

# REGULATORY CONSIDERATIONS FOR DEVELOPING DISTRIBUTED GENERATION PROJECTS

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# DG Business Models Matter

- ▣ DG penetration rates are increasing rapidly
- ▣ Careful selection of business model can maximize value for all participants by:
  - Maximizing access to government incentives
  - Maximize access to all available value streams for the developer, customer, and utility
  - Minimize regulatory burdens for all parties
  - Provide win-win-win solution

# What are the key elements of different business models?

- ▣ What size generator?
- ▣ What fuel or energy source? Does it include storage?
- ▣ Who pays the up-front cost of the generator?
- ▣ Who owns the generator?
- ▣ Who operates the generator?
- ▣ Who has a right to dispatch/control the generator?
- ▣ Who owns the kWh?
- ▣ To whom are the kWh sold? Where?
- ▣ At what price are the kWh sold?
- ▣ Are the kWh wheeled?

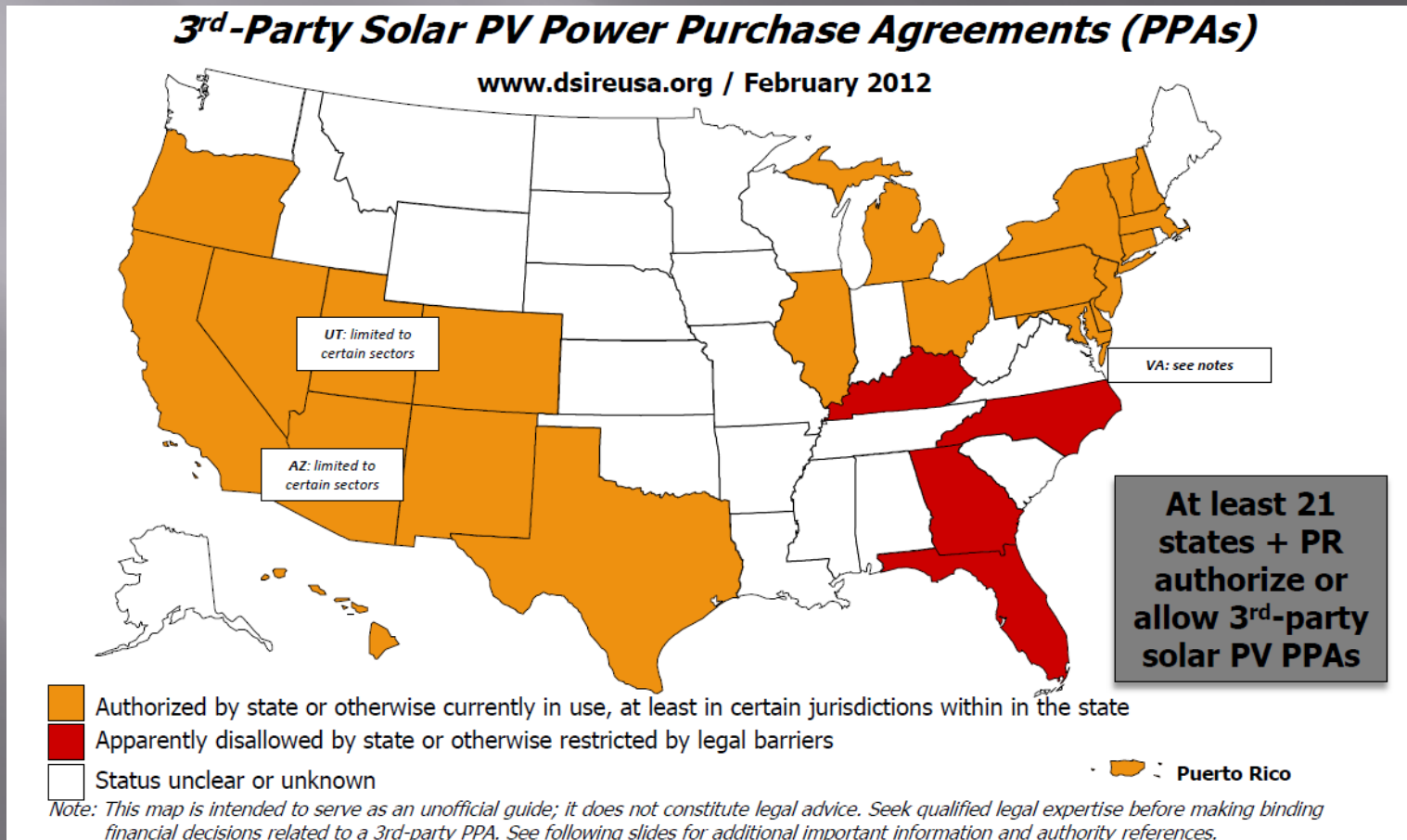
# More key elements

- ▣ What products besides kWh can the generator provide?
- ▣ To whom are those products sold?
- ▣ Who receives the environmental attributes?
- ▣ Where is the generation sited?
- ▣ How is the generator sized?
- ▣ How is the owner of the generator compensated?
- ▣ What revenue streams and incentives?
- ▣ What are the regulatory impacts of the answers to these questions?



# Regulatory Question 1

- Is the transaction subject to state territorial laws?



# Regulatory Question 2

- ▣ Does any party qualify as an “electric utility” under state law before or after the transaction?
  - Must the generator obtain state approval to sell at retail?
  - Does the state regulate rates, quality of service, or other terms of service?

# Regulatory Question 3

- ▣ Does the generator qualify as a QF?

# What is a QF?

- ▣ “Qualifying small power production facility:” solar, wind, waste, or geothermal facility  $\leq 80$  MW
- ▣ “Qualifying cogeneration facility:” a cogeneration facility that FERC determines meets regulatory requirements respecting minimum size, fuel use, and fuel efficiency.
- ▣ After EPAct’05, a QF may be owned by anyone



# What does it mean to be a QF?

- ▣ Under PURPA Sec. 210:
  - Right to interconnect to any electric utility
  - Right to obtain backup electric service from any electric utility
  - Right to be paid “avoided cost” for any net excess generation
  - With agreement of interconnecting electric utility, ability to be wheeled for free to the next electric utility over
- ▣ But under EPAct’05
  - Electric utility may obtain exemption from FERC from purchase obligation if in adequate wholesale electric market
  - Electric utility may obtain exemption from FERC from sale obligation if adequate retail electric market

# Regulatory Question 4

- ▣ Does any party qualify as a “public utility” under federal law before or after the transaction?

# What is a Public Utility?

- ▣ “[a]ny person who owns or operates facilities” for:
  - Wholesale sales of electric energy, or
  - Transmission in interstate commerce
- ▣ But not:
  - QFs
  - 201(f) entities
    - ▣ United States or agency or instrumentality thereof
    - ▣ State, political subdivision of a State or agency or instrumentality
    - ▣ Cooperative that sells < 4 million MWH or borrows from the Rural Utilities Service
    - ▣ Entity wholly owned by one of the above
  - Entities that sell power “at wholesale” solely via net metering

# What does it mean to be a Public Utility?

- ▣ A Public Utility is subject to “full” FERC jurisdiction.
- ▣ Must file an “OATT” with FERC for transmission.
- ▣ Must file a tariff with FERC for wholesale sales.
- ▣ Must sell wholesale power “at cost” or obtain approval to sell at market based rates.
- ▣ Subject to periodic reporting requirements, FERC approval for disposition of jurisdictional assets, restrictions on interlocking boards of directors, etc.

# Regulatory Question 5

- ▣ Does any party qualify as a “transmitting utility” under federal law before or after the transaction?



# What is a Transmitting Utility?

- ▣ Any entity that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce for the sale of electric energy
- ▣ Can include a QF or 201(f) entity
- ▣ **Warning:** Transmission = any wire that carries a wholesale electron, including a 7.2 kV distribution line or a radial generation intertie

# What does it mean to be a Transmitting Utility?

- ▣ Must interconnect with any electric utility under FPA 210
- ▣ Must wheel power for any electric utility under FPA 211
- ▣ If  $\geq 4$  million MWH, subject to orders under FPA 211A

# Regulatory Question 6

- ▣ Is any party subject to mandatory NERC standards as a result of the transaction?

# Who's subject to NERC?

- ▣ All users, owners, operators, of the Bulk Power System, including 201(f) entities
- ▣ The BPS includes all facilities and control systems necessary for operating an interconnected electric energy transmission network and electric energy from generation facilities needed to maintain transmission system reliability

# Who might this include?

- ▣ LSE
  - Peak load > 25 MW and directly connected to the >100 kV system
- ▣ Distribution provider
  - Peak load > 25 MW if responsible for a required UFLS program, UVLS program, Special Protection System or Transmission Protection System.
- ▣ Generator Owner/Operator
  - Individual Plant > 20 MVA directly connected to the BPS
  - Generating plant/facility >75 MVA (gross aggregate nameplate rating)
  - Black start unit
  - “Material” to reliability of BPS
- ▣ Transmission Owner/Operator
  - Transmission element  $\geq$  100 kV
  - Critical facility
  - “Material” to reliability



# What does it mean to be subject to NERC?

- ▣ Must comply with all relevant standards
- ▣ Must engage in substantial recordkeeping to demonstrate compliance
- ▣ Subject to audits from NERC Regional Entity, NERC, and FERC
- ▣ Subject to potential penalties up to \$ 1 million per day per violation

# Let's walk through some examples

A 2 MW Gas-fired Co-Gen unit, a federal customer owns the unit, uses all of the output, exports nothing, sells nothing, and interconnects at 12.5 kV

- ▣ What if the unit is 25 MW?
- ▣ What if the unit connects at 115 kV and the customer owns the tie-line?
- ▣ What if the customer sells energy and ancillary services to the neighboring utility?
- ▣ What if the unit is owned by a private 3<sup>rd</sup> party developer?

# Conclusion and Strong Recommendation

If you are considering a project, hire good counsel, including good FERC counsel. Don't rely on this presentation to have raised all the issues you need to know!

# A Few Resources

- State DG policies: [www.dsireusa.org](http://www.dsireusa.org)
- DG Owner as public utility under state law: *In re: SZ Enterprises, LLC*, Iowa Utilities Board, Dkt. No. DRU-2012-0001 (April 12, 2012).
- FERC PURPA information: <http://www.ferc.gov/industries/electric/gen-info/qual-fac.asp>
- Federal Power Act: <http://www.law.cornell.edu/uscode/text/16/chapter-12>
- PURPA: <http://www.law.cornell.edu/uscode/text/16/chapter-46>
- FERC jurisdiction over hydropower: <http://www.ferc.gov/industries/hydropower/gen-info/comp-admin/jur-deter.asp#skipnav>
- Federally recognized Indian tribes under 201(f): *City of Paris, KY vs. Federal Power Commission*, 399 F.2d 983 (DC Cir. 1968); *Sovereign Power Inc.*, 84 FERC ¶ 61,014 (1998); *Confederated Tribes of the Warm Springs Reservation of Oregon, a Federally Recognized Indian Tribe, and Warm Springs Power Enterprises, a Chartered Enterprise of the Confederated Tribes of the Warm Springs Reservation of Oregon*, 93 FERC ¶ 61,182 at 61,599 (2000) The Secretary of the Interior periodically lists in the Federal Register Indian tribes recognized by the United States government pursuant to Section 104 of the Act of November 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792, as codified at 25 U.S.C. § 479a-1.
- Net metering not “wholesale sale”: *MidAmerican Energy Co.*, 94 FERC P 61,340 (2001), *Sun Edison LLC*, 129 FERC P 61,146 (2009)
- NRECA DG Toolkit: <http://www.nreca.coop/issues/FuelsOtherResources/DistributedGeneration/Pages/DGToolkit.aspx>