



KEY CONTRACT TERMS IN M&A TRANSACTIONS AND PROJECT DEVELOPMENT

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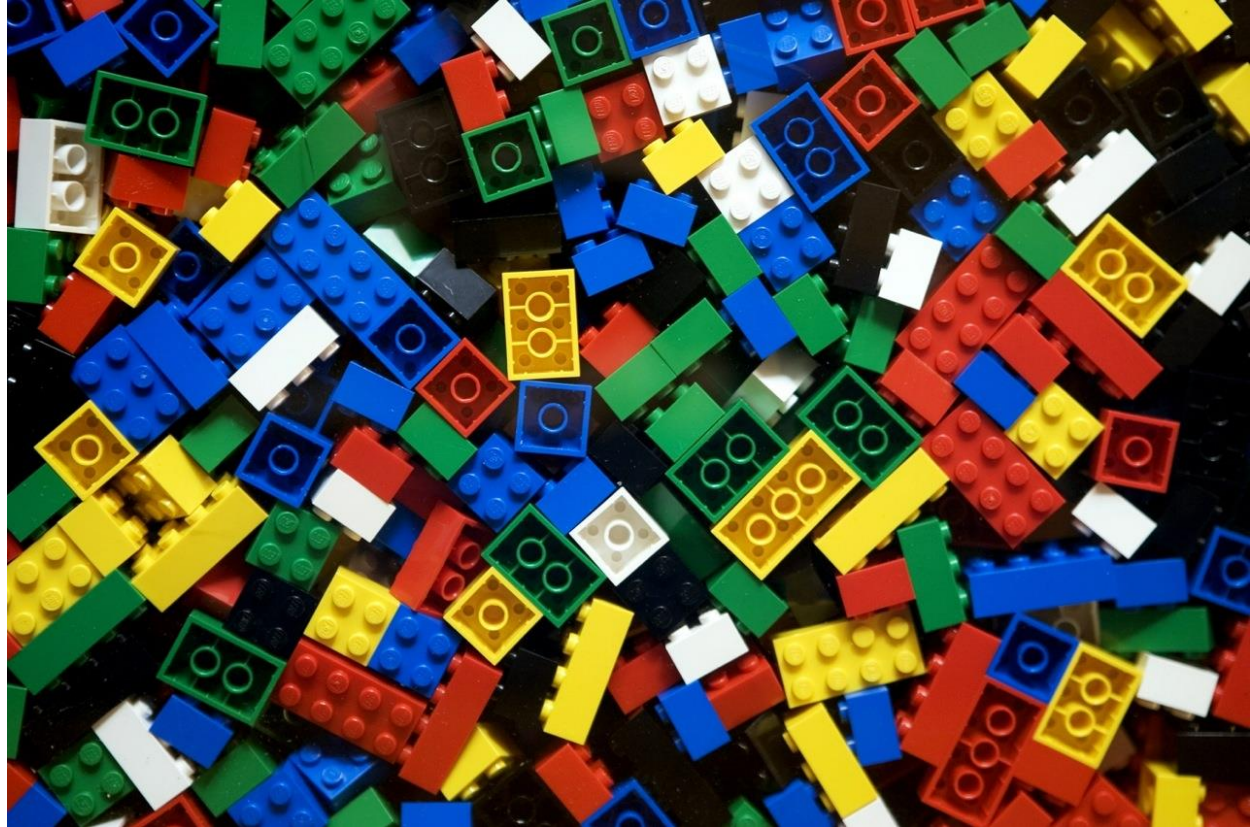


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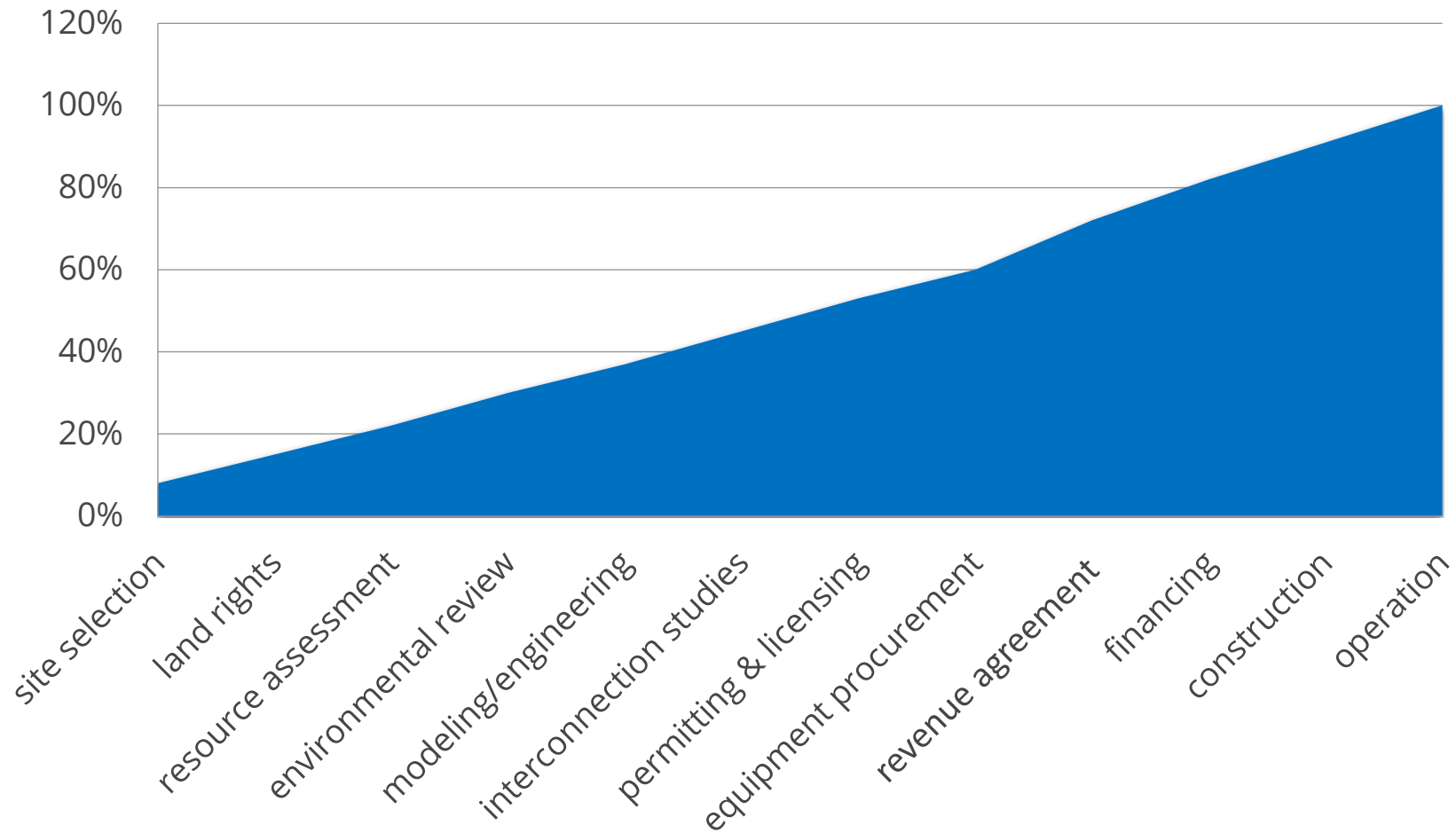


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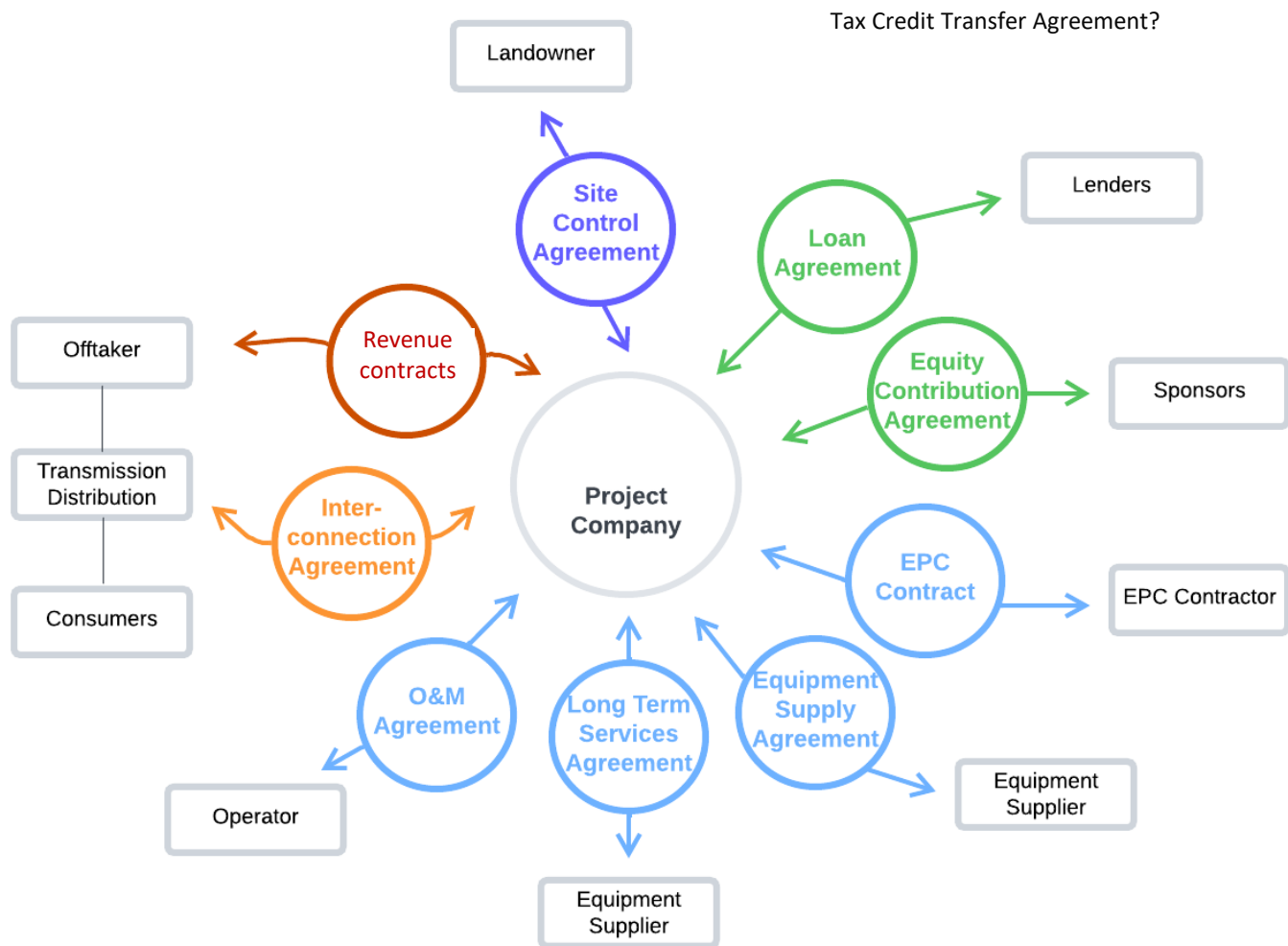
FINANCEABLE PROJECT?



VALUE CREATION DURING DEVELOPMENT CYCLE



PROJECT STRUCTURE AND KEY CONTRACTS





BACK TO FINANCEABILITY....

PROJECT FINANCE – Generally:

- Structured financing to fund the cost of a project
- Requires special purpose project entity
- Non-recourse (or limited recourse) to sponsors
 - Lender security in project assets and contracts; repayment from project revenues
- Dependent on comprehensive evaluation of project risks



PROJECT DEVELOPMENT AND FINANCE



SITE

Are all **long-term property rights** acquired?



RESOURCES

Is the resource data **sufficient**, and is the resource **sufficient**?



ENVIRONMENTAL

Are all regulatory and environmental approvals in effect at an **acceptable cost**?



REGULATORY REGIME

Is the regulatory regime **stable** and **determinable**?

PROJECT DEVELOPMENT AND FINANCE



TECHNOLOGY

Has the equipment been **proven**?



COMPLETION

Will the project be built **on time** and **on budget**?



REVENUE

Will the project generate determinable revenues **sufficient** to pay debt?
Is there a **creditworthy** offtaker?



MARKET RISK

Is sale to the market feasible?



FORCE MAJEURE

If there is a **force majeure** affecting construction/operation, are there **sufficient reserves** of insurance?

PROJECT DEVELOPMENT AND FINANCE



POLITICAL STABILITY

Is the prevailing government regime **stable enough** to justify investment?



MANAGEMENT

Is the project company **adequately managed**?



OPERATION

Is a creditworthy party willing to operate at a **determinable cost**?



LEGAL SYSTEM

Can claims be **enforced**?



PROJECT FINANCE – ULTIMATELY:

- The lenders require **sufficient certainty** about the project's success potential to make a credit decision to fund a company where cash flows will not commence until some future date
- Facility must be able to function profitably as an **independent, stand-alone business**
- Technology is proven on a **commercial** scale
- The risks are allocated to major stakeholders who are best situated to **mitigate** such risks over time
- **Creditworthiness** can be enhanced via contracts with creditworthy participants



CONTRACT BASICS

Contracts **SUPPORT THE FINANCING** and **ALLOCATE RISKS** from the project company to other project participants

Each contract defines:

- The **relationships** between the parties
- The **extent of the obligations** of the parties and **allocation of risks**
- **Credit support**

As a whole, project contracts set the “commercial deal” and are integrated



CONTRACT BASICS

Drafting MATTERS

- Clear language
- Complete language
- Internally consistent
- “Consistent” across project contracts



CONTRACT BASICS

Internally Consistent

- Order of priority
 - Body of the agreement versus exhibits/appendix
- Importance of the exhibits
 - Examples: scope of services/division of responsibility; technical specification; operating parameters; payment schedule; warranties; performance guarantees
 - Coordination of review among the commercial, technical, operations and legal teams



CONTRACT BASICS

“Consistent” across project contracts

- Development/Construction Milestones
- Liquidated Damages/Liability Caps
- Cure Periods
- Testing
- Change in Law/Force Majeure
- Operations Review/Supervision
- Warranties/Performance Guarantees

IMPORTANCE OF CONTRACT INTEGRATION



M&A – PRIMARY STRUCTURES

Company Purchase	Asset Purchase
Assume all known and unknown liabilities <ul style="list-style-type: none">• Environmental• Employee Benefits• Past operations	Assume only specified liabilities
Assignment restrictions not triggered; only change of control	Consent to assignment may be required
Capital gains treatment for Seller, but Buyer may not receive step up basis in assets unless can be treated as sale of assets	May be taxed as ordinary income for Seller, but Buyer allowed to step-up the basis in the assets
May trigger Securities Laws	



M&A – DUE DILIGENCE

- Types – Financial, Technical, and Legal
- Project level diligence
 - Key project agreements (real property, offtake, GIA, supply, long-term service, shared facilities, etc.
 - Is third party consent required? Who confirms?
 - Environmental matters
 - Permitting
 - Title work, including mineral interests
 - Title to assets and no liens (UCC searches)
 - No litigation
 - Financial model assumptions
 - Approvals – HSR, CFIUS, regulatory, etc.
 - Many more....
- Seller diligence – can Seller stand behind reps after closing?



M&A – AGREEMENT CONSIDERATIONS

Development Stage Project:

- Often small up front closing payment
- Success payments upon achievement of development milestones
 - Should be clear to avoid disputes
 - Buyer discretion?
- Often includes a holdback or setoff right
- Indemnities may be tied to purchase price actually paid (increases over time)
- Seller may provide post-closing development services
- Seller buyback right?
- Buyer transfer restrictions until milestone payments made?
- Non-compete restriction on Seller?



M&A – AGREEMENT CONSIDERATIONS

- Reps and Warranties – allocate risk
 - Scope and breadth vary
 - Consider which party is in best position to bear risk
 - Knowledge qualifiers – actual or after due inquiry?
 - Materiality (plus materiality scrap?)
 - Begun construction
 - Sufficiency of assets
 - 10(b)(5) rep?

“No representation or warranty by Seller in this Agreement and no statement contained in the Disclosure Schedules to this Agreement or any certificate or other document furnished or to be furnished to Buyer pursuant to this Agreement contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.”



M&A – AGREEMENT CONSIDERATIONS

- If staggered signing and closing:
 - Closing Conditions
 - Third party consents and estoppels
 - Phase I ESA
 - Interim Seller covenants
 - Exclusivity
 - Seller ability to update disclosure schedules
 - Termination rights and triggers?
- Consider possibility of phases
- Replacement of credit support



M&A – AGREEMENT CONSIDERATIONS

Indemnification – what’s market?

- Survival periods
- Liability caps – apply to only non-fundamental reps or all obligations?
- Deductibles or baskets (tipping?)
- Materiality Scraps
- Sandbagging
 - I.e., Can a Buyer sue Seller for breach if Buyer “knew” about the breach prior to closing?



BUILD TRANSFER AGREEMENTS

- Utility desire to rate base assets or use direct pay
- Hybrid – Asset Purchase and EPC
- Development/Construction risk on Project Developer
 - Can be long period
- Closing and transfer date – often mechanical completion
 - or Develop Transfer structure if NTP?
- Technology risk passes to buyer
- Commission regulatory approval
- Purchase Price – progress payments or at closing?
- Change orders and cost overruns
- Seller warranties or EPC pass through
- Requires design, layout and scope of work



SWITCHING TO REVENUE CONTRACTS

\$

(but many key terms are applicable to
other project contract diligence)



REVENUE CONTRACTS – GENERAL TERMS

Conditions Precedent to Effectiveness:

- Regulatory Approvals
- Interconnection/Transmission
- Board/Internal Approvals
- Permits
- Others?



REVENUE CONTRACTS – GENERAL TERMS

Development Milestones:

- Site control
- Interconnection
- Permits and regulatory approvals
- Major project contracts
- Equipment Delivery
- Financing
- Construction

Commercial Operation Milestone

Buyer right to monitor? Progress reports?



REVENUE CONTRACTS – GENERAL TERMS

Definition of Commercial Operation:

- Installed Equipment:
 - Interconnected, integrated, and synchronized with transmission system
 - Facility completed in all material respects (required MWs?)
 - Testing of equipment – BESS is capable of charging, storing, and discharging minimum MWhs
 - Metering and communications devices functional
- Credit Support
- Certificates of Insurance
- Site Control and Permits



REVENUE CONTRACTS – GENERAL TERMS

Delay and Shortfall Damages:

- Delay damages
 - \$/MW/day of delayed capacity
 - Cap damages?
 - Termination right after cap is reached?
- Capacity buydown (achieve COD < 100%)
 - \$/MW of uninstalled capacity
 - Adjustments to guarantees for Delivery Term



REVENUE CONTRACTS – GENERAL TERMS

Permissible Delays

- Force Majeure
 - Beyond reasonable control of affected party
 - No fault or negligence of the affected party
 - Reasonably foreseen?
- Regulatory Approvals
- Interconnection
- Permits
- Others?



REVENUE CONTRACTS – GENERAL TERMS

Force Majeure typically includes:



ACTS OF GOD

- Weather events (floods, lighting, hurricanes, tornadoes)
- Epidemics and pandemics



CERTAIN ACTION OF THIRD PARTIES

Sabotage, vandalism beyond Seller's control, explosion, general strikes or labor stoppages



POLITICAL INSTABILITY

War, terrorism, riots, blockades, embargoes, insurrection



GOVERNMENTAL ACTION

Delay or inaction by any Governmental Entity if filing timely made

REVENUE CONTRACTS – GENERAL TERMS

Force Majeure may exclude:



CHANGE IN PROJECT ECONOMICS

- Any increases in cost of performance or economic hardships
- A Party's ability to sell/purchase the Product at a higher/lower price
- Changes in financial condition



FAILURES OF THIRD PARTIES

Failure of third parties to provide goods and services, unless such failure was itself caused by an event of Force Majeure



CHANGES IN LAW

Changes in law that affect the value or cost of the Product or Project



EQUIPMENT FAILURE

Facility or related equipment failure, unless such failure was itself caused by an event of Force Majeure



REVENUE CONTRACTS – GENERAL TERMS

Additional Force Majeure Considerations:

- Fire risk?
- Payment reduction/suspension if impacts BESS?
- Reporting requirements
- Termination right if extended
- Casualty and repair obligations



REVENUE CONTRACTS – GENERAL TERMS

BESS Performance Requirements and Tests:

- Capacity
 - Value reset?
 - Degradation permitted?
 - Overbuild, augmentation, or replacement permitted?
- Availability
- Round Trip Efficiency
- Minimum/Maximum charging and discharging cycles, ramp rates and response times



REVENUE CONTRACTS – GENERAL TERMS

BESS Performance Testing:

- Detailed Test Parameters
- Conditions to COD
- Frequency after COD (On demand? Retests permitted?)
- Who provides energy needed
- Credit or Excused Events
 - Force Majeure
 - Buyer Default
 - Major equipment failures / serial defects
- Cure Rights or Repair Obligations
- LDs (or payment adjusters)
- Events of Default



REVENUE CONTRACTS – GENERAL TERMS

Seller Security:

- Amount – Development vs. Delivery Term
 - Solar + Storage – combined or separate requirements?
- Posting deadlines
- Replenishment Requirements
- Qualifying Forms
- Qualified Issuer/Guarantor
- Requirements for Draw

Buyer Security?



REVENUE CONTRACTS – GENERAL TERMS

“Change of Law”:

- Compliance Cost Cap?
- No modifications to Facility required?
- Seller and/or Buyer right to terminate (without default) when costs reach certain amount
- Who receives new or additional products during Term?



REVENUE CONTRACTS – GENERAL TERMS

Events of Default:

- Seller “Events of Default”
 - Standard non-performance
 - Failure to achieve COD by outside date
 - Availability/Capacity/Performance below minimum level
 - Security default
- Buyer “Events of Default”
- Cure Periods
- Additional Lender Cure Rights



REVENUE CONTRACTS – GENERAL TERMS

Consequences of Event of Default:

- Suspension
- Terminate PPA
- Direct actual damages – typically measured by “cover”
 - Actual replacement contract required?
- Damage limits
 - No consequential damages
 - Liability cap?
- Step-In Rights?
- Specific Performance
- Sole remedies?
- Duty to mitigate



REVENUE CONTRACTS – GENERAL TERMS

Assignability and Offtaker Options:

- Collateral Assignment
- Others – Affiliates, Qualified Operator, etc.
- Lender protections
- Purchase Options – end of Term or more frequently?
- ROFOs



REVENUE CONTRACTS – GENERAL TERMS

Solar + Storage Hybrid Contract:

- Full Solar PPA terms plus BESS provisions
 - Collective or bifurcated COD and LDs?
- Purpose of BESS? Who controls?
- Payment structure – adjustments for performance?
 - Energy payment + capacity payment
 - Energy only payment
 - Capacity only payment
- GIA capacity limits



REVENUE CONTRACTS – GENERAL TERMS

Solar + Storage – Additional Considerations:

- Revenue Meters – after Solar PV Facility or at Point of Delivery?
- RECs
- Curtailments:
 - Required to charge battery with curtailed energy first?
 - Reliability vs. Economic
 - Compensable – PTC gross-up?
 - Calculation methodologies and provisions
 - Deemed compensable if discharge notice reduces PV output?



THANK YOU

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