



Utility Scale Solar Leases: Understanding the Basics

Over the last two years, rural landowners in Pennsylvania, and reportedly across many parts of the country, have been approached by fledgling photovoltaic electricity generators or their agents, some with a track record and some without, to lease acreage upon which to generate electricity for sale to the grid. What these leases entail is important to understand before ever being presented with one.

Solar leases generally do not contemplate sharing of electricity or revenues but simply the payment of two forms of income to a rural landowner. The first is a few years of annual option payments in exchange for exclusive rights to perform due diligence on the location to explore the financial and logistical feasibility of generating and delivering electricity to the grid. Most times, the cost of delivering power to the grid is best shared over several properties in close proximity to transmission or other facilities that can accept the power.

After the due diligence is performed on the parcels involved, if a decision is made to proceed, the option may be exercised. The second form of income is then realized as flat monthly rent, with standard escalator clauses for inflation, for a term of anywhere from twenty to fifty years. What the solar developer is leasing is possession and control of the surface for the purpose of constructing, maintaining and operating millions of dollars' worth of solar panels and appurtenant transmission, battery storage, and other associated facilities, all done at the developer's cost and on land they do not own.

Most option and lease agreements are written so that when a landowner signs an option agreement, the landowner is also agreeing to the terms of the lease agreement presented at the same time as an attached exhibit. The right to exercise the option is unilateral, which means once the landowner signs an option agreement, there is no opportunity to change one's mind about the long-term project and

little to no renegotiation of any lease agreement terms is permitted.

The lease agreements being used are generally technical, voluminous, repetitive, and chocked full of legalese. They are very similar to what are traditionally called "ground leases" used in commercial real estate. In fact, the forms presently being used have many signs of having been lifted from lengthy form leases written by commercial real estate attorneys for use in the development of shopping malls, industrial sites, and office parks. A rural landowner is not generally equipped to immediately become a party to such a sophisticated transaction and become a commercial "landlord." A landowner also may not understand the needs of the "tenant" in such a complex, long-term relationship.

Attorneys who have knowledge and experience in commercial real estate are likely the best equipped to provide legal counsel in understanding, reviewing, and negotiating a solar lease. Many of the documents being offered are not "battle-tested" from years of use. It is not uncommon to see terms that are unrealistic or unworkable for a typical rural landowner. Additionally, the legal ramifications of the lease and its terms must be fully understood by the landowner and it will likely take an attorney to do that.

This is particularly so when the landowner has or may, in the past or future, reside upon, farm, borrow against, transfer to heirs, or restrict the land's present or future permissible uses by actions or conveyances of legal interests that can conflict with the tenant's unrestricted right to continuously generate electricity on the site. For example, the granting of mortgages, easements, rights-of-way, stormwater requirements, participation in government programs for preferential tax assessment or requiring certain conservation practices, can all cause complications for the solar tenant's intended operation on the site. Before the option is exercised, these competing legal interests

are investigated via due diligence and one or more may contribute to the option being unexercised.

From the tenant's perspective, investing in and building permanent structures costing millions of dollars on someone else's land is risky unless adequate protections are in place. While the lease text always ensures the affixed structures remain the tenant's property, landowner actions can put those assets and the lease rights in danger. That is why one very important lease term is non-negotiable from the tenant's perspective - all outstanding mortgages or monetary liens in existence at the time of signing must be "subordinated" to the lease. Any creditor who possesses potential legal recourse against the property to satisfy its debt must sign off via a recorded document stating the rights of the solar developer to continue operations uninterrupted is superior to the creditor's right to foreclose. That is just one example of protections the tenant needs in this unique relationship.

Another unique feature of solar leases is that the solar tenant will most likely be granting a security interest in the structures built to finance the project. As a result, there will be another party involved - the tenant's lender. Solar leases require communication and cooperation with that lender so that it may protect its investment and the value of its collateral.

This is an industry in its infancy and the forms being used vary greatly. One benefit of those circumstances is that there are only a few established "deal-breaker" terms which are off-limits in negotiations. Creative terms that fit the individual needs or desires of a landowner regarding their property may very well be possible. But attorney involvement to represent the landowner's interests should not be bypassed. Buried in the seventy-five pages of single-spaced text may very well be terms, or the absence of terms, that would long-ago have been revised to reflect a landowner's essential needs if this industry were firmly established and the lease forms standardized.

Authors

Brook Duer, Staff Attorney
Ross H. Pifer, Director

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PENN STATE CENTER FOR AGRICULTURAL AND SHALE LAW

329 Innovation Blvd., Suite 118
University Park, PA 16802
Phone: 814-865-4290
Fax: 814-865-3851
Website: AgLaw.psu.edu

PROFESSIONAL STAFF

Center Director Ross H. Pifer rpifer@psu.edu	Staff Attorney Jackie Schweichler jks251@psu.edu
Staff Attorney Brook Duer dhd5103@psu.edu	Research Specialist Chloe Marie, LL.M. cjm445@psu.edu

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