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Real Estate and Title Basics for Renewable Energy Projects

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Introduction

This session provides a high-level overview of real estate matters for the development of wind and solar energy projects, from the perspective of outside real estate counsel. Ultimately, the goal is to help developers secure sufficient real estate rights to finance, construct, operate, and sell the project.

Real estate is a critical component of the overall project. Due to the sizable nature of renewable energy projects, particularly wind energy projects, a substantial amount of time and resources are required to secure the necessary real estate rights, review title and survey work, and address issues. For example, a utility-scale wind project may require hundreds of landowner agreements, each encumbering one or more parcels of land. Since real estate issues could delay project development or jeopardize project operations, the lender and buyer will require title insurance coverage and will conduct extensive due diligence.

Real estate law and practices vary from state to state, and real estate needs vary from project to project. This presentation provides general information, and certain portions may not be applicable to all jurisdictions or projects.

1. Timelines and Milestones

Depending on the parties, the transaction structure, and other factors, the project timeline and milestones will vary from project to project. With that in mind, here are some typical key phases for project development, from the real estate perspective:

- a. Land Campaign / Landowner Negotiations
- b. Title and Survey Review / Curatives
- c. Project Contracting – Purchase Agreement, Financing Agreement
- d. Notice to Proceed and Other Contractual Milestones
- e. Closings – Financing, Sale of Project

2. Site Control

In the early stages of development, the project developer will begin efforts to achieve site control. “Site control” refers to securing the necessary real estate rights to construct and operate the project. For wind and solar projects, site control is generally achieved by means of voluntary real estate rights, including lease and easement agreements with landowners, generally along with a relatively few number of fee title acquisitions.

At the beginning of the land campaign, the developer will prepare a template landowner lease or easement agreement. Typically, this agreement will provide broad rights to construct all types of project facilities, and will allow for such facilities to be sited at any location on the landowner’s property. This will allow the greatest flexibility down the

road, when it comes time to actually plan out the specific facility locations, and adjust as needed. See Section 3 for a discussion of key terms in landowner agreements.

Ideally, the project developer will sign up a significant cluster of landowner agreements in the target project area. The developer will start identifying potential parcels for project substations, the operations and maintenance (O&M) building, and the point of interconnection. The project will commonly buy the land for these key infrastructure items, rather than utilizing leased land. The project may enter into option agreements or purchase agreements in order to acquire such property. The project will also identify an area for a laydown yard, that the construction team can use as its operations base and for equipment storage. The project can utilize a lease agreement in order to secure rights for the temporary laydown yard area. Real estate counsel can help prepare and negotiate documents for the fee title acquisitions and laydown yard agreement, and flag issues that could potentially arise later in the project.

When securing site control, contiguity and flexibility are essential. The volume of leased land is useful only to the extent that it is contiguous, since the turbines and solar panels will need to connect to the substation and grid via electrical collection and transmission lines. In addition to the primary template lease or easement agreement, the developer may also use Collection Easements or Transmission Easements as tools to achieve contiguity, particularly if certain landowners are willing to host electrical lines but do not want to host wind turbines or solar panels.

Flexibility is important because certain landowner agreements may turn out to be unusable for the project. Upon receipt and review of title commitments, the developer may encounter title issues that can't be resolved, or are cost-prohibitive. For a couple examples, there may be liens against the property for substantial debts that cannot be subordinated, or the landowner may have previously granted an exclusive wind easement to another wind developer. In both cases, the lien holder and third-party wind developer have senior rights that could hinder development, if not addressed. For another potential pitfall, perhaps the original landowner sells their property prior to construction of the project, and the new landowner is unwilling to cooperate; although the new landowner is subject to the terms of the previously recorded wind lease, it could still be problematic if the new landowner is unwilling to sign curatives or a required lease amendment. The more land that is signed up, the easier it will be to navigate issues that will inevitably arise over the course of project development.

During the land campaign, the project developer will also consider other siting constraints such as setback requirements, crossings, and efficient layout design. There will be various wind turbine setbacks, that will prohibit construction of turbines too close to residences, property lines, and other features. Typically, the setback requirements are more burdensome with respect to landowners that have not signed a project agreement. In some cases, project developers may sign up "Neighbor Agreements" with otherwise non-participating landowners; under a Neighbor Agreement, the landowner will not host

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