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Utility-Scale Solar Projects Require Clearing Multiple Hurdles

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Jim Kelsh is a partner in the Charleston, West Virginia office of Bowles Rice. He focuses his practice on representing solar farms; broadband and telecommunications carriers; water, sewer and natural gas utilities; and others in regulatory matters before the Public Service Commission of West Virginia. He has represented municipalities and other entities in the negotiation of inter-utility and inter-governmental agreements and frequently advises utilities on infrastructure development projects from conception to completion. Notably, Kelsh piloted the first solar siting certificate through the PSC under the provisions of SB 583.

During the 2020 Regular Session of the West Virginia Legislature, Mike Graney, the Executive Director of the West Virginia Development Office, testified to the State Senate that the lack of utility-scale solar power generation in the state was hurting the Development Office's efforts to attract large commercial and industrial employers. In looking at prospective sites, these commercial concerns have added to their checklist the availability of renewable electricity. The Legislature and the Governor responded by passing into law and approving two pieces of legislation aimed at attracting solar energy developments to the Mountain State – Senate Bill 578 and Senate Bill 583.

With the passage of S.B. 578, the Legislature adjusted the taxable generating capacity rate for utility-scale solar units for purposes of calculating state business and occupation taxes, bringing the tax rate in line with the actual generating capacity of solar units. In doing so, the Legislature made the development of utility-scale solar development projects economically feasible in the state.

Senate Bill 583 set up two programs for the development of utility-scale solar projects. Most of S.B. 583 addresses the development of utility-scale solar by electric utilities and allows for regulated utilities to develop such projects 50 megawatts (MW) at a time. The portions of S.B. 583 promoting the development of solar facilities by electric utilities involves a series of steps. First, electric utilities may propose a multi-year renewable energy facilities program to the Public Service Commission (PSC). Electric utilities may build their own solar facilities or purchase such facilities from developers. If the electric utility elects to purchase facilities from a developer, the electric utility must go through a competitive procurement process. Electric utilities are limited to facilities with an initial capacity no greater than 50 MW.

The two major electric utilities in the state, AEP and FirstEnergy, are required to file Integrated Resource Plans (IRP) with the PSC every five years, setting out the utilities' long-term plans for meeting the generation needs of their respective customers. AEP's December

23, 2020 IRP specifically expressed its intent to begin adding solar generation to its portfolio starting in 2024, with a goal of having 200 MW of solar generating capacity in use by 2030. Two-hundred megawatts is the maximum amount of solar-powered generation which electric utilities may own under S.B. 583. In its December 30, 2020 IRP, FirstEnergy stated it intended to continue to explore the addition of solar energy to its generation portfolio to align with its parent company's Environmental, Social and Governance initiative. Neither utility has presented any specific solar projects to the PSC yet.

The provisions of S.B. 583, aimed at encouraging the development of utility-scale solar by exempt wholesale generators (EWGs), have seen more visible fruit. Unlike public utilities, EWGs have no captive customers. Rather, they sell power at wholesale to electric utilities or regional transmission organizations according to either prices set in power purchase agreements or spot market prices. Three EWG solar siting applications have been filed with the PSC to date; two have been granted, and one is pending. Bowles Rice has prosecuted two of the applications to the PSC and, through this process, has learned of the multiple scope of legal services required to advance these projects to construction.

Like the developers of real estate or commercial projects, EWG solar developers must find a way to 'yes' on each of hundreds of questions that will be raised in the course of developing and advancing a project.

The first step is identifying attractive real property sites and negotiating options or purchase agreements for those sites. Utility-scale solar developments typically require hundreds of acres, and proximity to existing electric transmission lines and substations is often critical to the economic viability of these projects. Under S.B. 583, solar developers are obligated to first pursue brownfield sites and former industrial and mining sites in the vicinity of a prospective project. If those options are not viable, and such sites are located in the vicinity, the Secretary of the Department of Commerce can approve an alternative site.

Once an eligible site is identified and secured, the solar developer's engineering team needs to get to work preparing a design for the project, with an eye towards what regulatory permits and approvals will be required.

When the project is sufficiently defined and permit and approval applications are underway, the solar developer is then in a position to apply to the PSC for a solar siting certificate. Senate Bill 583 gives the PSC only 150 days to rule upon solar siting applications. That is half the time the PSC has, by statute, to rule upon applications by EWGs for non-solar siting certificates. However, the rub with that short deadline is these applications must be complete when filed, supported by a thorough engineering report and written testimony supporting every aspect of the engineering report.

The West Virginia State Buildings and Construction Trades Council has intervened in every solar siting certificate application filed by an EWG with the PSC to date. Negotiating a memorandum agreement with the Trades Council that sets out the parameters of relations when a project gets to the construction phase is essential to obtaining the important support of the Trades Council for these projects.

While the PSC had 150 days to issue a final order on one client's solar siting certificate application, it approved it in just 115 days. But more work to advance the project was required. Only a minority of West Virginia's counties have countywide planning and zoning ordinances or overlay districts that regulate the placement of a facility. For a project located in a county that does have countywide zoning or overlay district, often a conditional use permit is required from the county planning commission or board of zoning appeals. Obtaining a conditional use permit does not end the matter, as the granting of a permit can be appealed to the Circuit Court of a county, and a county Circuit

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Court order can be appealed to the West Virginia Supreme Court of Appeals.

Another complication is that many county commissions are attempting to amend their existing county zoning plans to address utility-scale solar sites. Active engagement in this process can be critical to a project moving forward. The amendments to its county zoning ordinance to address utility-scale solar sites by the Jefferson County Commission were recently found by a Circuit Court to have been improperly adopted, casting a cloud over solar development in that county for the moment.

Negotiations with the county commission serving the project location are also incumbent upon a solar developer. Developing and negotiating a payment in lieu of taxes agreement (PILOT) with a county commission can be critical to the economic viability of a project. While solar projects tend to have a long and useful life, it is not endless. Consequently, decommissioning agreements need to be developed with a county commission or the West Virginia Department of Environmental Protection to establish an escalating scale bonding arrangement over the life of a project to ensure that decommissioning can be implemented when a project is no longer generating sufficient energy. Reaching an agreement with an Engineering, Procurement and Construction (EPC) contractor is an essential element for solar developers who do not perform such functions themselves.

Interconnection agreements for the sale of power with the regional transmission organization PJM or one of the utilities is another hurdle which must be surmounted successfully.

The embrace of utility-scale solar development in West Virginia may have seemed inconceivable just a few short years ago. As solar developments have become more self-sustainable and economically competitive, state policy leaders have recognized the need for an “all of the above” energy portfolio in West Virginia. Getting these projects to the flip-switching stage, though, involves much additional work.