

Renewable Energy 2020

Contributing editor
Eric Pogue
Hunton Andrews Kurth LLP



Leaders in Renewable Energy and Clean Power



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Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

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Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

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Renewable Energy

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Contributing editor**Eric Pogue**

Hunton Andrews Kurth LLP

Lexology Getting The Deal Through is delighted to publish the third edition of *Renewable Energy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Eric Pogue of Hunton Andrews Kurth LLP, for his continued assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

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Global overview

Eric Pogue and Mike Klaus

Hunton Andrews Kurth LLP

We are excited to introduce this updated and expanded third volume of *Renewable Energy*.

As will become apparent from a review of the country-specific discussions, renewable energy law continues to evolve in many different directions around the world. Although each jurisdiction is unique, common themes continue to emerge with respect to the legal issues that practitioners face in this space.

One major recent theme in the renewable energy industry, particularly in the United States, is that newly constructed renewable energy projects are often generating revenue under contracts other than power purchase agreements (PPAs) with utilities. Under the traditional model for project finance, a special purpose entity that owns an energy project (a project company) sells electricity under a long-term PPA with a regulated utility that has a monopoly over retail electricity sales in its service territory. Although financing parties generally continue to require a long-term contract that covers the sale of electricity at a fixed price, as a result of new legislation and new demand for renewable energy from corporations and communities, the revenue contract is taking new forms, such as:

Corporate procurement

Many of the largest companies have committed to procuring all of their power from renewable energy. The RE100 initiative keeps an updated list, which at the time of writing identified more than 175 companies that have committed to this 100 per cent goal (see <http://there100.org>). These include many of the largest and most influential companies in the world, such as Facebook, Diageo, Goldman Sachs, Nestlé, General Motors, among others. Two power purchase models that have emerged for these companies are:

- PPAs for onsite generation. In certain markets, a corporation may enter into a PPA with a project company that constructs and owns an onsite energy project (such as a rooftop solar project), and the corporation purchases electricity from the project company under the PPA to meet a portion of its electricity needs at the particular site. Many states have enacted 'net metering' legislation, which allows a utility customer to sell to the utility any electricity produced by an onsite solar project that exceeds the customer's needs at any time (such as electricity generated during a weekend or another time that the customer does not need all of the electricity that is generated) and receive a credit on its electricity bill from the utility. Under such programmes, the customer pays a net electricity price to the utility, where the value of electricity sold to the utility is subtracted from the value of electricity purchased from the utility. In states with such programmes, the PPA usually requires the corporation to pay to the project company a fixed price for all electricity generated by the project, and then corporation transfers any excess energy to the utility under applicable net metering programmes.
- Hedges or 'virtual PPAs'. For projects that are located offsite, one structure that is being implemented in certain markets is that

(i) the project company sells electricity generated by the project into the wholesale market at a floating market price at the grid node; (ii) the corporation purchases electricity for its own needs from the utility at the floating market price; and (iii) the project company and the corporation enter into a hedge agreement, under which the corporation pays to the project company a fixed price per unit of electricity produced by the project, and the project company pays to the corporation the market price at a designated trading hub (or a net settlement payment is paid by one party to the other). Such structures are often referred to as 'virtual' or 'synthetic' PPAs because the arrangement achieves the same result as a PPA – the project company receives a fixed rate for electricity generated by the project and the corporation pays a fixed rate for such electricity over a long term. In addition to supporting the development of new projects by entering into virtual PPAs that make the projects financeable, companies that use large amounts of electricity enter into hedges in order to lock in power prices over 10 to 25 years rather than rely on sometimes volatile market prices from their local utility.

Community solar

Under community solar programmes, which are spreading through the United States, multiple customers participate in a net metering pool and purchase net metering credits from a renewable energy project. State legislation for these programmes typically provides that (i) a renewable energy project delivers electricity into the utility company's grid; (ii) the utility company's commercial or residential electricity customers may purchase, and the project company may sell, net metering credits associated with a percentage of a project's electricity production; and (iii) the customers may apply the net metering credits as an offset against their electricity bill with the utility company. These programmes thus extend the availability of net metering to customers that do not have an onsite project to meet their electricity needs. Key legal issues that arise for project developers and financing parties for these projects include the risk of a change in law, such as a change in the value of the net metering credits or caps on the capacity of projects that are eligible under a specific programme, and rights of a project company to replace customers that default on their obligations to pay for net metering credits.

Community choice aggregation

In California, which represents about 40 per cent of the US solar market, electricity from energy projects is increasingly being purchased by municipalities or groups of municipalities, known as community choice aggregators (CCAs), which may elect to procure electricity for customers within their areas from project companies, 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. A CCA's customers generally have the option

to opt out of the programme and revert to purchasing electricity from the local utility company. For project developers and financing parties, one key risk related to these programs is that a change in law or an increase in CCA customer fees may cause customers to opt out of the programme, which could cause the CCA to have insufficient customer revenue in order to continue to make payments to project companies under PPAs between the CCA and project companies. About 60 per cent of electricity load in California is expected to be provided by CCAs by 2020. Seven other states have enacted legislation to allow CCAs, and several other states are considering CCA legislation.

These non-traditional forms of offtake contracts raise new issues for lawyers to evaluate with their clients, such as understanding the laws that enable these new forms of offtake contracts and structuring protections against the risk of a change in law after the offtake contract has been executed. At the same time, lawyers in this market frequently need to interface with organisations or governmental entities that are new to the market, and may need assistance with legal issues that are specific to their participation in the market, including securities reporting considerations or energy regulatory matters.

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