THE SOLAR PPA AND PILOT

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What is a PPA—Generally

- Contract—Power Purchase Agreement
- For the purchase and sale of power
- Like any other contract, sets forth:
  - Rights and obligations of parties, generally
  - Term of contract
  - Quantity of power purchased by you, the buyer
  - Price paid for power by you, the buyer
  - Termination, default and remedies
Third-party develops PV solar facility
Electricity is delivered to utility
Third party receives:
- Payment from utility for electricity (credits/cash)
- Regulatory incentives (RECs/SRECs)
- Tax benefits (accelerated depreciation, tax credit)
What do I get?

- Facility owner needs you because:
  - Muni as “host customer” = higher net metering credit value & larger facility size for net metering
  - Facility owner cannot “use” net metering credits

- Use credits to off-set utility charges
  - Schedule Z filed with utility

- And if facility is installed on your property:
  - Lease payments
  - Tax payments (more on this later!)
You have to pay for net metering credits
You pay facility owner, utility sends you credits
    You have contract with facility owner
    Facility owner has contract with utility (so do you if you’re “host customer”)
Administrative task: keep track of credits/$$
Different methods of pricing credits . . .
Purchase Price—What’s the Risk?

Purchase Price:
- Fixed Price
- Percentage Price with Floor
- Percentage Price without Floor

Risk:
- Fluctuating value of Net Metering Credits
- Utility may seek to change rates
- Minimum Reliability Contribution charge
Some other risks

Quantity of purchase: Don’t over-buy

- It’s not about kilowatt-hours
- It’s about utility charges
- Compare average annual utility charges with anticipated value of Net Metering Credit x annual quantity to be purchased
Some other risks

- Facility owner is single project LLC
  - Little ability to pay if things go south
  - Lenders/investors have $$ at risk
  - Is facility on your property?
  - Are you host customer?

- Contract provisions to address risk:
  - Insurance—yours and facility owners
  - Third party security—surety bonds
Some other risks

- Term of PPA is typically 20 years
- No “free” right to terminate for convenience
- Contract provisions to address risk:
  - Termination rights (default)
  - Change in law provision (tough)
- Expect to be bound for 20 years
What is a PILOT?

G.L. c. 59, § 38H(b): “agreement for payment in lieu of taxes”

Not your “typical” PILOT

Included in tax base for levy limit/ceiling

DOR calls them “tax agreements”

No tax break here: Must be “equivalent of property tax obligation based on full and fair cash valuation”
Payments:
- Stipulated over term, or
- Formulaic: Based on stipulated valuation

In either case, assessor:
- Obtains project information
- Determines to assess as RP or PP
- Develops valuation

Once foregoing is done, negotiate
A PILOT is a contract

Can sue or be sued “on the contract”

Typical provisions:
- Term: Typically coterminous with PPA
- Payment amounts and schedule
- Termination, default, remedies
- Changes to payments for changes to facility

Why do I need a PILOT—you don’t—or do you?
G.L. c. 59, § 5, clause forty-fifth:

“Any solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.”
Did I hear you say, “exemption”?

What does that mean?
- DOR interpretation—behind-the-meter system
- ATB interpretation—any solar system

Who is right? There’s no such thing!

What should I do—the “case” for a PILOT?

Beware of disparate treatment: What you do for one, you do for all
The Massachusetts Department of Revenue ("DOR") has interpreted Clause 45 as applicable only if the system is located on, or contiguous to, the property being supplied with heat or energy.

In a decision dated December 4, 2014, the Massachusetts Appellate Tax Board ("ATB") rejected that interpretation. **Forrestall Enterprises Inc. v. Board of Assessors of the Town of Westborough**
The Forrestall case involved the installation of a small solar energy facility on vacant land by Forrestall Enterprises.

The system’s electricity was delivered to the utility’s electric grid, and all net metering credits were allocated, without charge, to other properties also owned, directly or indirectly, by Forrestall.

Forrestall applied for an abatement under Clause 45.
Applying DOR’s interpretation of Clause 45, the Westborough Board of Assessors denied the application.

The ATB disagreed and rejected DOR’s interpretation of Clause 45.

The ATB held that if the legislature sought to apply Clause 45 only to solar or wind powered systems located on or contiguous to the property being supplied with heat or energy, it would have so stated.
After Forrestall, one interpretation of the reach of the ATB’s decision in that case was that it would be limited to situations where an individual or entity owns, directly or indirectly, the solar or wind powered system, as well as the properties to which the system’s net metering credits are allocated.
In KTT, LLC v. Board of Assessors of the Town of Swansea, ATB 2016-246 ("KTT LLC"), the ATB further expanded application of Clause Forty-fifth of G.L. c.59, § 5 for energy suppliers. In KTT LLC, the ATB found that a solar facility was entitled to an exemption from real estate taxes as a solar powered system even though the net metering credits generated by the solar facility were sold “for profit” to an unaffiliated, off-site business.
In **KTT LLC**, the Swansea Board of Assessors taxed a solar facility located on 65 acres of land owned by KTT.

KTT had entered into a net metering credit purchase agreement with a Bank, which was unaffiliated with KTT and not located on the site of the solar facility.
Under the agreement, 98% of the net metering credits generated by the solar facility were allocated to the electric bills of four of the Bank’s Massachusetts branch locations, while 2% of the credits were allocated to the electric bills for the residence of the owners of KTT. In exchange for the credits, the Bank agreed to pay KTT an amount equal to 95% of the dollar value of the net metering credits.
KTT requested an exemption from property taxes pursuant to Clause 45.
The Board of Assessors denied the request on the grounds that Clause 45 was not intended to apply to for-profit solar powered systems.
The ATB rejected the Board of Assessor’s argument, and expanded its application of Clause 45 to for-profit systems solar powered systems.
Instead, the ATB held that, for purposes of the exemption, for-profit allocation of net metering credits by the solar array owner to a utility customer’s electric accounts constituted “supplying the energy needs of property,” even if that customer was not the owner of the solar array.
As a result, unless Clause 45 is amended, the ATB will likely continue to construe it as providing an exemption from taxation for solar facilities that supply the energy needs of taxable properties regardless of whether the facility is located on or adjacent to the properties, or whether the credits generated by the facility are sold for profit to entities unaffiliated with the owner of the facility.