

## Events of Default/Cure

The Default provision is one of the most important provisions of the Lease.

- Why is the default provision required by the Tenant?
- Why is the default provision required by the Landlord?
- Difference between Monetary Default and Non-monetary Default.
- Key Issue for all parties on Tenant side of Lease – do not allow termination of Lease.

## Events of Default/Cure

### Option A – Preferred (No right of Owner to terminate for Non-monetary default)

Except as qualified by Section [ ](Covenants for Mortgagee's Benefit), Owner shall have the right to terminate this Lease if (a) **a failure by default in the performance of Tenant's payment obligations under this Lease shall have occurred and remains uncured after all applicable notice and cure periods,** (b) **Owner simultaneously notifies Tenant and all Mortgagees and Assignees in writing of the default,** which notice sets forth in detail the facts pertaining to the default, and (c) the default shall not have been remedied within sixty (60) days after Tenant receives the written notice, or, if such cure cannot, with the exercise of commercially reasonable diligence, be completed within such period of time, Tenant, has not begun to diligently undertake the cure within the relevant time period or to thereafter prosecute the cure to completion. OWNER SHALL HAVE ALL RIGHTS AND REMEDIES AVAILABLE TO OWNER AT LAW AND IN EQUITY (EXCEPT AS LIMITED BY THIS LEASE); **PROVIDED HOWEVER, THAT NOTWITHSTANDING ANY OTHER PROVISION OF THIS LEASE OR ANY RIGHTS OR REMEDIES WHICH OWNER MIGHT OTHERWISE HAVE AT LAW OR IN EQUITY, WITH RESPECT TO ANY NON-MONETARY DEFAULT UNDER THIS LEASE THAT IS NOT REMEDIED WITHIN THE TIME PROVIDED IN THIS LEASE, OWNER SHALL BE LIMITED TO SEEKING DAMAGES OR SPECIFIC PERFORMANCE; AND OWNER SHALL NOT (AND OWNER WAIVES THE RIGHT TO) COMMENCE ANY ACTION OR PROCEEDING IN WHICH TERMINATION, CANCELLATION, RESCISSION OR REFORMATION OF THIS LEASE IS SOUGHT AS A REMEDY DUE TO A NON-MONETARY DEFAULT.**

## Events of Default/Cure - Continued

### Option B – Acceptable (Good option if Owner insists on right to terminate for Non-monetary default)

Owner's Remedies. If Lessee is in default and fails to cure the default as required and within the timeframe stated in this Lease, Owner shall have the right and option to do any or all of the following:

(a) If a monetary default occurs, then notwithstanding anything to the contrary contained in this Lease, Owner may terminate this Lease while such monetary default is still continuing if both of the following occur:

(i) Lessee fails to cure the monetary default within thirty (30) days after receipt of written notice from Owner advising Lessee of Owner's intent to terminate this Lease, and

(ii) all Mortgagees fail to cure the monetary default within the additional time period permitted them under the terms of this Lease.

(b) Notwithstanding any other provision of this Lease or any rights or remedies which Owner might otherwise have at law or in equity, during the Term, Owner shall not (and hereby waives the right to) commence any action or proceeding in which termination, cancellation, rescission or reformation of this Lease is sought as a remedy (except as set forth in subsection (a) above), and Owner shall be limited to seeking damages in the event of any failure by Lessee to perform its obligations hereunder; provided, however, that if Lessee fails to pay to Owner, within thirty (30) days after the date such award becomes final, any damages awarded Owner by a court of last resort with jurisdiction, then Owner may, subject to Mortgagee's rights to limited additional time to cure set forth in Section [ ], terminate this Lease and require a full release of all rights granted under this Lease to be executed by Lessee.

## Events of Default/Cure - Continued

### Option C – Last Resort

Defaults. Each of the following events shall constitute an event of default (“Event of Default”) by a Party and, subject to Section [ ](Covenants for Mortgagee’s Benefit), shall permit the non-defaulting Party to terminate this Lease and/or pursue all other appropriate remedies available at law or equity:

(a) The failure or omission by either Party to pay amounts required to be paid hereunder when due, and such failure or omission has continued for thirty (30) days after written notice from the other Party (a “Monetary Default”); or

(b) The failure or omission by either Party to observe, keep or perform any other material term, Lease or condition set forth in this Lease, **and such failure or omission has continued for sixty (60) days (or such longer period of time as may reasonably be required to cure such failure or omission, if such failure or omission cannot reasonably be cured with a sixty (60) day period, so long as such party is diligently pursuing such cure) after written notice from the other Party (“Non-monetary Default”)**. In any event, if the default is not cured within one hundred eighty (180) days (regardless as to whether the defaulting party is diligently pursuing a cure), the non-defaulting Party shall have the right to terminate this Lease.

## Events of Default/Cure

- Landlord objections
- Tenant responses
- Minimum requirements:
  1. Notice and opportunity to cure for Tenant; and
  2. Notice and opportunity to cure for Lender before Lease can be terminated.

## Assignment/Division of Lease

Purpose of provision:

- Developer Identity will change.
- Many renewable energy projects are built in phases.
- Developers may need to grant rights to third parties through subleases or subeasements.
- Obtaining owner consent can delay project.

## Assignment/Division of Lease

1. Assignment by Tenant. Owner hereby consents and grants to Tenant the right, on an exclusive or non-exclusive basis, to grant, sell, lease, convey or assign all or a portion of Tenant's interest in the Lease or the Project Facilities or to grant co-leases (including, without limitation, co-tenancy interests), separate leases, subleases, easements, sub-easements, licenses or similar rights to all or a portion of Tenant's interest in the Lease or the Project Facilities (collectively "Assignment") to one or more persons or entities (collectively "Assignee"). No Owner consent shall be required for any change in ownership of Tenant. Owner further hereby consents and grants to Tenant the right, on an exclusive or non-exclusive basis, to encumber, hypothecate, mortgage or pledge (including by mortgage, deed of trust or personal property security instrument) all or any portion of Tenant's right, title or interest under this Lease and/or in any Project Facilities to any Mortgagee as security for the repayment of any indebtedness and/or the performance of any Mortgage. If any additional consent is needed, Owner shall not unreasonably withhold, condition, or delay its consent to any assignment that is not allowed by the preceding portions of this Section 1. All Assignees will be subject to all of the obligations, covenants and conditions applicable to the Tenant under this Lease. Upon Tenant's assignment of its entire interest under this Lease as to all or any portion of the Property, or as may otherwise be provided in the applicable grant, sale, lease, conveyance or assignment document, Owner shall recognize the Assignee as Tenant's proper successor, the Assignee shall have all of the assigned rights, benefits and obligations of Tenant under and pursuant to this Lease, and Tenant shall be relieved of all of its obligations relating to the assigned interests under this Lease that relate to acts or omissions which occur or accrue following the effective date of such grant, sale, lease, conveyance or assignment. Owner shall notify Tenant in writing of any sale, assignment or transfer of any of Owner's interest in the Property, or any part thereof. Until Tenant receives such notice, Tenant shall have no duty to any successor Owner, and Tenant shall not be in default under this Lease if it continues to make all payments to the original Owner before Tenant receives such notice of sale, assignment or transfer.

## Assignment/Division of Lease - continued

2. Notice to Owner. Following an assignment or the granting of a Mortgage as contemplated by Section 1, Tenant or the Mortgagee will give notice of the same (including the address of the Mortgagee for notice purposes) to Owner; **provided, however, that the failure to give such notice shall not constitute a default but rather shall only have the effect of not binding Owner hereunder with respect to such Mortgagee until such notice is given.**



### Assignment/Division of Lease - continued

3. Cure. Each Assignee that holds a partial interest in, or a sublease under this Lease, shall have the same amount of time following delivery of written notice of such default, to cure said default as is given to Tenant pursuant to this Lease. If Tenant or an Assignee holds an interest in less than all of this Lease, the Property or the Project Facilities, any default under this Lease shall be deemed remedied, as to Tenant's or such Assignee's partial interest only (and Owner shall not disturb such partial interest), if Tenant or Assignee, as the case may be, shall have cured its pro rata portion of the default by paying the fees attributable to the Lease, the Property or Project Facilities in which Tenant or the Assignee, as the case may be, holds an interest.

## Assignment/Division of Lease - continued

4. Division into Separate Leases. **Tenant may divide the Property into two (2) or more separate solar energy projects or phases of development if such division becomes necessary to further the development of the Project Facilities.** If Tenant elects to divide the Property into two (2) or more solar energy projects or phases of development, then Owner shall, within twenty (20) days after written request from Tenant, and without demanding any additional consideration, bifurcate this Lease by entering into and delivering to Tenant new stand-alone Leases (as many as are necessary for each division) (which shall supersede and replace this Lease) that provide Tenant with separate leasehold estates in different portions of the Property, as designated by Tenant. Each of such new Leases shall: (i) specify the portion(s) of the Property to be covered thereby (and the term "Property", as used therein, shall refer only to such portion(s)), (ii) contain the same terms and conditions as this Lease (except for any requirements that have been fulfilled by Tenant, any Assignee, or any other person or entity prior to the execution of such new Leases, and except for any modifications that may be required to ensure that Tenant's and Owner's respective combined obligations under such new leases do not exceed their respective obligations under this Lease) and be in a form reasonably acceptable to Tenant and Owner; (iii) be for a term equal to the then-remaining term of this Lease; (iv) contain a grant of access, transmission, communications, utility and other easements for the benefit of the bifurcated leasehold estates, covering such portion or portions of the Property as Tenant may designate (but only to the extent permitted in this Lease); (v) require payment to Owner of only an acreage-proportionate part of the amounts hereof; and (vi) to the extent permitted by law, enjoy the same priority as this Lease over any lien, encumbrance or other interest against the Property.

## Assignment/Division of Lease - continued

- Landlord Objections
- Tenant Responses

Assignment/Division of Lease – continued

Alternate Provision

Assignment by Tenant. Tenant shall not have the right to assign or sublet any of its rights, duties or obligations under this Lease (an "Assignment") to one or more persons or entities (each, an "Assignee") **without the prior written consent of Owner, which shall not be unreasonably withheld, delayed or conditioned.** Tenant shall deliver notice to Owner of a proposed assignment at least forty-five (45) days prior to the desired effective date of the assignment. **Notwithstanding the foregoing, Tenant may, without securing Owner's consent, assign any of its rights, duties or obligations under this Lease (a) to an Affiliate of Tenant, (b) to a Mortgagee, or (c) to an Assignee if the Assignee, or an Affiliate of the Assignee (or a guarantor of the Assignee's obligations) (1) has a net worth on the date of Assignment equal to or greater than \$10 million, as evidenced by a letter from an officer of Assignee certifying to such net worth, which letter shall be delivered to Owner concurrently with the required notice of the desired assignment, (2) has at least two (2) years' experience in developing, operating and/or maintaining solar projects similar in size and scope to the Project (or has contracted with an entity with at least two (2) years' experience in developing, operating and/or maintaining solar projects similar in size and scope to the Project), and (3) agrees in writing or otherwise is bound by the terms and conditions of this Lease (a "Permitted Assignee").**

Assignment/Division of Lease – continued

*“Affiliate” defined*

Transfers to Affiliates should be allowed.

“Affiliate” for purposes of this Lease means any person or entity which directly or indirectly controls, or is under common control with, or is controlled by, Tenant or Owner (as applicable). As used in this definition, “control” (including, “controlled by” and “under common control with”) means possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities or other ownership interests, by contract or otherwise); any person or entity which owns directly or indirectly ten percent (10%) or more of the securities having ordinary voting power for the election of directors or other governing body of an entity will be deemed to control such entity.

## Mortgagee Protections

### Most significant provision for Lenders

- Project cannot obtain financing without sufficient Lender protections.
- Key Lender concerns:
  1. Lenders do not want to lose rights in the collateral in event of Tenant default.
  2. Lenders want to be able to enforce Lease following foreclosure.
  3. Lenders want to be free to sell project following foreclosure.

## Mortgagee Protections

### Section 12.

Mortgagee Protection. Any Mortgagee of the Property, or any portion of the Property, shall, for so long as its Mortgage is in existence and until the lien thereof has been extinguished, be entitled to the following protections, upon delivery to Owner of notice of its name and address:

12.1 Mortgagee's Right to Possession, Right to Acquire and Right to Assign. A Mortgagee shall have the absolute right: (a) to assign its security interest; (b) to enforce its lien and acquire title to the leasehold estate by any lawful means; (c) to take possession of and operate the Property or any portion thereof and to perform all obligations to be performed by Lessee or Assignee under this Lease, or to cause a receiver to be appointed to do so; and (d) to acquire the leasehold estate by foreclosure or by an assignment in lieu of foreclosure and thereafter to assign or transfer the leasehold estate to a third party. Owner's consent shall not be required for (a) the pledge, mortgage or hypothecation of Lessee's rights in the Lease, the Project Facilities, or Lessee or (b) the acquisition of Lessee's or Assignee's leasehold estate by a third party who acquires the same by foreclosure or assignment in lieu of foreclosure. As used in this Lease, (i) the term "Mortgagee" means any financial institution or other person or entity that from time to time provides secured financing for or otherwise encumbers some or all of Lessee's or an Assignee's interest in the Lease or Project Facilities, collectively with any security or collateral agent, indenture trustee, loan trustee or participating or syndicated lender involved in whole or in part in such financing, and their respective representatives, successors and assigns, (ii) the term "Mortgage" refers to the mortgage, deed of trust or other security interest in this Lease and/or the Project Facilities given to a Mortgagee in connection with such financing and (iii) the term "Mortgaged Interest" refers to the interest in this Lease and/or the Project Facilities, that is held by the Mortgagee.

## Mortgagee Protections - continued

12.2 Notice of Default: Opportunity to Cure. As a precondition to exercising any rights or remedies as a result of any alleged default by Lessee or Assignee, Owner shall give written notice of the default to each Mortgagee concurrently with delivery of such notice to Lessee or Assignee, as applicable, specifying in detail the alleged event of default; provided however that such Mortgagee shall have provided Owner with its current address. In the event the Owner gives such a written notice of default, the following provisions shall apply:

12.2.1 A “Monetary Default” means failure to pay when due any rent or other monetary obligation of Lessee or Assignee to Owner under this Lease; any other event of default is a “Non-Monetary Default.”

12.2.2 The Mortgagee shall have the same period after receipt of notice of default to remedy the default, or cause the same to be remedied, as is given to Lessee or Assignee, plus, in each instance, the following additional time periods: (i) sixty (60) days after receipt of the notice of default in the event of any Monetary Default; and (ii) ninety (90) days after receipt of the notice of default in the event of any non-monetary default, provided that such period shall be extended for the time reasonably required to complete such cure, including the time required for the Mortgagee to perfect its right to cure such non-monetary default by obtaining possession of the Property (including possession by a receiver) or by instituting foreclosure proceedings, provided the Mortgagee acts with reasonable and continuous diligence. The Mortgagee shall have the absolute right to substitute itself for Lessee or any Assignee and perform the duties of Lessee or any Assignee under this Lease for purposes of curing such defaults. Owner expressly consents to such substitution, agrees to accept such performance, and authorizes the Mortgagee (or its employees, agents, representatives or contractors) to enter upon the Property to complete such performance with all the rights, privileges and obligations of the Lessee or any Assignee. Owner shall not terminate this Lease prior to expiration of the cure periods available to a Mortgagee as set forth above.



Mortgagee Protections - continued

12.2.3 During any period of possession of the Mortgaged Interest by a Mortgagee (or a receiver requested by such Mortgagee) and/or during the pendency of any foreclosure proceedings instituted by a Mortgagee, the Mortgagee shall pay or cause to be paid the rent and all other monetary charges payable by Lessee or any Assignee under this Lease which have accrued and are unpaid at the commencement of said period and those which accrue thereafter during said period. Following acquisition of Lessee's or any Assignee's Mortgaged Interest by the Mortgagee or its assignee or designee as a result of either foreclosure or acceptance of an assignment in lieu of foreclosure, or by a purchaser at a foreclosure sale, this Lease shall continue in full force and effect and the Mortgagee or party acquiring title to the Mortgaged Interest shall, as promptly as reasonably possible, commence the cure of all defaults under this Lease and thereafter diligently process such cure to completion, whereupon Owner's right to terminate this Lease based upon such defaults shall be deemed waived; provided, however, the Mortgagee or party acquiring title to the Mortgaged Interest shall not be required to cure those non-monetary defaults which are not capable of being cured or performed by such party ("non-curable defaults"). Non-curable defaults shall be deemed waived by Owner upon completion of foreclosure proceedings or acquisition of interest in this Lease by such party.

## Mortgagee Protections - continued

12.2.4 Any Mortgagee or other party who acquires the Mortgaged Interest pursuant to foreclosure or assignment in lieu of foreclosure shall not be liable to perform the obligations imposed on Lessee or an Assignee by this Lease incurred or accruing after such party no longer has ownership of the leasehold estate or possession of the Property.

12.2.5 Neither the bankruptcy nor the insolvency of Lessee or any Assignee shall be grounds for terminating this Lease as long as the rent and all other monetary charges payable by Lessee or Assignee under this Lease are paid by the Mortgagee in accordance with the terms of this Lease.

12.2.6 Nothing in this Lease shall be construed to extend this Lease beyond the Lease Term or to require a Mortgagee to continue foreclosure proceedings after the default has been cured. If the default is cured and the Mortgagee discontinues foreclosure proceedings, this Lease shall continue in full force and effect.

## Mortgagee Protections - continued

12.3 New Lease to Mortgagee. If this Lease terminates because of Lessee's or Assignee's default or if the Mortgaged Interest is foreclosed, or if this Lease is rejected or disaffirmed pursuant to bankruptcy law or other law affecting creditors' rights, then Owner shall, upon written request from any Mortgagee, enter into a new lease of the Property, on the following terms and conditions:

12.3.1 The terms of the new Lease shall commence on the date of termination, foreclosure, or rejection and shall continue for the remainder of the Lease Term of this Lease, at the same rent and subject to the same terms and conditions set forth in this Lease. Such new Lease shall be subject to all existing subleases, provided the subtenants are not then in default.

12.3.2 The new Lease shall be executed within thirty (30) days after receipt by Owner of written notice of the Mortgagee's election to enter a new Lease, provided said Mortgagee: (i) pays to Owner all rent and other monetary charges payable by Lessee or Assignee, as applicable, under the terms of this Lease up to the date of execution of the new Lease, as if this Lease had not been terminated, foreclosed, rejected or disaffirmed, less the rent and other income actually collected by Owner from subtenants or other occupants of the Property; and (ii) perform all other obligations of Lessee and/or Assignee under the terms of this Lease, to the extent performance is then due and susceptible of being cured and performed by the Mortgagee; and (iii) agrees in writing to timely perform, or cause to be performed, all non-monetary obligations which have not been performed by Lessee or any Assignee and would have accrued under this Lease up to the date of commencement of the new Lease, except those obligations which constitute non-curable defaults as defined above; (iv) reimburses Owner for Owner's reasonable attorney fees incurred in reviewing the same. Any new Lease granted the mortgagee shall enjoy the same priority as this Lease over any lien, encumbrance or other interest created by Owner.

12.3.3 At the option of the Mortgagee, the new Lease may be executed by a designee of such Mortgagee without the Mortgagee assuming the burdens and obligations of the Assignee thereunder.

12.3.4 If more than one Mortgagee makes a written request for a new Lease pursuant hereto, the new Lease shall be delivered to the Mortgagee requesting such new lease whose Mortgage is prior in lien, and the written request of any other Mortgagee whose lien is subordinate shall be void and of no further force or effect. Owner shall be reimbursed all reasonable expenses incurred in determining whose Mortgage is prior in lien.

## Mortgagee Protections - continued

12.4 Mortgagee's Consent to Amendment, Termination or Surrender. Notwithstanding any provision of this Lease to the contrary, the Parties agree that so long as there exists an unpaid Mortgage, this Lease shall not be modified or amended and Owner shall not accept a surrender of the Property or any part thereof or a cancellation or release of this Lease from Lessee or Assignee prior to expiration of the Lease Term without the prior written consent of the Mortgagee. This provision is for the express benefit of and shall be enforceable by such Mortgagee.

12.5 No Waiver. No payment made to Owner by a Mortgagee shall constitute an Lease that such payment was, in fact, due under the terms of this Lease; and a Mortgagee having made any payment to Owner pursuant to Owner's wrongful, improper or mistaken notice or demand shall be entitled to the return of any such payment.

12.6 No Merger. There shall be no merger of this Lease, or of the leasehold estate created by this Lease, with the fee estate in the Property by reason of the fact that this Lease or the leasehold estate or any interest therein may be held, directly or indirectly, by or for the account of any person or persons who shall own the fee estate or any interest therein, and no such merger shall occur unless and until all persons at the time having an interest in the fee estate in the Property and all persons (including Mortgagee) having an interest in this Lease or in the estate of Owner or Assignee shall join in a written instrument effecting such merger and shall duly record the same.

## Mortgagee Protections - continued

12.7 Third Party Beneficiary. Each Mortgagee is and shall be an express third party beneficiary of the provisions of this Section, and shall be entitled to compel the performance of the obligations of Owner under this Lease.

12.8 Further Amendments. Provided that no material default in the performance of Lessee's obligations under this Lease shall have occurred and remain uncured after the expiration of all applicable notice and cure periods, at Lessee's request, Owner shall (a) amend this Lease to include any provision that may reasonably be requested by an existing or proposed Mortgagee, or by any entity that is proposing to directly or indirectly acquire any Project, and (b) shall execute such additional documents as may reasonably be required to evidence such Mortgagee's or other entity's rights hereunder; provided, however, that such amendment shall not materially impair the rights of Owner under this Lease, or extend the Lease Term of this Lease beyond the period of time stated in Section 4. Further, Owner shall, within ten (10) days after written notice from Lessee or any existing or proposed Mortgagee, execute and deliver thereto a certificate to the effect that Owner (a) recognizes a particular entity as a Mortgagee under this Lease and (b) will accord to such entity all the rights and privileges of a Mortgagee hereunder.

12.9 Further Amendments to Property Description. In the event that it is determined that there are any inaccuracies in or changes required to the legal description of the Property contained in Exhibit A, the validity of this Lease shall not be affected, and, upon the request of Lessee, Owner shall amend the legal description of the Property contained in Exhibit A of this Lease and in Exhibit A of the memorandum of this Lease to reflect the legal description of the Property contained in a title commitment, other title report or survey obtained by Lessee for the Property.

## Mortgagee Protections - continued

- Landlord objections
- Tenant responses
- **RULE: Do not delete Lender protections!**

## Restoration

Purpose of restoration provisions:

1. Landlord wants to ensure that property is restored at end of Lease.
2. Landlord wants security for Tenant's obligation to restore property.

## Restoration

Restoration. Upon any surrender, termination or expiration of this Lease, Lessee shall, **within six (6) months**, commence decommissioning the Project Facilities, which shall include (collectively, the “Restoration Requirements”) the restoration of the surface of the Property to a condition and contour reasonably similar to that existing on the Property as of the Effective Date and shall remove all of its above-grade and below-grade Project Facilities located on the Property to not less than three (3) feet below grade, and bury all foundations below grade with topsoil and reseed areas where the pads were located with grasses and/or natural vegetation. Lessee shall not have any obligation to remove any cables, lines, or conduit which is buried three feet or more below-grade. Any access roads constructed by Lessee may remain on the Property at Lessee’s option, unless Owner specifically requests their removal in writing. Lessee is not required to restore any borrow pits or quarries. **During such six (6) month period for purposes of Lessee being able to meet the Restoration Requirements, Owner shall grant to Lessee or any Affiliate, or any other entity designated thereby that is involved or intends to be involved in meeting the Restoration Requirements, recordable and assignable non-exclusive easements on, under, over and across the Property, for access to and from, and ingress to and egress from, the Solar Energy Projects and Project Facilities, whether the Solar Energy Projects and Project Facilities are located on the Property or on any other lands.** Among other things, such access easements shall contain all of the rights and privileges for access, ingress, egress and roads as are set forth in this Lease.



## Restoration – continued

- Landlord objections
- Tenant Responses

## Restoration – continued

### **Restoration Security**

**Two (2) years prior to expiration of this Lease (the “Restoration Security Date”), Lessee shall deposit with Escrow Agent (defined below), at Lessee’s discretion, either (x) a surety bond, (y) a letter of credit, or (z) cash deposit equal to the “Net Removal Cost” to secure the performance of the Restoration Requirements set forth herein (the “Restoration Security”), and Lessee shall maintain the Restoration Security through satisfaction of its obligations in Section [ ]. This provision shall survive termination, expiration or release of this Lease. The "Net Removal Cost" shall be the difference between the estimated cost to perform the Restoration Requirements set forth herein, and the salvage value of the Project Facilities to be removed from the Property, as of the expiration of the Operations Term, as reasonably determined by an engineer hired by Lessee and reasonably acceptable to Lessee and Owner, and the decision of such independent engineer shall be conclusive as between and binding upon the parties.** The Restoration Security shall be held by an escrow agent reasonably acceptable to Lessee and Owner (“Escrow Agent”) pursuant to an escrow Lease among Escrow Agent, Lessee and Owner (the terms of which shall be reasonably agreed to by such parties) which shall permit the investment of any cash deposit in investments reasonably approved by Owner and shall provide for the interest on such investments to be paid to Lessee so long as there is no continuing Event of Default by Lessee hereunder. Lessee shall pay all costs of the Escrow Agent for such escrow. **Upon satisfaction by Lessee of the Restoration Requirements, the Restoration Security shall be released to Lessee. To the extent applicable law includes decommissioning requirements, Lessee shall comply with such requirements in lieu of compliance with the Restoration Requirements and Restoration Security requirements herein, and satisfaction of same shall be deemed to satisfy the Restoration Requirements and Restoration Security requirements herein.**

## Purchase Option – General Right of First Refusal

Purpose of provision:

1. Tenant may want right to purchase for financial reasons.
2. Tenant may want to control identity of Landlord.

## Purchase Option – General Right of First Refusal

Right of First Refusal. Subject and subordinate to the obligations of Owner under any Existing Lien, in the event of any offer acceptable to Owner, or to Owner's successor in interest, at any time during the Term, for the sale of the Site (the "Sale Offer"), Owner, prior to the acceptance thereof, shall give Lessee, with respect to such Sale Offer, written notice thereof and a copy of said Sale Offer including the name and address of the proposed purchaser, and Lessee shall have the option and right of first refusal for sixty (60) days after receipt of such notice within which to elect to purchase the Site on the terms of said Sale Offer. If Lessee shall elect to purchase the Site pursuant to the right of first refusal herein granted, it shall give notice of such election within such sixty (60) day period. Lessee's failure at any time to exercise its option under this Section 19 shall not affect this Lease and the continuance of Lessee's rights and options under this and any other section hereof.

## Purchase Option – General Right of First Refusal

- Landlord objections
- Tenant responses

## Purchase Option – Substation Land

- Purpose of Lease provision
- What if owners do not want to sell?

## Purchase Option – Substation Land

Upon Lessee's request, Owner agrees that it shall transfer up to ten (10) acres of the fee interest in the Property (the "Substation Land") to a local utility company (including, but not limited to the transmission and distribution of utility in the area) (the "Substation Land Lessee") for purposes of constructing a substation, overhead and underground utility lines, communication lines and other related facilities for interconnection purposes to the substation or other point of interconnection in connection with the Project, and for operation, maintenance and repair thereof, in a location reasonably agreed to by Owner, Lessee and the applicable local utility company, and using a form of purchase Lease and deed reasonably requested by the applicable utility. Lessee shall pay Owner [\_\_\_\_\_ and No/100 Dollars (\$\_\_\_\_\_.00)] per acre as consideration for such transfer concurrent with the recordation of the deed effectuating such transfer.

## Lease Memorandum

### Lease Provision:

Memorandum. Owner and Lessee shall execute in recordable form and Lessee shall then record a memorandum of this Lease in the form attached to this Lease as Exhibit C. Owner consents to the recordation of the interest of an Assignee in the Property. The memorandum will be recorded in all counties in which the Property is located.



## Lease Memorandum - continued

### Louisiana Revised Statute 9:2742

1. In lieu of recording a written lease or sublease or any amendment or modification thereof, as provided by Civil Code Article 3338, a party may record a notice of lease or sublease, signed by the lessor and lessee of the lease or sublease.
2. Recordation of a notice makes the lease or sublease and any subsequent amendment or modification thereof effective as to third persons to the same extent as would recordation of the instrument evidencing it.
3. **The notice of lease must contain the following:**
  - a) **A declaration that the property is leased, and the names and addresses of the lessor and lessee.**
  - b) **A description of the leased property.**
  - c) **The date of the lease, its term, and the provisions of any extensions and renewals of the term provided for in the lease.**
  - d) **A reference to the existence of an option, right of first refusal, or other Lease of the lessor to transfer all or any part of the leased premises.**
  - e) **If of a sublease, the notice shall also contain reference to the recordation information of the primary lease or notice of lease that is subleased; however, the omission of this information does not affect the efficacy of the notice.**

Lease Memorandum - continued

Acknowledgement examples in TX:  
[Representative Capacity]

STATE OF TEXAS                    )  
  )  
COUNTY OF \_\_\_\_\_)

This instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_,  
2018 by John Smith, Managing Member of ACME, LLC, a Texas limited liability  
company, on behalf of such company.

[SEAL]

\_\_\_\_\_  
Notary Public State of \_\_\_\_\_  
My commission expires: \_\_\_\_\_

Lease Memorandum - continued

Acknowledgement examples in TX:

[Individual Acknowledgment]

STATE OF \_\_\_\_\_ )

)

COUNTY OF \_\_\_\_\_ )

This instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_,  
2018 by John Smith a resident of the State of Texas.

[SEAL]

\_\_\_\_\_  
Notary Public State of \_\_\_\_\_

My commission expires: \_\_\_\_\_

## Construction Considerations

- Lease must provide access for construction by contractors and subcontractors.
- Owner will want indemnity for damages, so make certain contractors and subcontractors provide Tenant indemnity and sufficient insurance. Insurance should name landowner as additional insured.
- Contractor not allowed to file a mechanic's lien against Owner's fee interest in property. Lien may be filed only against the leasehold estate.
- Contractor must subordinate its lien rights to the rights of the Tenant's lender.

# Title Insurance Considerations

## What does title insurance do and why is it required?

Title insurance guarantees that the insured possesses an ownership interest or a leasehold interest in real property. If the insured's title is challenged, the title insurance company has the option to indemnify the insured for the loss, or to defend the insured with respect to the claim and to establish title in favor of the insured.

## Difference between title insurance and liability or property insurance.

Property insurance covers physical damage to property. Liability insurance provides indemnity and defense for physical injuries or property damages caused by the insured.

## Policy and endorsements needed to insure leasehold estate.

Endorsements available vary from state to state. For a renewable project, you generally want to purchase additional coverage, generally evidenced through endorsements, to provide coverage with respect to oil and gas activities on the property, and easements on the property in favor of third parties. You also want endorsements insuring access to the property, and insuring that if the property consists of multiple parcels, they are contiguous.

## What must developers do to ensure that the title insurance company will provide insurance for the leasehold estate?

- Lease needs to be signed by all property owners
- Lease needs to be joined by spouses even if they do not own an interest
- Title company will want to see estoppels signed by the landowners
- Title company will want to see waiver of right to use the surface for production of oil, gas and other minerals
- Make certain property description is sufficient
- Record lease memorandum
- Include covenant in Lease requiring that Owner sign any documents needed to obtain leasehold title insurance policy reasonably acceptable to Lessee
- The title insurer will need to approve the survey.

## Miscellaneous Lease Provisions – Legal Matters

- Choice of law
- Venue
- Waiver of jury trial
- Attorneys' fees
- Mediation
- Arbitration

## Miscellaneous Lease Provisions – Legal Matters

Legal Matters. This Lease shall be governed by and interpreted in accordance with the laws of the State of Texas. Venue shall be proper in the County where the Property is located. If the parties are unable to resolve amicably any dispute arising out of or in connection with this Lease, they agree that such dispute shall be resolved in the state courts located in the county in which the Property is situated. The Parties agree that any rule of construction to the effect that ambiguities are to be resolved in favor of either Party shall not be employed in the interpretation of this Lease and is waived. In any lawsuit arising out of or in connection with this Lease, a party that obtains a judgment from the court substantially the same as the judgment sought therein shall be entitled to payment of its reasonable attorneys' fees in connection with the action.

WAIVER OF RIGHT TO JURY TRIAL. TO THE EXTENT PERMITTED BY LAW, EACH OF THE PARTIES KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO. EACH OF THE PARTIES TO THIS AGREEMENT WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES FOR ENTERING INTO THIS AGREEMENT.

[State laws on the issues addressed above varies from state to state]

## Miscellaneous Lease Provisions – Tax Credits

Tax Credits. If under applicable law the holder of any interest under this Lease becomes ineligible for any tax credit, benefit or incentive for alternative energy expenditure established by any local, state or federal government, then, at Lessee's option, **Owner and Lessee shall amend this Lease or replace it with a different instrument so as to convert Lessee's interest in the Property to a substantially similar interest that makes Lessee eligible for such tax credit, benefit or incentive**; provided, however, that nothing in this Lease shall entitle Lessee to a fee interest in the Property, diminish Lessee's payment obligations under this Lease or extend the Lease Term of this Lease. Owner hereby acknowledges and agrees that Lessee has the exclusive right to harness the Renewable Energy Resources on, around, about or at the Property and Lessee is the exclusive owner of all Renewable Energy and related economic benefits generated by the [Solar/Wind] Power Facilities, including, but not limited to, any and all federal, state and/or local benefits and credits (including tax credits, investment credits, carbon credits, renewable energy credits), rebates, incentives, benefits, emissions reductions, entitlements, reporting rights, deductions, depreciation, offsets and allowances of any kind, howsoever entitled, attributable to the Project Facilities or the electric energy, capacity or other generator-based products produced therefrom, whether in effect as of the date of this Lease or as may come into effect in the future (collectively, "Credits"). Lessee shall be exclusively entitled to apply for, collect, receive, and obtain the benefit of all Credits. To the extent Owner becomes the beneficiary of any Credits, Owner shall assign the same to Lessee.



## Miscellaneous Lease Provisions - Condemnation

Condemnation. If all or part of the Property is proposed to be taken as a result of any action or proceeding in eminent domain, or is proposed to be transferred in lieu of condemnation to any authority entitled to exercise the power of eminent domain (collectively, a "Taking"), Owner shall provide Lessee with reasonable advance notice of any impending proceeding or meeting related to such Taking and shall not in the absence of Lessee settle with the Taking authority or agree on compensation for such Taking. The Lease shall terminate as to any portion of the Property so condemned or taken (except in the case of a temporary Taking after the duration of which Lessee desires to continue the Lease, and the Lease Term shall be extended, in such event, by the duration of such temporary Taking). Subject to any applicable law or regulation, if any, any award or other compensation ("Award") payable as a consequence of such Taking shall be paid as follows:

- a. Owner shall first be entitled to receive out of the Award the value of Owner's fee interest in the Property, valued as if no Project Facilities were on the Property;
- b. Lessee shall next be entitled to receive out of the Award: (A) the value of the Project Facilities installed on the Property; (B) any other compensation or benefits payable by law as a consequence of the loss or interruption of Lessee's business and the other costs and expenses incurred by Lessee as consequence of the Taking; and (C) the remaining present value of Lessee's interest in the Property (determined at the time of the Taking), including the value of Lessee's interests under this Lease;
- c. Owner shall then be entitled to receive out of the Award, taking into account the leasehold and easement estates created by this Lease, the estimated amounts that would have been paid by Lessee hereunder; and
- d. Owner shall be entitled to any remainder of the Award.

## Miscellaneous Lease Provisions – Force Majeure

Force Majeure. If performance of this Lease or of any obligation under this Lease is prevented or substantially restricted or interfered with by reason of an event of “Force Majeure” (defined below), the affected party, upon giving notice to the other party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference and the Lease Term shall be extended for the duration of the Force Majeure event; provided however nothing in this Section [ ] shall relieve Lessee of its obligations to pay Development Fees or Rent amounts or other monetary obligation payable to Owner pursuant to this Lease. The affected party shall use its reasonable efforts to avoid or remove such causes of nonperformance, and shall continue performance under this Lease whenever such causes are removed. “Force Majeure” means flood, drought, earthquake, storm, fire, tornado, lightning, windstorm, unusually inclement weather or other natural catastrophe; acts of God, casualty or accident; war, sabotage, vandalism, the unauthorized cutting of power, transmission or other lines, wires or cables to any of the improvements of the Project Facilities, civil strife or other violence; strikes or labor disputes; any law, order, proclamation, regulation, ordinance, action, demand or requirement of any government agency or utility; a Regulatory Suspension (defined below); litigation challenging the validity or content of any permit or approval necessary for the construction or operation of the Project; litigation by Owner, nearby landowners or third party interest groups challenging the validity or content of this Lease or any aspect of the Project; or any other act or condition beyond the reasonable control of a party hereto. A “Regulatory Suspension” shall mean the application of any local, state or federal law, order, rule or regulation which results in the delay, interruption, or suspension of the: (i) construction of the Project; or (ii) transmission, production or sale of electricity from the Project.

## Miscellaneous Lease Provisions – Further Assurances

Further Assurances; Cooperation. Owner shall fully support and cooperate with Lessee in the conduct of its Operations and the exercise of its rights hereunder (including with Lessee's efforts to (a) obtain from any governmental authority or any other person or entity any environmental impact review, permit, entitlement, approval, authorization or other rights, or (b) sell any Solar Power Facilities, assign or otherwise transfer all or any part of or interest under this Lease or obtain any financing), and Owner shall perform all such acts (including executing and/or delivering maps, instruments and documents within five (5) days after receipt of a written request made from time to time by Lessee) as Lessee may reasonably specify to fully effectuate each and all of the purposes and intent of this Lease. Without limiting the generality of the foregoing, within five (5) days after receipt of a written request made from time to time by Lessee, Owner shall: (i) enter into any reasonable amendment to this Lease (1) to correct an error in this Lease, (2) to amend the legal description attached to this Lease (including by replacing said legal description with a revised description prepared or provided by Lessee's surveyor or title company), (3) that may be required by any Mortgagee or in connection with the transfer by Lessee of its rights under this Lease or (4) to cause this Lease to comply with Law; (ii) execute and deliver to Lessee any owner's affidavit reasonably requested by a Title Company; (iii) enter into any consent and nondisturbance Lease requested by any Mortgagee, stating that Owner shall recognize the rights of the Mortgagee and not disturb its possession of the Property so long as it is not in default under this Lease, and stating such other things as such Mortgagee may require; (iv) join in any grants for rights-of-way and leases for electric and other public utilities and facilities and any other electric power purpose (including any power transmission line) as Lessee may deem necessary or desirable for its development and use of the Property as contemplated by this Lease; (v) join with and support Lessee in the signing of any protest, petition, appeal or pleading that Lessee may deem advisable to file or in requesting any and all zoning changes or any waivers, variances, land use permits and/or approvals, in each case as Lessee may deem necessary or desirable for Lessee's development and use of the Property as contemplated by this Lease; and (vi) if because of the nature of this Lease Lessee is unable to qualify for any tax credit or similar benefit associated with the Solar Power Facilities or the Operations, amend this Lease to assure that Lessee will receive such credits and benefits (but only if such amendment does not materially adversely affect Owner's rights or obligations hereunder); and Lessee agrees to pay Owner's reasonable out of pocket expenses incurred by Owner in connection with Owner's cooperation pursuant to the foregoing provisions of this Section [ ]. Without limiting the generality of the foregoing, Owner shall not oppose, in any way, whether directly or indirectly, any application by Lessee for any permit, approval or entitlement at any administrative, judicial, legislative or other level.

## Miscellaneous Lease Provisions – Further Assurances

- Landlord objections
- Tenant responses