include all meter data and the then-current Energy Rate.
Payment	<ul style="list-style-type: none">• Purchaser would pay all invoices within fifteen (15) days of receipt of the applicable invoice. The PPA would include customary provisions on disputing any portion of an invoice and resolving such dispute.
Early Termination Right	<ul style="list-style-type: none">• Purchaser would have the right, to be exercised (if at all) at designated times during the Term, e.g., the 8th and 12th anniversaries of the Commercial Operations Date, to purchase the System.• The Early Purchase Price would be the higher of (a) fair market value or (b) a fixed Buyout Value to be included in the PPA (as an exhibit).• If Purchaser exercises the Early Termination Right, System Owner would deliver title to the System, "as is, where is," and transfer any existing manufacturer warranties to Purchaser.

Interactive Discussion of Term Sheet

(select provisions)

Representations and Warranties	<ul style="list-style-type: none">• Each Party would provide customary warranties of authority and enforceability to enter into the PPA.• Each Party would also provide specific warranties that it will have and maintain all necessary authorizations to enter into and perform its obligations under the PPA, including obligations on net metering.
Indemnification	<ul style="list-style-type: none">• Each Party would indemnify the other for (a) breach of obligations under the PPA and (b) negligence or intentional misconduct. In addition, Purchaser would indemnify Seller for liabilities arising out of hazardous materials at any Site, except to the extent deposited or otherwise released by Seller.
Termination Rights for Default	<ul style="list-style-type: none">• Either Party would have customary rights to terminate the PPA upon the occurrence of a material breach by the other party, subject to a reasonable opportunity for cure.• In addition to such other rights and remedies available upon a default by Purchaser, System Owner would be entitled to (a) remove the System from the site, and (b) recover damages in an amount equal to the then-applicable Termination Value (plus any tax recapture costs, penalties and fines associated with such termination).

Interactive Discussion of Term Sheet

(select provisions)

Assignment	<ul style="list-style-type: none">• Purchaser would not be authorized to assign the PPA without the express written consent of System Owner, which consent would not be withheld unreasonably.• System Owner would be entitled to assign the PPA without Purchaser's consent (a) to an affiliate, or (b) to an entity purchasing substantially all of its assets.• System Owner would be entitled to assign the PPA without Purchaser's consent in connection with any financing of the System.
Financing	<ul style="list-style-type: none">• Seller would intend to obtain financing for the development of the System and to pledge the PPA and the System as collateral for such financing. The PPA would include customary Purchaser obligations to cooperate with any such financing and to provide any financing party with notice and cure rights in event of Seller's failure to perform.

Select PPA Provisions

Access Rights (Customer-Friendly)

Access Specifications. Purchaser hereby grants Provider and its approved designees (including Installer) a non-exclusive license to access the Premises during the Term, at reasonable times and upon reasonable advance written notice to Purchaser or as otherwise set forth in a schedule for performance approved in writing by Purchaser, and in accordance with all of the terms and conditions set forth in this Agreement, for the sole purpose of designing, constructing, installing, inspecting, operating, maintaining, repairing and removing the Project, and any other express purpose set forth in this Agreement, all in accordance with the provisions of this Agreement. All access rights shall be coordinated by Provider with Purchaser's other contractors performing any work or services at the Site. Access Rights with respect to the Site shall consist of the following:

- (i) Vehicular & Pedestrian Access. Reasonable vehicular and pedestrian access across those portions of the Site to the Premises as designated on Exhibit D solely for purposes of designing, constructing, installing, inspecting, operating, maintaining, repairing and removing the Project. In exercising such access, Provider shall, and shall cause its approved designees to, use commercially reasonable efforts to minimize any disruption to Purchaser's and Purchaser's separate contractors' activities occurring on the Site. Any access outside the areas designated on Exhibit D shall be subject to Purchaser's prior written approval, which approval shall be at Purchaser's sole discretion and which approval, if given, may limit additional access to those locations in order to minimize the disruption to Site aesthetics and Purchaser's activities occurring on the Site.
- (ii) Transmission Lines & Communication Cables. The right to locate transmission lines and communications cables across the Site as designated on Exhibit E. The location of any such transmission lines and communication cables outside the areas designated on Exhibit E shall be subject to Purchaser's prior written approval, which approval shall be at Purchaser's sole discretion, and shall be at locations that minimize any disruption to Purchaser's or its separate contractors' activities occurring at the Site or Premises. Provider acknowledges that the location of transmission lines and communication cables shall be, in part, within an electric utility services easement and a telecommunication easement (collectively, the "Easements"), both on lands owned by a third party, and Provider agrees that it shall comply with the terms and conditions of the Easements.
- (iii) Storage. Temporary storage space on the Site reasonably convenient to the Premises for storage of non-hazardous materials and tools used during construction and installation of the Project. Provider shall be responsible for providing and maintaining initial shelter, security and appropriate insurance for stored items during construction and installation, and Purchaser shall have no responsibility for loss of or damages to such items. The location and type of any storage facilities provided by Provider shall be subject to Purchaser's prior written approval and shall be designed and constructed to minimize any disruption to Site aesthetics and Purchaser's and Purchaser's separate contractors' activities occurring on the Site or Premises. Promptly following installation, Provider shall cause all temporary storage facilities to be dismantled and removed from the Premises, at Provider's sole cost and expense. In the event the temporary storage facilities are not promptly dismantled and removed from the Premises, Purchaser shall have the right, but not the obligation, on five (5) Business Days' prior notice, to dismantle and remove such facilities from the Premises and dispose of such facilities at Provider's sole cost and expense and without liability to Purchaser.
- (iv) Utilities. Water, drainage, electrical, and ethernet connections on the Premises for use by Provider in constructing, installing, inspecting, operating, maintaining, repairing or removing the Project.

Select PPA Provisions

Access Rights (Developer-Friendly)

Adequate Access for System Owner; Site Lease.

Pursuant to the terms and conditions of that certain Site Lease being entered into concurrently herewith, the Parties acknowledge and agree that System Owner is leasing the portion of Host Customer's Premises during the Construction Period and Service Term and as otherwise agreed to by the Parties for the sole purposes of installing, operating and maintaining the System and uses ancillary thereto. Subject to the terms of the Site Lease, System Owner will be entitled to the use of certain portions of the Premises as may be necessary or required by System Owner for the temporary storage, laydown and staging of tools, materials and equipment, the parking of construction crew vehicles and temporary construction trailers and facilities, and rigging reasonably necessary during the furnishing, installation, testing, commissioning and, if necessary during any period of repair or deconstruction, disassembly, decommissioning and removal of the System. Subject to the terms and conditions of the Site Lease, System Owner will be entitled to use agreed-upon portions of the Premises to otherwise exercise its rights and meet its obligations hereunder, including interconnection with the Site Electrical System. System Owner shall use reasonable efforts to minimize disruption to Host Customer's operations.

The terms of the Site Lease will also provide System Owner, together with its employees, representatives, agents and contractors adequate access to the Site, across or through the Premises and any surrounding or adjacent lands or buildings owned, leased or under the control of Host Customer at such locations to be chosen by Host Customer as may be reasonably required for (a) the installation, maintenance, repair and removal of the System; (b) utility lines, pipes and conduits for the transmission of electricity or otherwise serving the System; and (c) as may be otherwise reasonably required by System Owner in connection with the Agreement and the System, passage through which is necessary or convenient, to gain access to the System or the Site.

Select PPA Provisions

Change in Law (Customer-Friendly)

- “Change in Law” means that after the Effective Date, an Applicable Law is amended, modified, nullified, suspended, repealed, found unconstitutional or unlawful, or changed or affected in any material respect by any Applicable Law. Change in Law does not include changes in federal or state income tax laws. Change in Law does include material changes in the interpretation of an Applicable Law by any Governmental Authority.
- Within the net metering provision:
 - “If at any time during the Term there is a Change in Law or in the practice of the Local Electric Utility that imposes any additional costs on Purchaser, whether under a net metering or similar program, or otherwise as a result of the Project or Purchaser’s purchase of the electric energy produced by the Project, Provider agrees that such increased costs will be split equally between Purchaser and Provider for the remainder of the Term.”

Select PPA Provisions

Change in Law (Developer-Friendly)

Change in Law/Regulation.

In the event there is a Change in Law/Regulation that (a) imposes taxes on the ownership or operation of the System, (b) requires modifications to the System in excess of \$5,000, or (c) materially impacts the cost of operating and maintaining the System, then the Parties shall negotiate in good faith for a period of thirty (30) days in an attempt to amend this Agreement to address the Change in Law/Regulation.

If the Parties are unable to negotiate a mutually acceptable amendment to this Agreement within such 30-day negotiation period, then Host Customer shall have the option to purchase the System for the applicable Early Termination Payment, and upon such purchase this Agreement shall terminate. In the event Host Customer does not exercise its purchase option within thirty (30) days of the expiration of the negotiation period, then System Owner may, at its sole discretion, elect to terminate this Agreement and remove the System in accordance with Section [__].

Select PPA Provisions

Assignment & Financing (Customer-Friendly)

Assignment. Provider may not assign, sell, transfer or in any other way convey its rights, duties or obligations under this Agreement, either in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Purchaser may assign this Agreement at any time to any party that agrees to assume the obligations of Purchaser hereunder.

Financing. Subject to the delivery of not less than thirty (30) days' prior written notice to Purchaser, Provider may mortgage, pledge, grant security interests, or otherwise encumber its interests in this Agreement to any persons, or their agents, providing funding, financing or refinancing involving the Project. Provider shall provide in its notice the names of the proposed financing parties and a brief description of the terms and conditions of any proposed funding, financing or refinancing for the Project from each such financing party, including any proposed grant of any purchase options or security interest in the Project with respect to any such transactions. Purchaser shall execute applicable consents required by Provider's lender in form and substance satisfactory to Purchaser; provided, however, that Purchaser shall not be obligated to enter into any consent which shall in any way affect Purchaser's rights or obligations under this Agreement or encumbers Purchaser's property.

Select PPA Provisions

Assignment & Financing (Developer-Friendly)

Assignment; Financing.

(a) Assignment. Except as set forth in the next sentence, neither Party shall have the right to sell, transfer or assign this Agreement or its rights, duties or obligations hereunder, without the prior written consent of the other Party, which consent may not be unreasonably withheld, conditioned or delayed. System Owner may, without the prior written consent of Host Customer, assign, mortgage, pledge or otherwise directly or indirectly assign its interests in this Agreement to any Financing Party, any entity through which System Owner is obtaining financing from a Financing Party, any Affiliate of System Owner or any person succeeding to all or substantially all of the assets of System Owner (provided that System Owner shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of System Owner's obligations hereunder by the assignee); provided, that with respect to any assignment described above, the assignee either (A) is an entity that has the appropriate experience and ability to operate and maintain photovoltaic solar systems (an "Operator"); or (B) enters into a contract with an Operator, pursuant to which (1) such Operator shall be responsible for all System operation and maintenance under this Agreement and (2) System Owner shall have granted to Operator all other rights granted to System Owner herein necessary for operation and maintenance of the System (including access rights to the Site) as required by this Agreement. This Agreement shall be binding upon, inure to the benefit of and be enforceable by the Parties and their respective successors and assigns.

(b) Financing. Host Customer acknowledges that System Owner may be financing a part or all of its capital requirements for the installation of the System and its operation and maintenance with a Financing Party. System Owner may choose the manner of financing the System and the financing parties in System Owner's sole discretion. The transaction costs and repayment of any such System Owner financing shall be borne entirely by System Owner.

(i) System Owner may assign and transfer as security to any Financing Party all of the interest, rights and remedies of System Owner in, to and with respect to this Agreement or with respect to the System.

Select PPA Provisions

Assignment & Financing (Developer-Friendly)

Assignment; Financing. (CON'T)

(ii) In the event of a default by System Owner in the performance of any of its obligations under this Agreement, or upon the occurrence or non-occurrence of any event or condition under this Agreement which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable Host Customer to terminate or suspend its obligations or exercise any other right or remedy under this Agreement or under applicable law. If System Owner has provided written notice to Host Customer of the Financing Party's name and address, Host Customer will provide the Financing Party with notice of such occurrence at the same time it provides such notice to System Owner. Host Customer will afford the Financing Party or its designee the same cure period as provided to System Owner pursuant to this Agreement, it being understood that the cure period in respect of one event will cover the same days for System Owner and the Financing Party or its designee as long as each receives such written notice of default.

(iii) Upon any default by System Owner and the exercise of remedies by a Financing Party under any System Owner financing agreement, including any foreclosure on or taking of possession of the System by the Financing Party, whether by judicial proceeding or under any power of sale contained in any security agreement, or any conveyance from System Owner to the Financing Party (or any assignee of the Financing Party) in lieu thereof, and upon compliance by such Financing Party or designated operator with System Owner obligations in connection with its rights of cure as contained in such financing agreement, Host Customer shall accept such Financing Party or designated operator in place of System Owner for all purposes under or in connection with this Agreement for the remainder of the Term hereof.

(c) Host Customer's Cooperation in respect of System Owner Financing. To facilitate System Owner's financing, including System Owner's pledge or collateral assignment of its rights under this Agreement and/or grant of a security interest in the System, Host Customer agrees as follows:

(i) Host Customer acknowledges that it has been advised that part of the collateral securing financial accommodations of System Owner may be the granting of a first priority or purchase money security interest in the System to a financing party to be perfected by a filing under the Uniform Commercial Code, as enacted in the State of [_____], or by a fixture filing. Host Customer consents to such filings.

(ii) Host Customer shall provide all reasonable assistance to System Owner to help System Owner consummate financing of the System by any Financing Party. Host Customer shall use its best efforts to obtain any lien waivers, execution of commercial law forms and other documents as reasonably needed by System Owner or any Financing Party to secure such Financing Party's collateral position in the System or in System Owner's rights under this Agreement, all at System Owner's expense, including any attorneys' fees incurred for any requested assistance.

Other Provisions/Considerations

- For customer:
 - Subcontractor restrictions/approval
 - Bond or cash to secure removal costs
 - Maintenance of roof warranty
 - System performance
- For developer:
 - Creditworthiness of customer
 - Shut-down restrictions/LDs for roof repairs, etc.
 - Insolation

Questions?

