

RENEWABLE ENERGY NEWSLETTER



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Hunton & Williams' Energy Practice Publishes Several Chapters in 2018 *Getting the Deal Through – Renewable Energy* Inaugural Edition

Hunton & Williams LLP, in coordination with the Law Business Research Ltd., published several chapters in the inaugural edition of the book, *Getting the Deal Through: Renewable Energy* 2018. The guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to renewable energy. Topics covered include: public and private market participants, the legal and regulatory framework for renewable energy projects, incentives that encourage market growth,

foreign investment opportunities and utility-scale projects. Eric Pogue, co-chair of the renewable energy and clean power practice served as contributing editor of the guide.

Hunton & Williams' global energy and infrastructure lawyers prepared several chapters in the guide, including the introduction, which provided a global overview of the legal and regulatory issues that practitioners face in the renewable energy space, authored by Washington, DC partner [Eric Pogue](#). Other team members who authored chapters include [Jeff Schroeder](#) (United States), [Laura Jones](#) (United States), [Mike Klaus](#) (United States) and Ryan Ketchum (Ethiopia and Nepal). [Brian Zimmet](#) and [Tauna Szymanski](#) also contributed to the United States' chapter.

A downloadable PDF of Hunton & Williams' chapters is available [here](#).

Battery Storage: Legislative Updates and Financing Considerations

Mike Klaus

The continued expansion of battery storage is supported by State-level legislation designed to improve grid flexibility, particularly in California. In order to finance battery storage projects, sponsors may be able to include the projects within portfolios of solar projects or contribute the assets to existing tax equity partnerships.

State Legislative Support

At the end of September 2017, California passed SB 338, which requires California's utilities to develop plans to meet a larger portion of their peak energy demand through renewable resources. Given that many utilities have excess solar supply in the middle of the day, the new law encourages utilities to pair solar supply with storage so that the mid-day supply could be stored and then used later in the day when electricity demand is the highest. By causing utilities to use solar energy during peak times, California would be able to increase the aggregate percentage of electricity that is procured from renewable sources. The new California requirement is a lighter version of the "clean peak standard" proposed in Arizona in 2016. Similar to a "renewable portfolio standard" or RPS (which establishes the minimum percentage of aggregate electricity that must be procured from renewable sources), a clean peak standard would establish the minimum percentage of electricity that must be procured from renewable sources *during peak times* (i.e., between 4 p.m. and 8 p.m.).

SB 338 builds off previous legislative support for energy storage in California, including AB 2514, which was passed in 2010 and requires California's three largest utilities to procure 1.3 GW of storage capacity by 2020.

With utilities implementing these and other initiatives, combined with falling battery costs, there has been a sharp increase in utility scale energy storage installations in the United States over the past two years. According to GTM Research reports, 231 MW of new energy storage capacity was installed in 2016 and an additional 295 MW of new storage capacity was installed in 2017, and the market is projected to grow by 9 times over the next five years, with 2,535 MW of new storage capacity projected to be installed



in 2022. Based on a survey of utilities conducted by Smart Electric Power Alliance (SEPA), 31 utilities nationwide deployed their first energy storage project in 2016, and 76% of utilities are planning or considering procuring energy storage.

Financing Considerations

As the declining cost of lithium-ion energy storage batteries improves financeability of battery storage projects, issues that continue to create financing challenges include the relatively small size of energy storage projects, a lack of operating history of the technology, and, in the case of solar + storage systems, recapture risk associated with the investment tax credit (ITC). With respect to solar + storage systems, investments in the costs of storage systems are eligible for the investment tax credit if the battery is at least 75%-charged by a solar facility for each of the first five years. Where a storage system could be charged by sources other than a solar facility, the ability of a project to satisfy the 75%-charge requirement depends on, among other things, the project owner's ability to control charging and dispatch in relation to the utility company's dispatch and suspension rights under the energy storage agreement. In addition to detailed technical diligence, investors may require specific covenants or indemnities to address the specific recapture rules that apply to energy storage property.

Where a system is not financeable on a standalone basis, sponsors may be able to (a) include a battery storage system in the financing of a portfolio of solar projects or (b) contribute the ITC-eligible storage assets into existing tax equity partnerships in order to accelerate the "flip date" and the sponsor's purchase option over other operating assets.

The Outlook on Community Choice Aggregation

Mike Klaus and Margaret Yi

Under state-level community choice programs, municipalities or groups of municipalities (known as community choice aggregators or “CCAs”) may elect to procure electricity for customers within their areas, while partnering with the local utility company for transmission, distribution and billing services. The aim of CCAs is typically to purchase electricity that is cleaner, and often less expensive, than the electricity that is sold by local utility companies. These programs are rapidly transforming the energy markets in California and other parts of the United States, and electricity from renewable energy projects is increasingly being sold under power purchase agreements with CCAs rather than with traditional investor owned utilities.

In California alone, over one million customers have transitioned from purchasing electricity from utility companies to purchasing electricity from CCAs, and up to 60% of the electric load is expected to be served by CCAs or direct access providers by 2020. Seven states have legislation authorizing CCA programs: California, Illinois, Massachusetts, New Jersey, Ohio, Rhode Island, and New York.

For financial institutions providing loans or equity investments for renewable energy projects, new issues arise in evaluating the credit and regulatory risks associated with a power purchase agreement with a CCA. Meanwhile, as a utility’s electricity customer base declines when customers buy electricity from CCAs, state public utility commissions (PUCs) are striving to ensure that utility companies are properly compensated by departing electricity customers for past investments in energy projects or transmission infrastructure.

CCAs in California

CCAs in California were enabled by Assembly Bill 117 in 2002. The first CCA, MCE Clean Energy (MCE), launched in 2010.

The California Public Utilities Commission (CPUC) presides over CCAs, but in a more limited capacity than its jurisdiction over investor owned utility companies. Consumers in a CCA’s area of service are automatically enrolled, but can opt out of the program.

The CPUC also sets the Power Charge Indifference Adjustment (PCIA), known as an “exit fee.” Utility companies

impose the PCIA on consumers who depart for a CCA, with the goal of ensuring that consumers that continue to buy electricity from the utility company are not adversely affected if the utility company expended funds to build a power project or enter into a power purchase agreement to deliver electricity to its customers, but loses those customers to a CCA. On June 29, 2017, in response to the growth of CCAs and the risk that sunk costs of utility companies are not being properly allocated between continuing and departing electricity customers, the CPUC announced that it is considering alternatives to the amount of the PCIA. The expansion and stability of CCAs depends heavily on a low PCIA.

California CCAs have weathered other legislative challenges. Proposition 16 was an unsuccessful ballot measure introduced in 2010 that would have required a two-thirds supermajority voter approval before local governments could use public funds or issue bonds to establish CCAs. In 2014, AB 2145 would have converted the opt-out feature of CCAs into an opt-in, but was defeated.

More recently, in December 2017, the CPUC issued proposed Resolution E-4907 that would implement a new registration process for new or expanding CCAs for the purpose of coordinating compliance by utilities and CCAs with CPUC resource adequacy requirements. The proposal is scheduled to be voted on at the CPUC’s February 8, 2018 meeting, and if passed, could cause delays in the launch of prospective or expanding CCAs, as it would require CCAs to file implementation plans a full year before the CCA can service new customers.

CCAs in New York

In 2016, New York became the latest state to approve CCAs as part of its Reforming the Energy Vision initiative to encourage greater use of clean energy sources. CCAs in New York are approved and governed by the New York State Public Service Commission and also operate on an opt-out basis.

Before authorizing CCAs statewide, New York approved a pilot program, Westchester Smart Power. Westchester awarded a \$150 million contract to ConEdison Solutions in early 2016 to provide electricity for 90,000 residential and small business customers.

The New York legislature has continued to demonstrate support for CCAs. For instance, it rejected an attempt to convert the program into an opt-in process, which would

dramatically reduce a CCA's customer base. It also allowed CCA programs to be phased in rather than implemented citywide at once, which would make CCAs more feasible in densely populated areas.

Issues for Project Financings

For parties that finance projects that have power purchase agreements with CCAs, new factors to consider include the creditworthiness of the offtaker and the risk that CCA customers will opt out of the program.

With respect to credit risk, CCAs generally do not have credit ratings, and few CCAs have a long track record of buying electricity. To improve credit profiles, certain CCAs are building reserves from cash flows or establishing lockbox accounts so that PPA payments to project companies are paid out of the CCA's revenues collected from customers

prior to the CCA's payment of general operating expenses. Although opt out rates have been low for customers in CCA areas, there is a risk that if the PCIA or other fees on CCA customers increase through regulatory changes, some electricity customers (particularly large industrial customers) could opt to leave the CCA and switch to buying lower cost electricity from the local utility. These risks could be mitigated when projects with power purchase agreements with CCAs are financed on a portfolio basis, along with projects with utility or corporate offtakers.

While projects with CCA offtakers raise new diligence and credit issues for lenders and investors, a large share of the next wave of renewable energy projects that are developed and financed, especially in California, will have CCA offtakers.

Hunton & Williams' Renewable Energy Newsletter is prepared quarterly to provide general information about selected clean power developments and issues for attorneys at Hunton & Williams LLP, and is provided to clients and friends of Hunton & Williams LLP. It is not intended to provide legal advice or legal opinions and must not be relied on as such.

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