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Understanding & Executing Utility Build-Transfer Transactions

May 5 - 6, 2021 | Digital Access

Wednesday, May 5, 2021

8:30-8:45 PST **Introduction and Opening Remarks**

8:45-9:25 **Session 1: Overview of Common Utility Build-Transfer Structures & Incentives**

This session will provide an introduction to utility build-transfer arrangements, including common transaction structures. It will also include a discussion of the changing incentives that are increasing utility interest in the ownership of renewable generation assets. Attendees will evaluate:

- Why utilities are seeking to acquire more renewable projects through build-transfer arrangements
- “Traditional” build-transfer structure: asset sale at mechanical completion (solar) or substantial completion (wind)
- Variant structures: sale of project company and/or sale at NTP with EPC agreement between developer and utility
- Implications of equity vs. asset sale

Paul Kraske, Partner, SKADDEN

9:25-9:40 *Live Q&A*

9:40-9:50 *Break*

9:50-10:30 **Session 2: Allocating Development Risks**

Build-transfer deals are often negotiated and executed while the project is still in development. This reality requires that the parties allocate risks related to key development activities—namely real estate and title, permitting and interconnection. This session will discuss contractual strategies for negotiating this risk allocation, including:

- Challenges presented by ongoing acquisition of real estate after signing
- Title objections and the developer’s obligation to cure title issues
- Dealing with unexpected or onerous local permitting conditions
- Contractual framework for dealing with uncertainty regarding the cost of upgrades to interconnect the project
- Utilization of an “NTP” or “Firm Date” concept to bifurcate period with development risk
- Need for schedule update regime that reflects the reality of a project in development

Sarah Ridel, Associate, Energy and Infrastructure Projects, SKADDEN

10:30-10:45 *Live Q&A*

10:45-10:55 *Break*

10:55-11:45

Session 3: Utility Tax Equity Structures and Issues

Utilities' ability to capture the benefits of the ITC and PTC has been a driver of the increased interests in build-transfer transactions. This session will discuss how utilities have been structuring transactions to optimize tax benefits and what complexities this adds to their negotiations with developers.

- Current tax incentives available for wind & solar projects and qualification requirements
- Challenges with respect to utility ownership of wind & solar projects (i.e., normalization and related party sales)
- Issues presented by traditional tax equity structure and modifications to address such concerns

Sean Shimamoto, *Partner, Tax*, SKADDEN

11:45-12:00

Live Q&A

12:00-12:45

Lunch

12:45-1:25

Session 4: State and Federal Regulatory Approvals

Although regulatory regimes vary by state, utilities almost always will want prior approval from their regulators before acquiring a project through a build-transfer arrangement. The need for this approval introduces significant closing uncertainty into the transaction and obtaining this approval is often a key milestone allowing the transaction to move forward. In addition, certain FERC approvals may be required depending on the timing of the closing and what tax equity structure the utility is employing. This session will discuss the state and federal regulatory regime for these transactions, including:

- Need for state utility commission approvals for inclusion in "rate base" so utility can recover from its ratepayer-customers
- Role of utilities' Integrated Resource Plans (IRPs)
- Timing and applicability of FPA §203 approval
- FERC approval of PPAs between utility affiliates under FPA §205, including *Edgar* and *Allegheny* standards
- FERC rules on "non-power goods and services" between utility affiliates

Greg Camet, *Associate General Counsel*, ENTERGY

Mike Naeve, *Partner, Energy Regulatory*, SKADDEN

1:25-1:40

Live Q&A/Day 1 Wrap Up

1:40-2:40

Virtual Networking

8:30-9:45

Session 5: A Developer's Perspective on Negotiating Build-Transfer Contracts

Build-transfer transactions are most commonly structured as a fixed price contract. This structure puts pressure on the parties to agree on many design and development decisions upfront in order to provide the developer with certainty that it can deliver a project that meets the utility's requirements for the agreed price. This session will provide participants with an overview how this structure factors into negotiations and specific provisions of build-transfer contracts.

Tomo Aiko, *Vice President*, THE D. E. SHAW GROUP

9:45-10:00

Live Q&A

10:00-10:10

Break

10:10-10:45

Session 6: Allocating Construction Risks

Utilities are often expecting a "turnkey" project. While the developer will usually seek to contract with a prime contractor and major equipment supplier(s), it must manage the risks it is taking on through its contractual arrangements with the utility that it cannot offload to its subcontractors. This session will discuss the construction-specific provisions of build-transfer contracts and how they interact with utility and developer expectations and risk appetite.

- Force majeure and change in law
- Change order procedures
- Utility oversight of construction
- Delay risk (including liquidated damages and dealing with tax credit implications)

Tom Logan, *Counsel, Energy and Infrastructure Projects*, SKADDEN

10:45-11:00

Live Q&A

11:00-11:10

Break

11:10-11:55

Session 7: Solving Difficult Issues: Financing, Termination Rights and Liability Regime

While every transaction presents unique challenges, certain issues have emerged as particularly difficult for parties negotiating a build-transfer transaction to resolve. This session will focus on these issues, specifically the implications of obtaining third-party construction financing for the project, termination triggers for developers and utilities and liability exposure for the parties at the different stages of the transaction.

- Focus on closing conditions and the need for objective standards
- Implications of failure to obtain financing
- Termination rights and fees
- Need for a staggered liability regime
- Credit support

Paul Kraske, *Partner*, SKADDEN

11:55-12:10

Live Q&A

- 12:15-1:00 *Lunch*
- 1:00-1:30 **Session 8: Applying Key Concepts to Real-World Applications**
This session will offer concluding remarks on the topics discussed and also provide an overview of key structural and contractual differences between solar build-transfer transactions and wind build-transfer transactions. It will also touch on the potential for build-transfer structures to be deployed in other contexts, including transmission and storage.
- Paul Kraske**, *Partner*, SKADDEN
Sarah Ridel, *Associate, Energy and Infrastructure Projects*, SKADDEN
- 1:30-1:45 *Live Q&A*
- 1:45-2:00 *Break*
- 2:00-2:40 **Session 9: Office Hours: Interactive Live Zoom Session**
This Interactive Live Zoom Session at the class conclusion allows you to get your most pressing questions answered, and to interact with Master Class Instructors and your peers in real time.
- Moderator:
Paul Kraske, *Partner*, SKADDEN
- Panelists:
Tomo Aiko, *Vice President*, THE D. E. SHAW GROUP
Tom Logan, *Counsel, Energy and Infrastructure Projects*, SKADDEN
Sarah Ridel, *Associate, Energy and Infrastructure Projects*, SKADDEN
Sean Shimamoto, *Partner, Tax*, SKADDEN
- 2:40-2:45 **Closing Remarks by Infocast**
- 2:45 *Master Class Adjourns*
- 2:45-3:45 *Virtual Networking*