

2019 | THE ACADEMY
Legal & Regulatory
Conference



Renewables Projects: Structures and Issues to Consider

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Legal & Regulatory Conference**

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PRESENTED BY
TAMMIE PTACEK, PARTNER, STINSON LLP
GUY SMITH, PARTNER, STINSON LLP

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We focus on substantial projects throughout the United States and beyond, representing municipal utilities and electric cooperatives, refineries and pipelines, independent power producers and renewable energy developers.

Our counsel embraces the complexities of the energy industry for a diverse group of clients bolstered by a deep understanding of finance and regulatory concerns.

Today's Presentation will Cover

- Models for expanding your utility's renewables portfolio — ownership or long-term power purchase agreement (PPA) (or something else?)
 - Legal considerations for both models – ownership and long-term PPA -- and possible contract structures/issues to be considered with respect to each
 - Additional issues to consider
 - Project development, funding/financing, tax credits and other incentives
 - Legal, regulatory, market and performance risks that can affect decision-making

Models for Expanding Your Renewable Energy Portfolio

- A. Project Ownership
- B. Long-term Power Purchase Agreement
- C. Other
 - 1. REC Acquisition
 - 2. Community Solar
- D. Additional Considerations

A. PROJECT OWNERSHIP

1. Acquisition

- Status of project when acquiring – due diligence considerations and negotiations of Purchase and Sale Agreement
 - In development – what stage, environmental, technical, contract (e.g., leases/easements, interconnection agreement), permitting and regulatory review
 - Shovel-ready – same as above plus EPC/equipment contracts and maybe others (e.g., O&M agreement), financing agreement
 - Operational – same as above plus operating reports, financials, environmental violations, additional contracts

1. Acquisition *(continued)*

- Deal Structure
 - Asset versus Equity transaction – pros and cons, strategy, negotiation of PSA
 - Development Services after acquisition if in development stage
 - Transition Services after acquisition if in operation
- Payment Structure
 - Development stage – smaller initial payment; milestone payments associated with events such as obtaining permits, NTP, COD
 - Shovel-ready – larger initial payment; possible earn-out based on production; COD milestone payment
 - Operational – all up front with possible escrow to cover indemnification obligations, depending on creditworthiness of seller and/or guarantor

1. Acquisition *(continued)*

- Exposure to development risk
 - How to mitigate
 - Independent engineer
 - Development services
 - Payment structure – pay upon reaching certain milestones in development and construction process

1. Acquisition *(continued)*

- Exposure to construction risk
 - How to mitigate
 - Same as above plus ...
 - Construction management
 - EPC contractor diligence and warranty
 - Contract terms – turnkey/lump sum, milestones, liquidated damages, performance guarantees, parent guaranty/bonds
 - Equipment provider warranties
 - Be sensitive to proposed technology (e.g., new module technology, latest vintage wind turbines)

1. Acquisition *(continued)*

- Human/Financial Resources
 - Needed to support due diligence and acquisition – vary depending on stage but may include:
 - Engineering consultant
 - Environmental consultant
 - Insurance consultant
 - Accountants
 - Counsel
 - Additional staff?

2. Greenfield Development

- Developing project from inception or relatively nascent stage
 - Same as acquiring project in development stage w/more risk and more activities to manage (more moving parts)
 - Requires team
 - More staff and/or consultants
 - Responsible for and manage:
 - Site identification
 - Site control
 - Form (ownership, lease/easement/, lease option)
 - Permits
 - Construction, including procurement of contractor/suppliers
 - Financing
 - Other project agreements

3. Financing

- Need to determine and structure whether acquisition or development
 - Development Costs over long period – pay from cash or development financing?
 - Construction Costs – construction period relatively short, construction loans available

3. Financing *(continued)*

- Third-party Financing
 - Tax Exempt Bonds
 - Per APPA's website, tax-exempt municipal bonds have financed \$80 billion in new investment in electric power generation, transmission and distribution over last decade
 - Long-term permanent financing with significant costs of issuance
 - Lower interest but subject to complex private-use rules

3. Financing *(continued)*

- Construction Financing
 - Lender due diligence, including lender's independent engineer
 - Need permanent financing "take out"
 - Consents to collateral assignment of contracts
- Permanent Financing
 - Bonds as mentioned above
 - Long-term debt
 - Remains a borrowers market
 - Term often shorter than operational life of project (mini-perm, 4-7 year term)
 - Align term of debt with operational life of project (Solar Mortgage REIT)

3. Financing *(continued)*

- Tax Equity Financing
 - Investment Tax Credit available for solar, generally 30% (*but phasing out to 26% in 2020, 22% in 2021 and 10% thereafter*) of basis of eligible property (qualifying energy property that is depreciable and used to produce electricity)
 - Public power agencies may be able to use a blocker corporation to get benefit of ITC if owning the project; partner with tax equity investor that can use tax credits
 - Production Tax Credit available for wind projects that commenced construction prior to January 1, 2020. Available for each kWh produced in 1st 10 years of operation. For 2019 credit is \$0.025 per kWh. Phased down to 40% for projects that commenced construction in 2019.
 - Will also need to understand if purchasing power from a project financed with tax equity

4. Operational Risk

- As owner have responsibility for operating risk
 - Issues:
 - Power supply obligations/responsibilities
 - PPA, Power Sales Agreements, etc. where acting as seller
 - Need to understand obligations and operational/system limitations
 - Dispatch/scheduling requirements/limitations
 - Distribution utility and system/market framework (as applicable)
 - Warranty management/spare parts/maintenance issues, outage management, etc.
 - Contract with third parties and pass-through risk (e.g. third party operator, etc. through O&M and related agreements)

5. Commercial Risk

- As owner assume responsibility for commercial risk
 - Multiple aspects
 - Paid too much for asset
 - Cost overruns
 - Mismanage development or construction
 - Fail to mitigate risk adequately in project contracts (PPA/PSA, EPC, O&M agreements)
 - Payment issues: (rates, payments, etc. inadequate or insufficient to cover all cost components, including operating and capital expenses and debt service)
 - Mismanagement of expenses
 - Take advantage of additional incentives that may be available (e.g., state and local incentives)

B. LONG-TERM POWER PURCHASE AGREEMENT (10+ YEARS)

1. Less Risk than Project Ownership

- Focus on utility scale
- Owner (i.e., seller) assumes development/permitting risk, construction risk, risk of loss, operational risk
- But not risk free for Buyer
 - May have price escalators (but typically below historic market price increases)
 - May result in paying more than prevailing market price
 - Change in law
 - Default by Seller and creditworthiness of Seller (mitigate with credit support requirements to ensure payment of damages for failure to meet PPA obligations)

2. Provides Predictability

- Key advantages to PPA for Buyer are predictable cost over the life of the PPA and having another party be responsible for development, ownership and operation of project.
- Also results in predictability of revenues on project owner side allowing project to be financed.

3. Considerations Relating to Project Owner (Seller)/ Sponsor(s) and Project

- Project Owner (Seller)/Sponsor(s)
 - Diligence regarding financial wherewithal, competence/expertise to develop, construct and operate project per the terms of the PPA
 - Financial strength – requirements for credit support provisions of PPA; may be bifurcated for pre-COD and post-COD periods
 - Experience – how many MWs developed/owned/operated using same or similar technologies, etc.?
 - If contracted w/third parties to manage/operate, same assessment as to experience/capabilities

3. Considerations Relating to Project Owner (Seller)/ Sponsor(s) and Project *(continued)*

- Project
 - Location (capable of being built, political climate for support/permitting, nearby projects)
 - Technology
 - Other project participants (tax equity, key service and equipment suppliers)

4. PPA Considerations/Terms

- Term
- Price
- Conditions Precedent
 - Construction and other milestones/conditions
 - Delay liquidated damages
- Performance guarantees (output/availability/performance-based liquidated damages)
- Curtailment rights/risk
- Overproduction
- Reporting obligations
- Ownership of environmental attributes
 - Clearly spell out

4. PPA Considerations/Terms *(continued)*

- Termination rights
- Default and Remedies
- Force Majeure and other excused performance
 - Items to exclude from definition of Force Majeure
- Purchase option and related tax considerations
- Change in law
- Financial / credit support / performance assurance
- Operating requirements
- Financing requirements (collateral assignment/consent)
- Participation in decision-making
 - Management committee/other

5. Planning for PPA

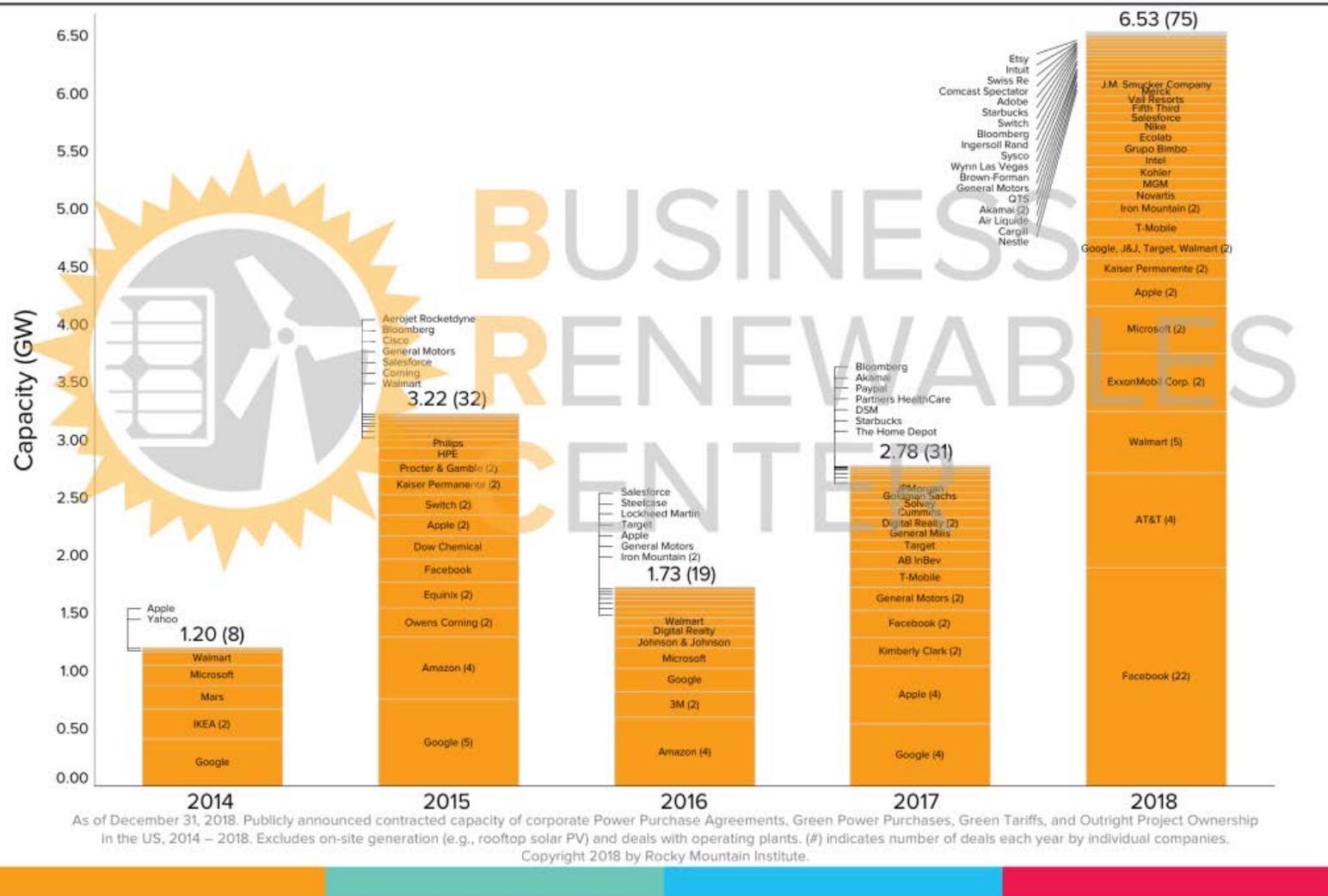
- Understand intermittent nature of resource and impact on supply
- Understand price paid and nexus to budgeted operating costs/revenues
- Management/use of energy purchased (supply to wholesale and/or retail customers)
- Fulfillment of Buyer's PPA obligations (e.g., interconnection, delivery, metering, financial, etc.)

6. PPA Structures/Renewable Energy Procurement

Corporate Renewable Energy Procurement

- Corporate procurements by large utility customers are expected to grow beyond 2019 due to factors such as increasingly favorable contract terms (pricing, structure and “understandability”), and sustainability goals
- Three additional positive trends to keep corporate renewable procurements growing:
 - Emerging policies supporting renewable growth
 - Expanding investor interest in sector
 - Advancing technologies that increase wind and solar energy’s value to grid, owners and customers

Corporate Renewable Deals 2014 – 2018



Source: Rocky Mountain Institute

Renewable Procurement Options

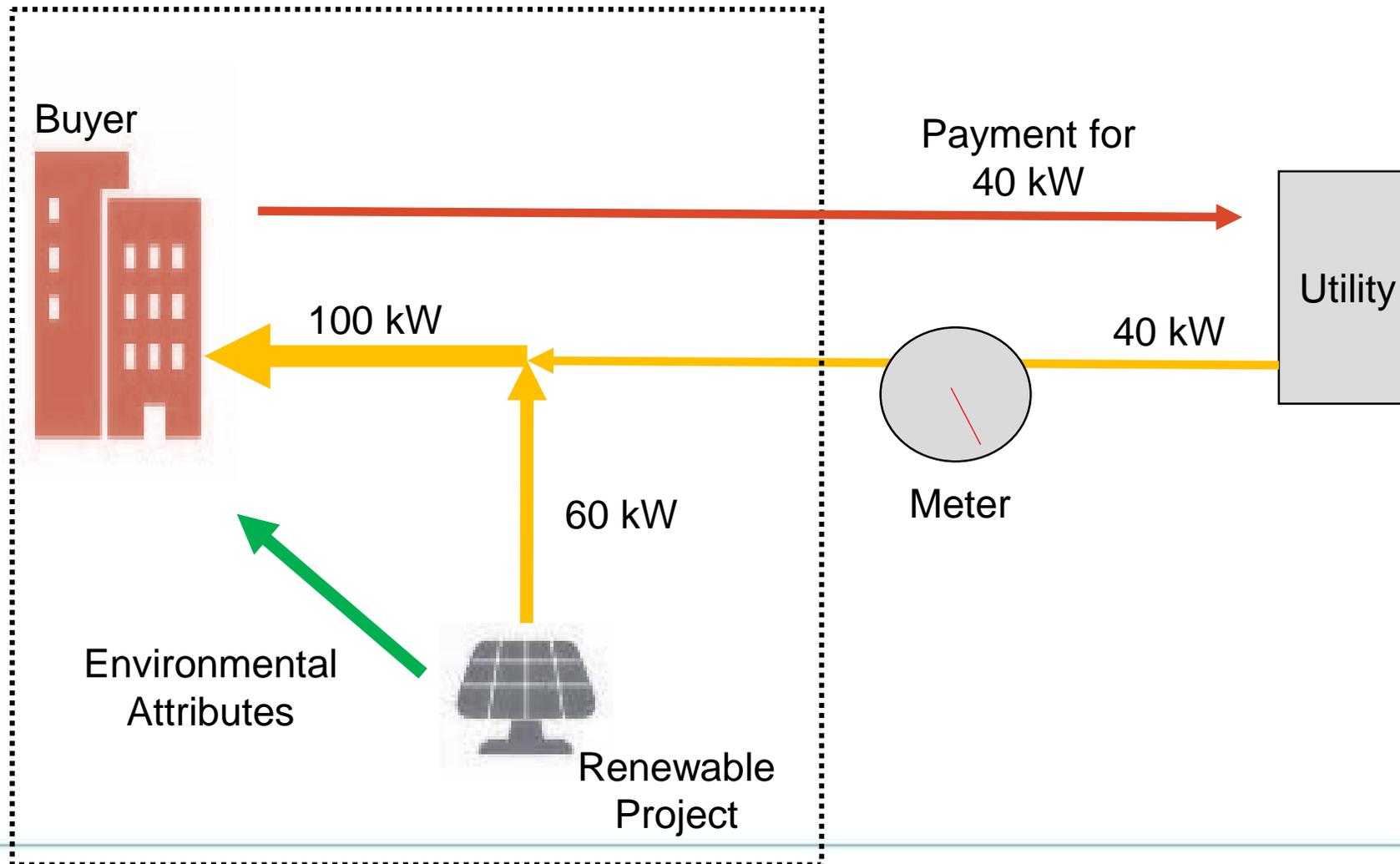
1. On-Site, Self Supply
2. On-Site, Vendor Supply
3. Community Solar
4. Wholesale Power Purchase (PPA)
5. Virtual Power Purchase + RECs
6. REC Acquisition
7. Retail/Utility-Sleeved PPA
8. Utility/Retail Green Program

Renewable Procurement Options

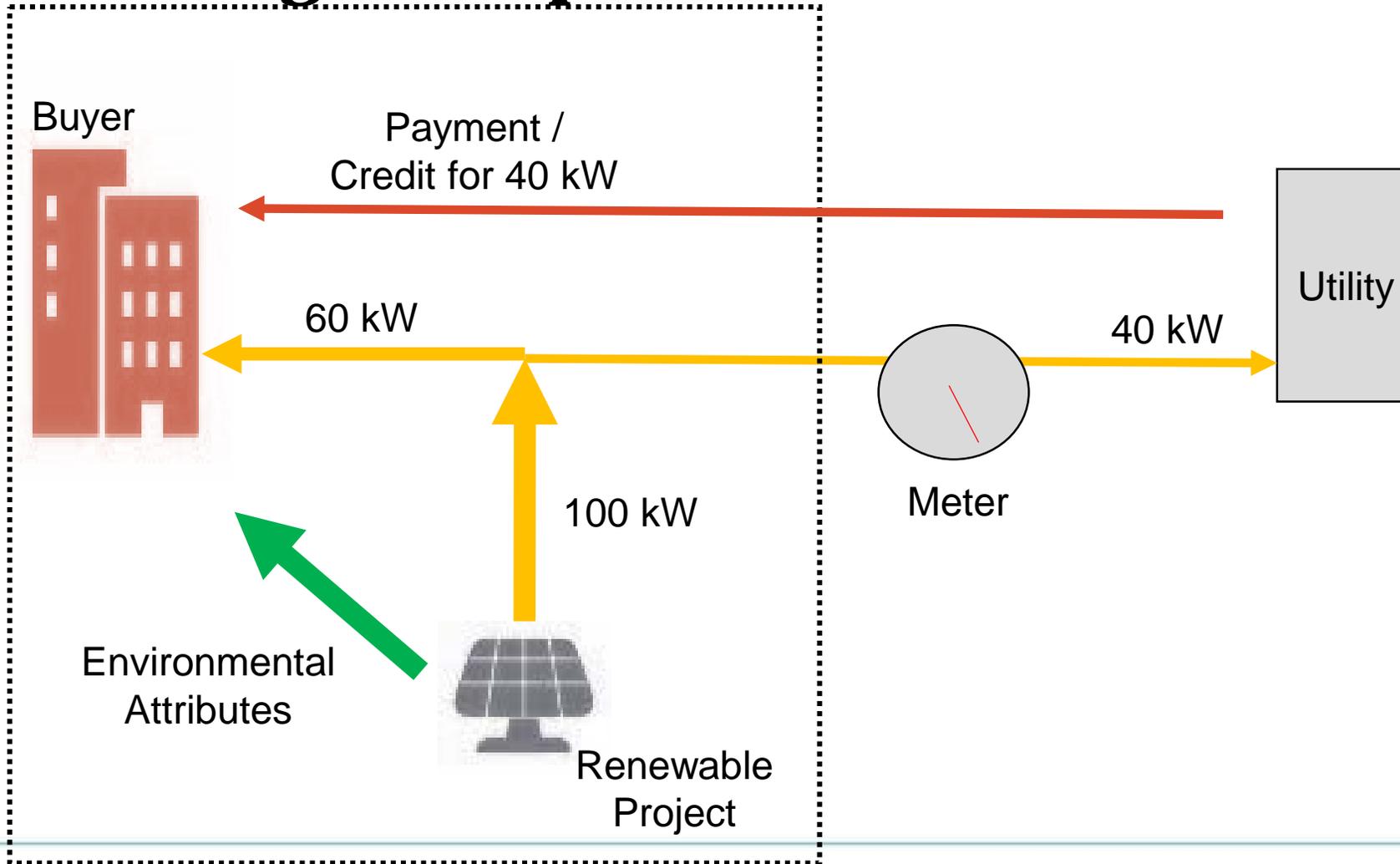
Utility side:

- may be able to use prepaid PPA structure – best characterized as mixture between a cash deal on solar equipment and ease and risk-adverse benefits of a PPA; pay upfront with substantial discount for a portion of the power; prepayment may be financed with tax-exempt bonds
- Way to lower cost of capital for project resulting in lower overall price

1. On-Site, Self Supply (“Behind the Meter”)



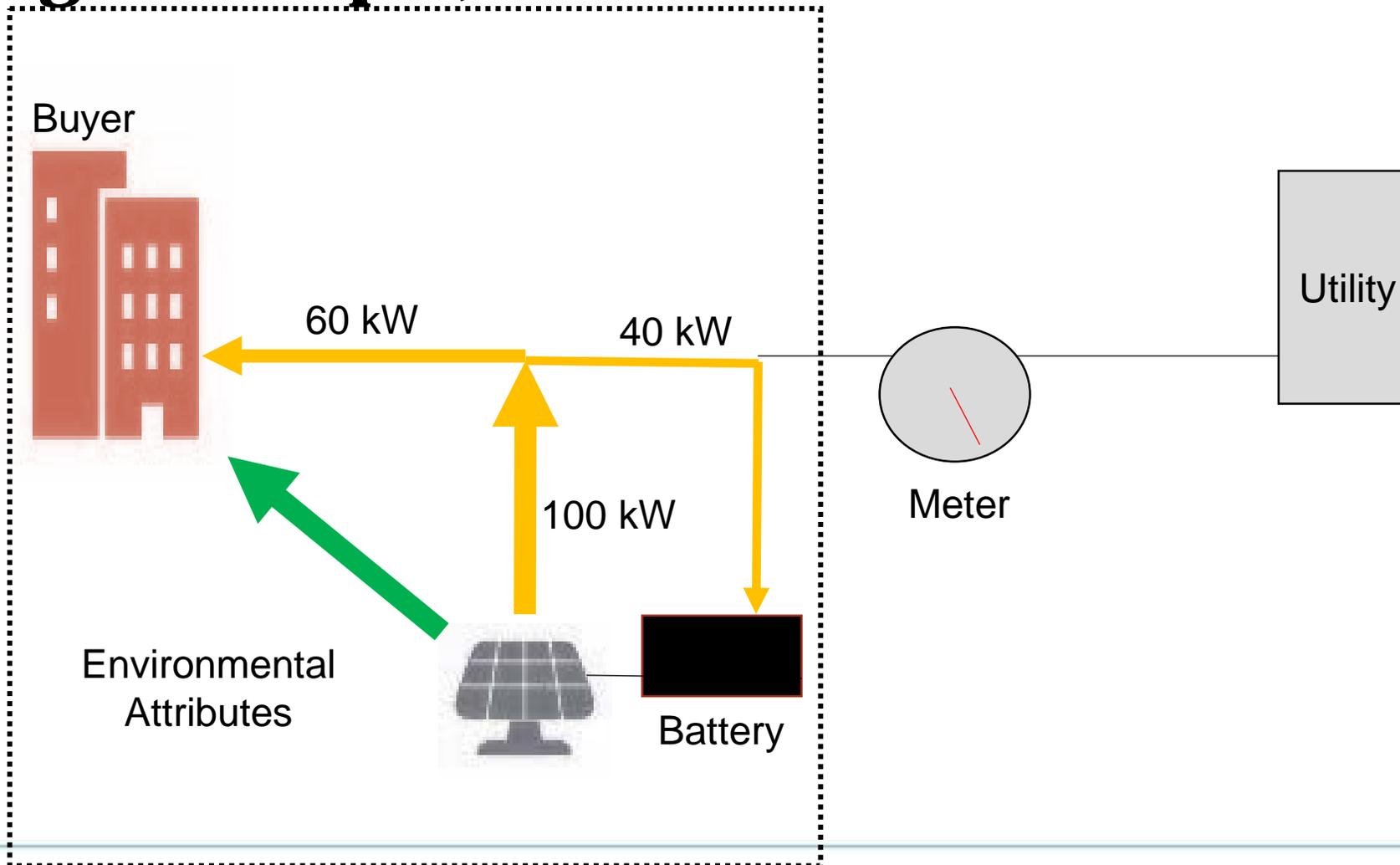
On-Site, Self Supply (continued) (Net Metering Example)



Net Metering—Regulatory Developments

- Basic Concept:
 - Customer consumes 50 MWh, produces 50 MWh
 - Customer pays utility for 0 MWh
- Cost-Shifting Issue—Customer depends on utility and grid infrastructure to ensure it has reliable 24-hour power but is not paying for it
- Alternatives (States with high levels of solar adoption—e.g., AZ, HI, CA):
 - Net metering + fixed monthly fee on solar owners
 - Compensate excess output at lower than retail rate (e.g., “Value of Solar”)
 - Compensate all output at lower than retail rate (two meters, “buy-all, sell-all”)
- Technological “End-Around”: **Energy Storage...**

On-Site, Self Supply (continued) (Storage Example)

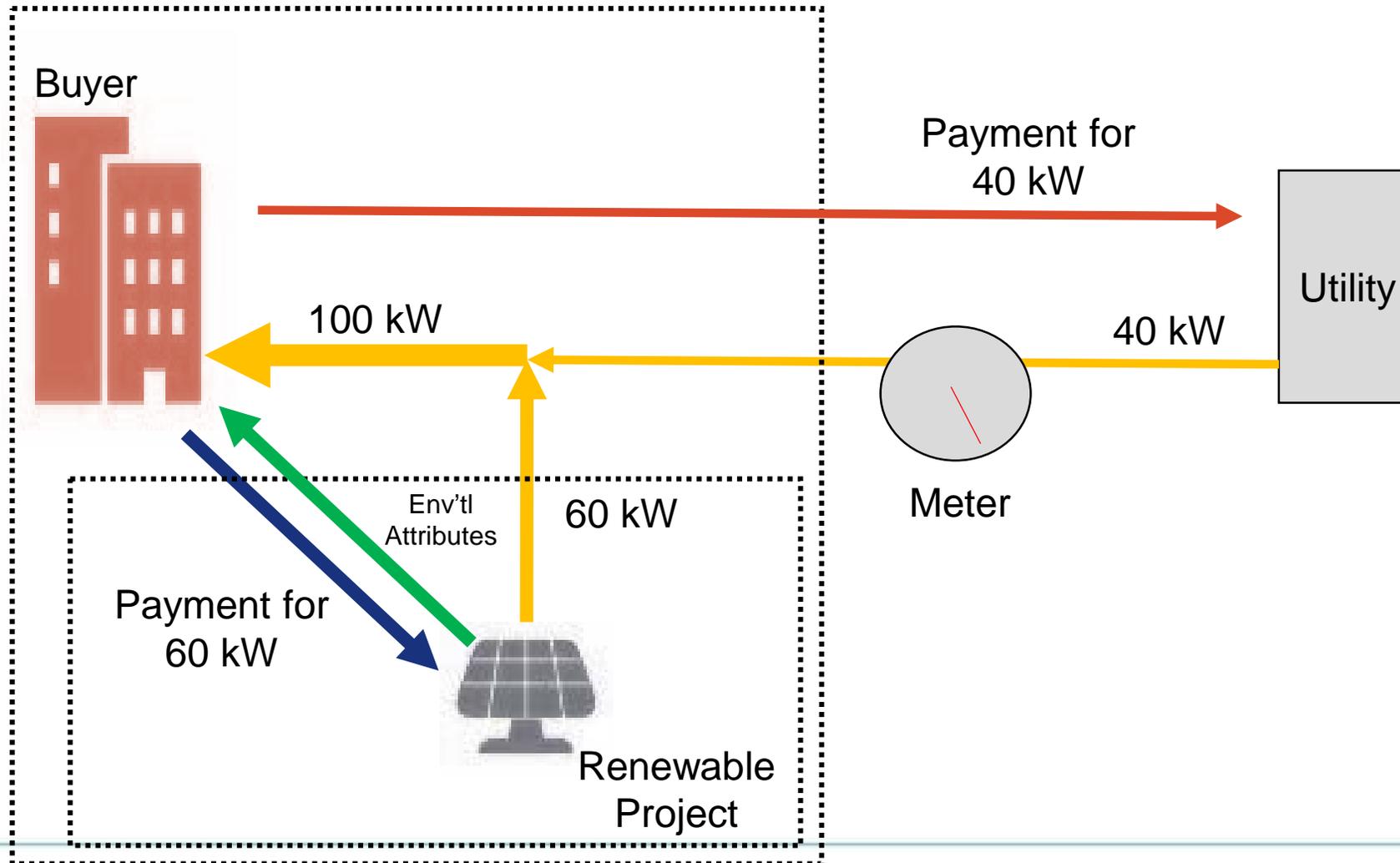


On-Site, Self Supply *(continued)*

Summary of Legal Considerations

- Permitting
 - a. Public Utility Commission Need/Site Permit (Large Projects)
 - b. Zoning/Conditional Use Permit
 - c. Building Permit
 - d. Environmental (SWPP, wetlands, etc.)
- Utility Tariff—Interconnection, Net Metering/Solar Rate
- Incentives—Federal Tax, State Agencies, Utility Programs
- Contracts
 - a. Module Supply—Product & Output Warranty, Term, Exclusions
 - b. O&M—Scope of Services, Pricing Structure, Term
- Insurance—Property and Commercial General Liability

2. On-Site, Vendor Supply (PPA)



On-Site, Vendor Supply *(continued)*

- Power Purchase Agreement (PPA)
 - Long Term, Fixed/Scheduled Price
 - Common and useful method for developers to finance projects
- Advantages
 - Shift construction/installation burden
 - Shift O&M responsibility, focus on core business
 - Shift tort liability
- **Regulatory Issue for customers to consider – Avoid becoming a “public utility” or violating “exclusive service area” of a public utility...**

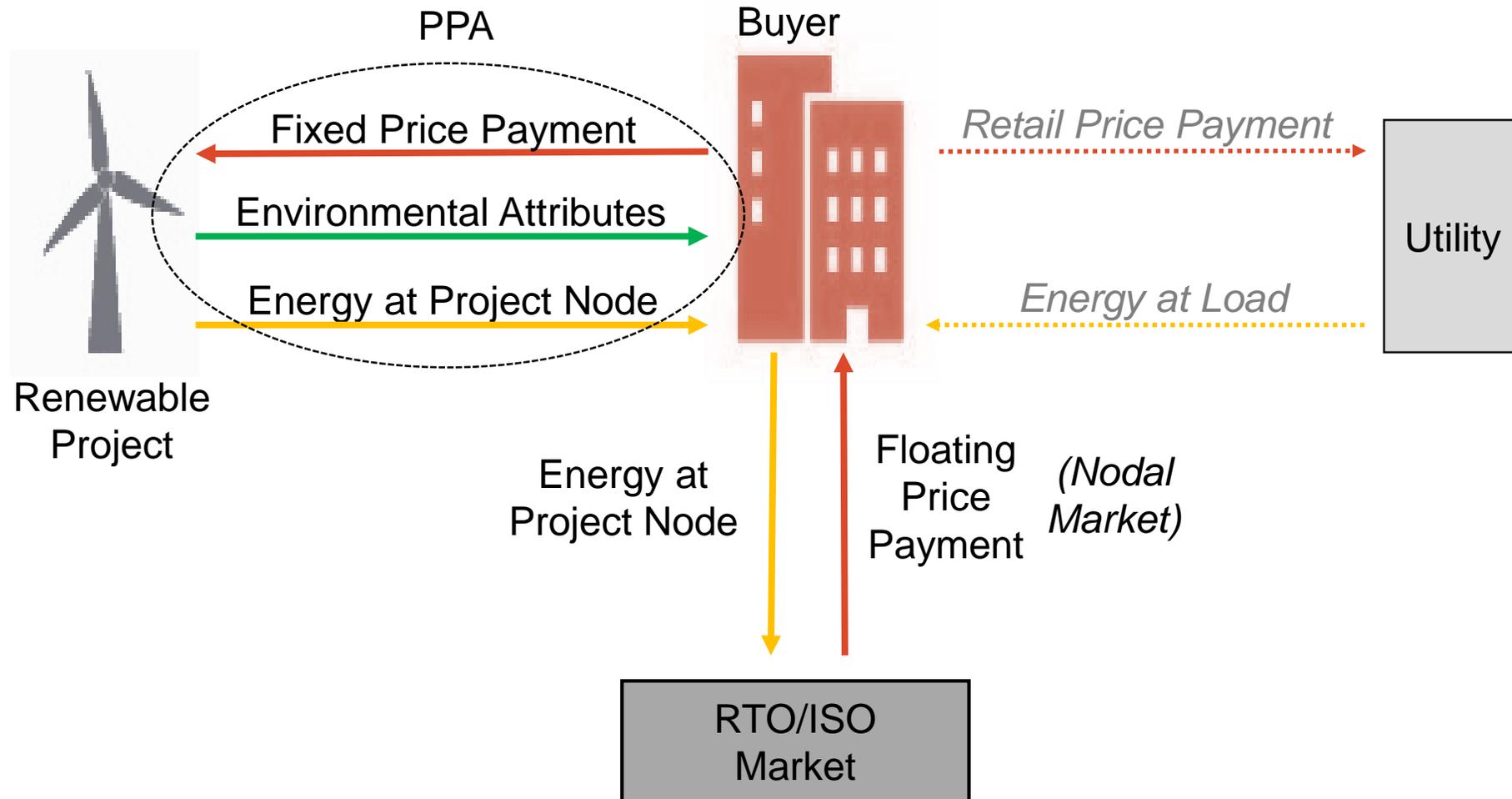
On-Site, Vendor Supply *(continued)*

Contracting Considerations

- PPA + Lease/Easement (with cross-termination)
- Conditions Precedent/Early “Outs”
- Price (fixed/escalating), Term/Renewal, Quantity (versus load)
- Allocation of RECs
- Allocation of Permitting/Utility Interconnection Obligations/Risk
- Allocation of Insolation/Solar Obstruction Risk
- Access/Non-Interference with Buyer Operations & Vendor Output
- Protection of Property/Roof
- Indemnity & Insurance
- Limitation of Liability/Consequential Damages
- Purchase or Removal Option/Obligation at End of Term (and associated tax issues)

3. Community Solar – discussed below

4. Wholesale Power Purchase (PPA)



Wholesale Power Purchase *(continued)*

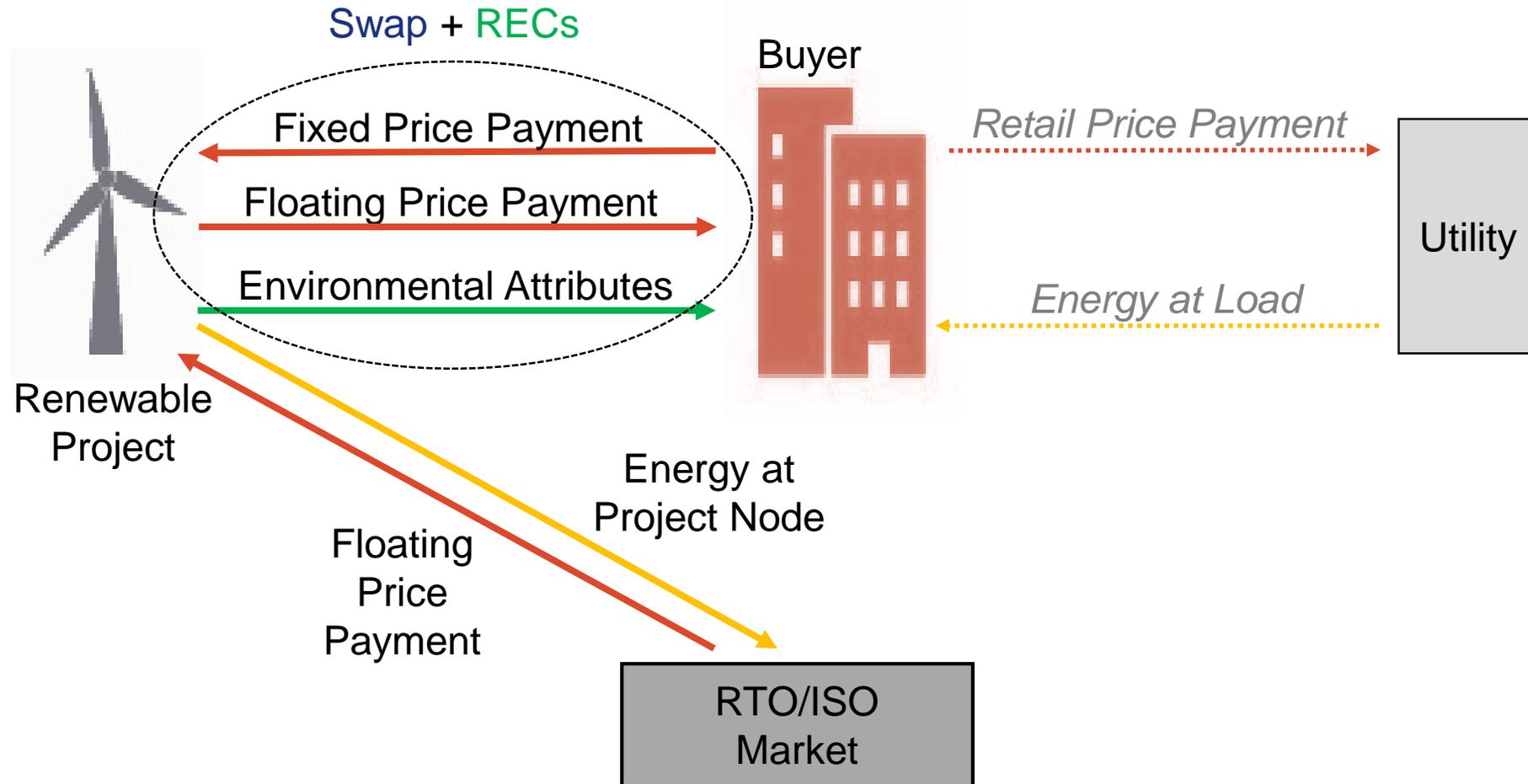
- Power Purchase Agreement (PPA)
- FERC Regulatory Requirements:
 - “Sale of electric energy at wholesale in interstate commerce” is subject to FERC jurisdiction under FPA, 16 U.S.C. § 824(b)(1)
 - Generally applicable to all wholesale sales unless limited to AK, HI, or TX-ERCOT markets
 - “Wholesale” = sale for resale
 - Must obtain Market-Based Rate (MBR) authority, 18 C.F.R. Pt. 35
 - Initial application based on formulaic “market power” screens
 - 60-day review period
 - Update for “change in status” (e.g., add’l 100 MW within geo. market)
 - Must file Electric Quarterly Reports (EQRs), 18 C.F.R. § 35.10b
 - Other compliance obligations—Anti-manipulation, etc.
- RTO/ISO Participation
 - Must become “Market Participant” in applicable RTO/ISO
 - Must satisfy credit requirements (guaranty or other performance assurance)

Wholesale Power Purchase *(continued)*

Contracting Issues

- Conditions Precedent (permitting, land, financing, board approval)
- Commercial Terms
 - Price (fixed/escalating)—Imperfect hedge of retail load costs
 - Term/Renewal
 - Quantity (typ. full output; flexibility for development risk?)
- Credit Support (guaranty, letter of credit, bond, cash; pre/post-COD)
- Accommodation of Financing Parties (collateral assignment and consent issues)
- RTO Products—Energy, Capacity, Ancillary Services
- Production Guarantees
- Allocation of RECs
- Allocation of Change-In-Law/RTO Rules Risk (e.g., PTC/ITC)
- Allocation of Curtailment Risk (RTO/reliability, regulatory, market pricing) and Payment for “Deemed Energy” (including lost PTC)
- Purchase Option or Right of First Offer (ROFO)

5. Virtual Power Purchase + RECs



Virtual Power Purchase + RECs *(continued)*

- Financially-Settled Transaction Between Parties
 - No physical transfer of power between the parties
 - Buyer receives standard retail power from utility
 - Imperfect hedge
 - Fixed price payment to Seller
 - “Offsetting” market price payment to Seller/retail price payment to utility
- Accommodates restricted retail access
- Buyer avoids need for FERC MBR status, RTO participation
- Geographic flexibility—Advantage for Buyer with scattered footprint or limited access to good projects
- “Additionality” claims—Finances development of project
- Contracting—Non-phys. items of PPAs + regulatory issues
- Disadvantages—More complicated “story,” **swap regulation...**

Virtual PPAs—Swap Regulation

Dodd–Frank Wall Street Reform and Consumer Protection Act (2010)

→ Swap Provisions of Commodity Exchange Act, 7 U.S.C. §§ 1-27f

→ Commodity Futures Trading Commission (CFTC) Swap Rules

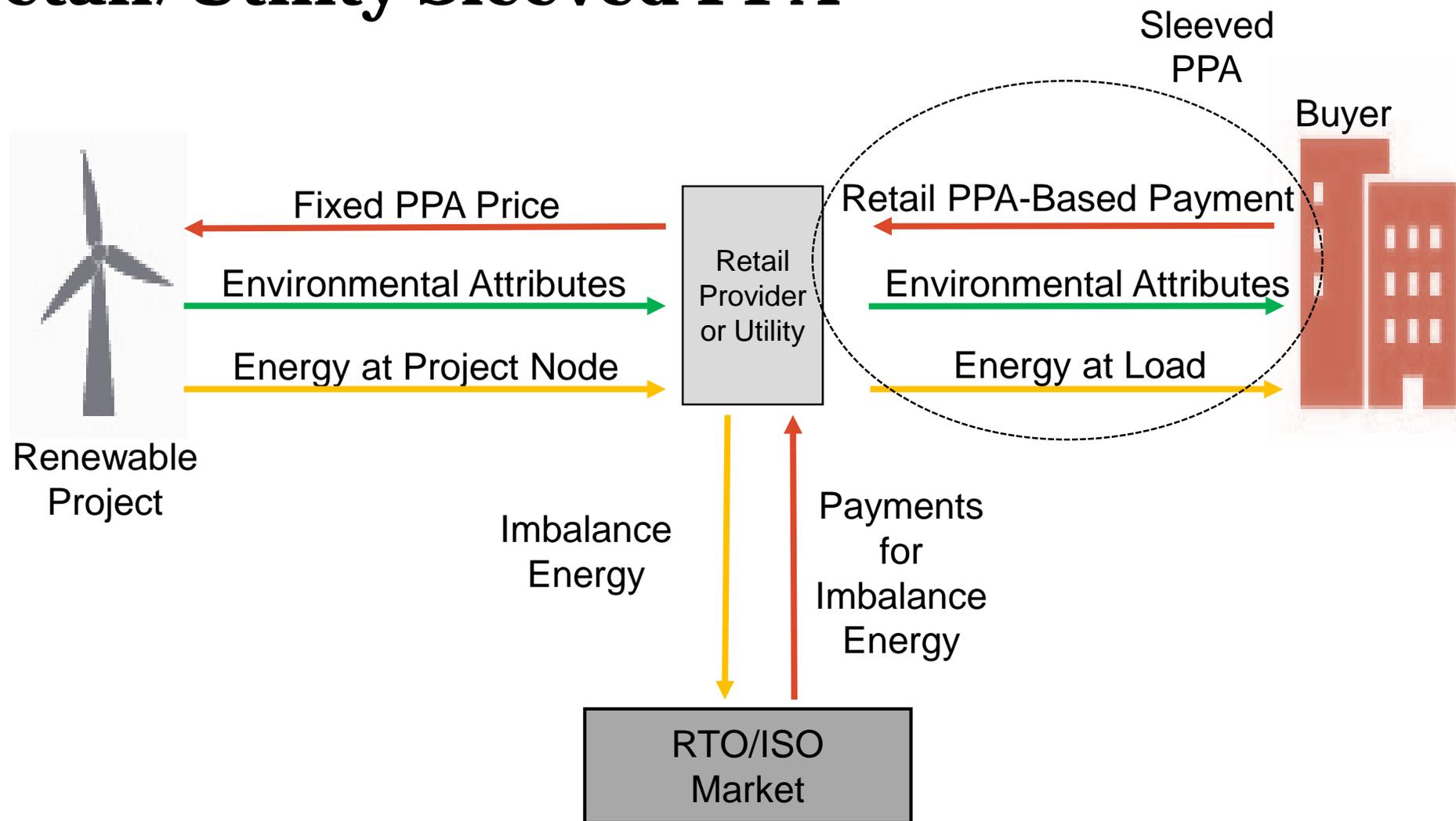
- Eligible Contract Participant (ECP) Requirement
 - Only ECPs can trade in off-exchange swaps, 7 U.S.C. §2
 - Generally, any company with assets > \$10,000,000, 7 U.S.C. §1a(18)
- Swap Recordkeeping, 17 C.F.R. §45.2
 - “[F]ull, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap”
 - Maintain during life of swap and 5 years following termination
 - Must be retrievable within 5 business days

Virtual PPAs—Swap Regulation *(continued)*

- Swap Reporting, 17 C.F.R. Pts. 43, 45
 - Each swap must be reported to a swap data repository (SDR)
 - Only one party reports—either the “swap dealer” or by agreement
 - Each party must have a legal entity identifier (LEI)
- Swap dealers transacting with municipal entities have additional obligations that apply to such “Special Entities” – QIR requirements (third-party or employee)

6. REC Acquisition – discussed below

7. Retail/Utility Sleeved PPA



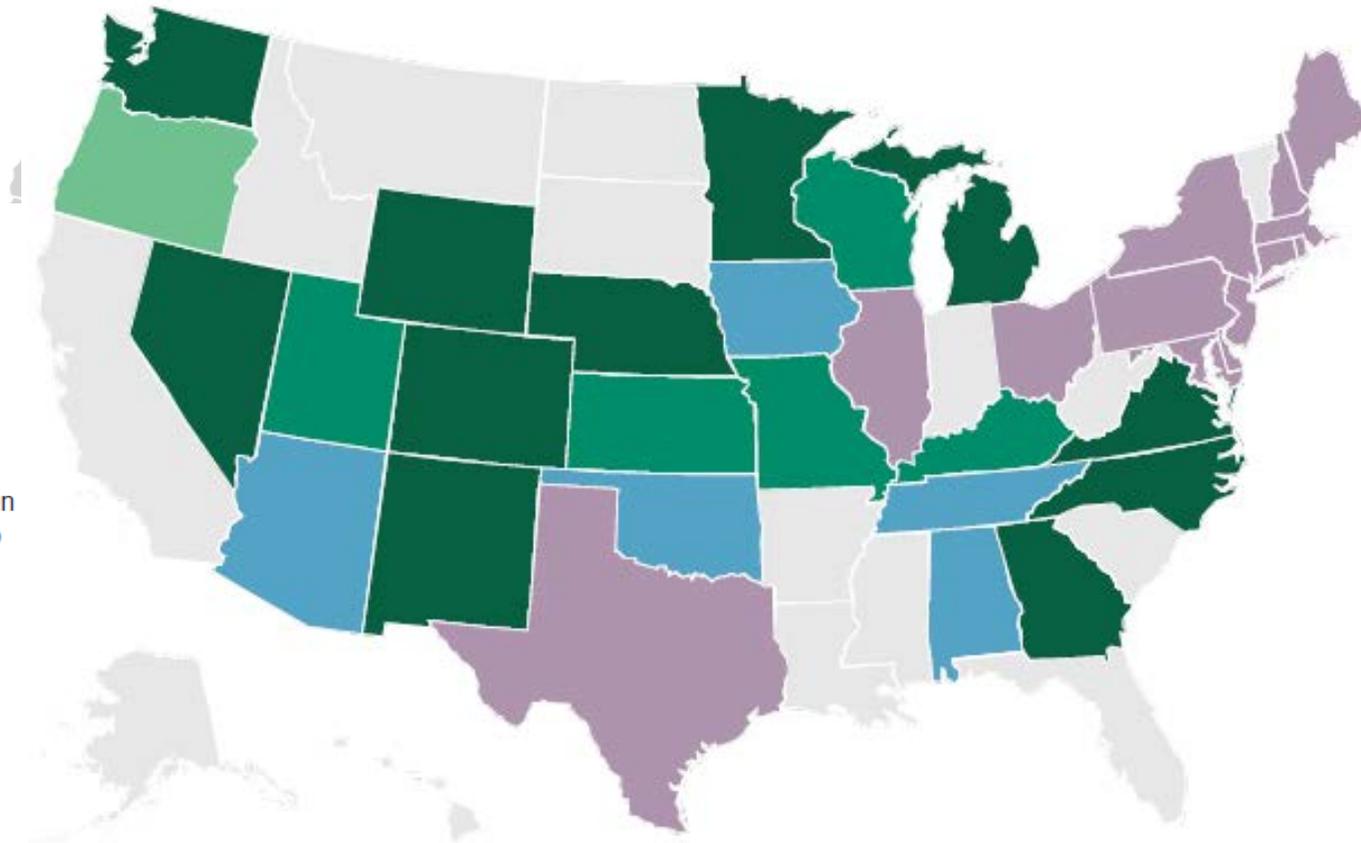
Retail/Utility Sleeved PPA *(continued)*

- PPA with Renewable Project, Intermediated by Utility
 - Provides a long-term price hedge in addition to RECs
 - Buyer avoids need for FERC MBR status, RTO participation
 - Nexus to specific renewable project(s)
- **Retail Choice** (Deregulated States)
 - Wide flexibility to structure transaction
- Regulated Utilities
 - **“Green Tariff”**
 - Price structure offered by local utility & approved by state PUC
 - Purchase energy & RECs from renewable project(s) at large scale, up to 100% of load
- **One-on-One Renewable Energy Deal**
 - “Special contract” negotiated with utility under PUC rules/approval (not generally available)
 - Limited transparency
- Structures Blend Into Standardized “Green Programs”

Sleeved PPA* Availability

Utility Renewable Energy (RE) Deals

-  Green tariff(s) and executed RE deal(s) through tariff
-  Green tariff(s) but no deal(s) through tariff to date
-  Considering a green tariff (proposal with the PUC)
-  One-on-one RE deal(s) between companies and utilities, but no green tariff to date
-  Electric retail choice easily available
-  No known direct large-scale RE access available



Source: World Resources Institute, U.S. Renewable Energy Map: A Guide for Corporate Buyers

Retail/Utility Sleeved PPA *(continued)*

Contracting Issues

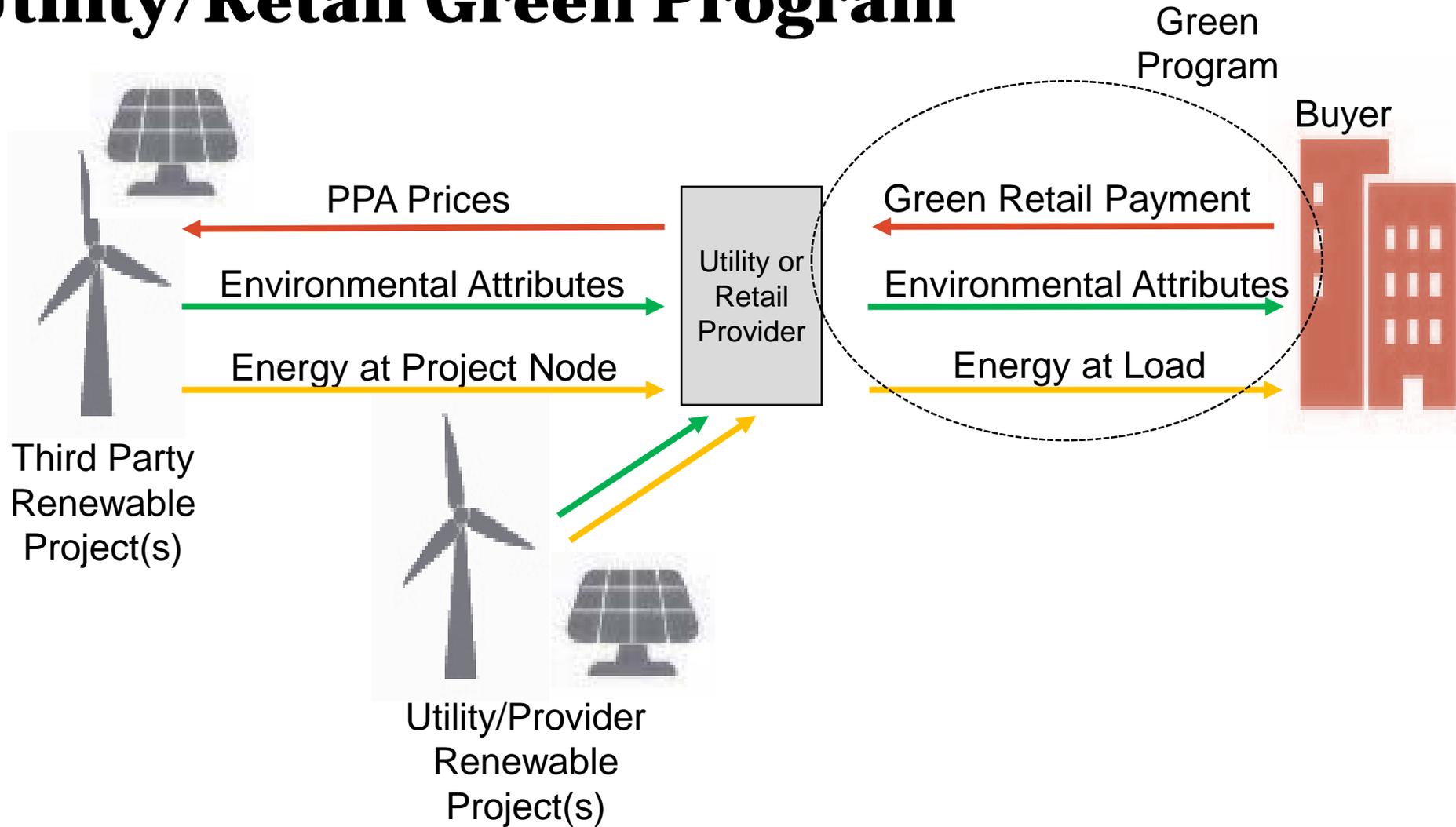
- Legal authorization for arrangement (reps & warranties)
- Commercial Terms
 - Price (fixed/escalating)—Full hedge of retail load costs
 - Retail Service Fees
 - Term/Renewal
 - Quantity
 - Full/partial output
 - Full/partial requirements (with targets, minimums, makeup)
 - Fixed quantity (MW) block
 - Layering of renewable over generic service
 - Right/prohibition of adding on-site generation

Retail/Utility Sleeved PPA *(continued)*

Contracting Issues

- Credit Support
- Allocation of Change-In-Law or RTO Rule Risk
- Allocation of RECs
- See also § 4. Wholesale PPAs

8. Utility/Retail Green Program



Utility/Retail Green Program *(continued)*

Examples:

- 100% renewable or renewable “blocks” (X MWh/month)
- Source-specific (wind/solar) or generic (renewable)

Advantages:

- Ease (off-the-shelf)
- Avoid project risk

Disadvantages:

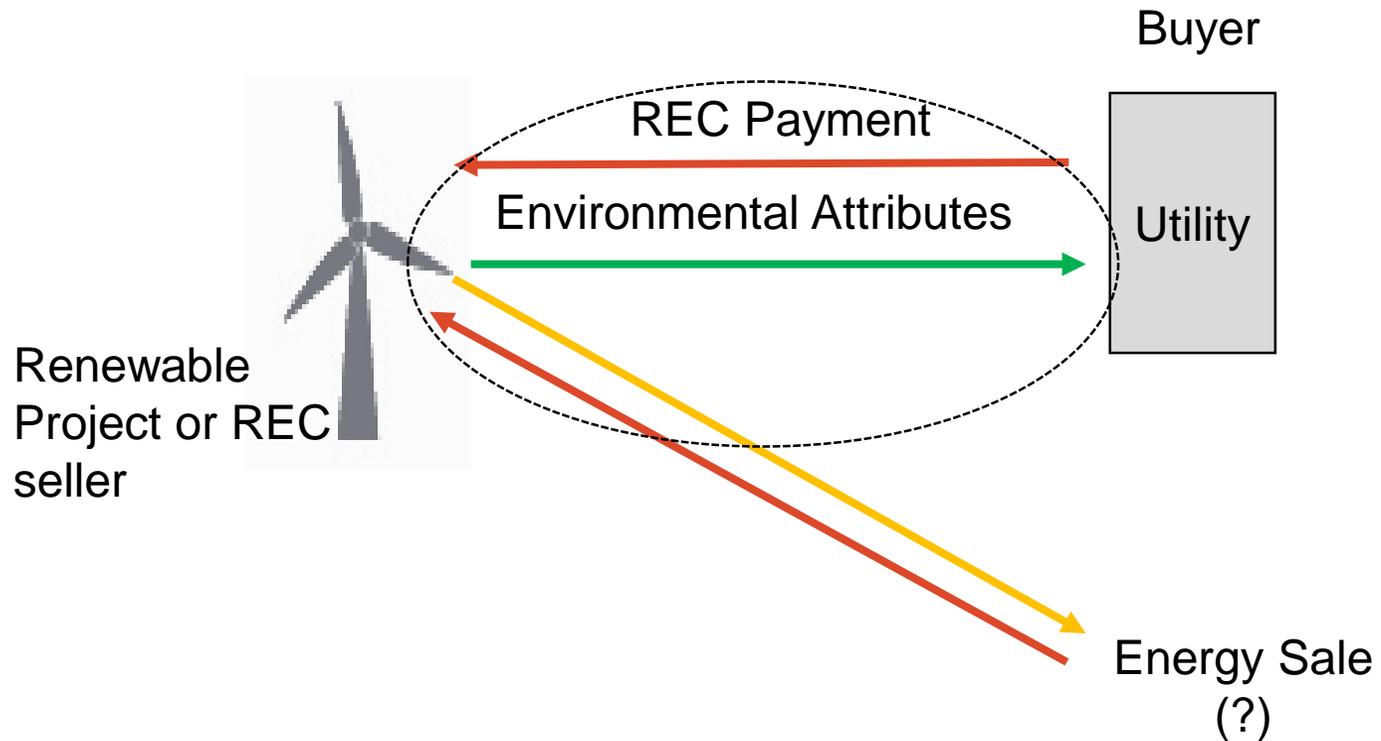
- Limited offerings, depending on state
- Limited savings/hedge opportunities?
- Less “sexy” claims? (but still renewable)

C. OTHER

1. REC Acquisition

- Purchase renewable energy credits to offset fossil fuel generation
- Advantages:
 - Flexibility—purchase RECs from any project anywhere – although certain states can offer better market
 - Avoid certain regulatory issues
 - Avoid long-term commitment to any renewable project(s)
- Disadvantages:
 - Exposed to REC market risk unless long-term purchase
 - Diminished renewable “story” but can still assert certain renewable attributes

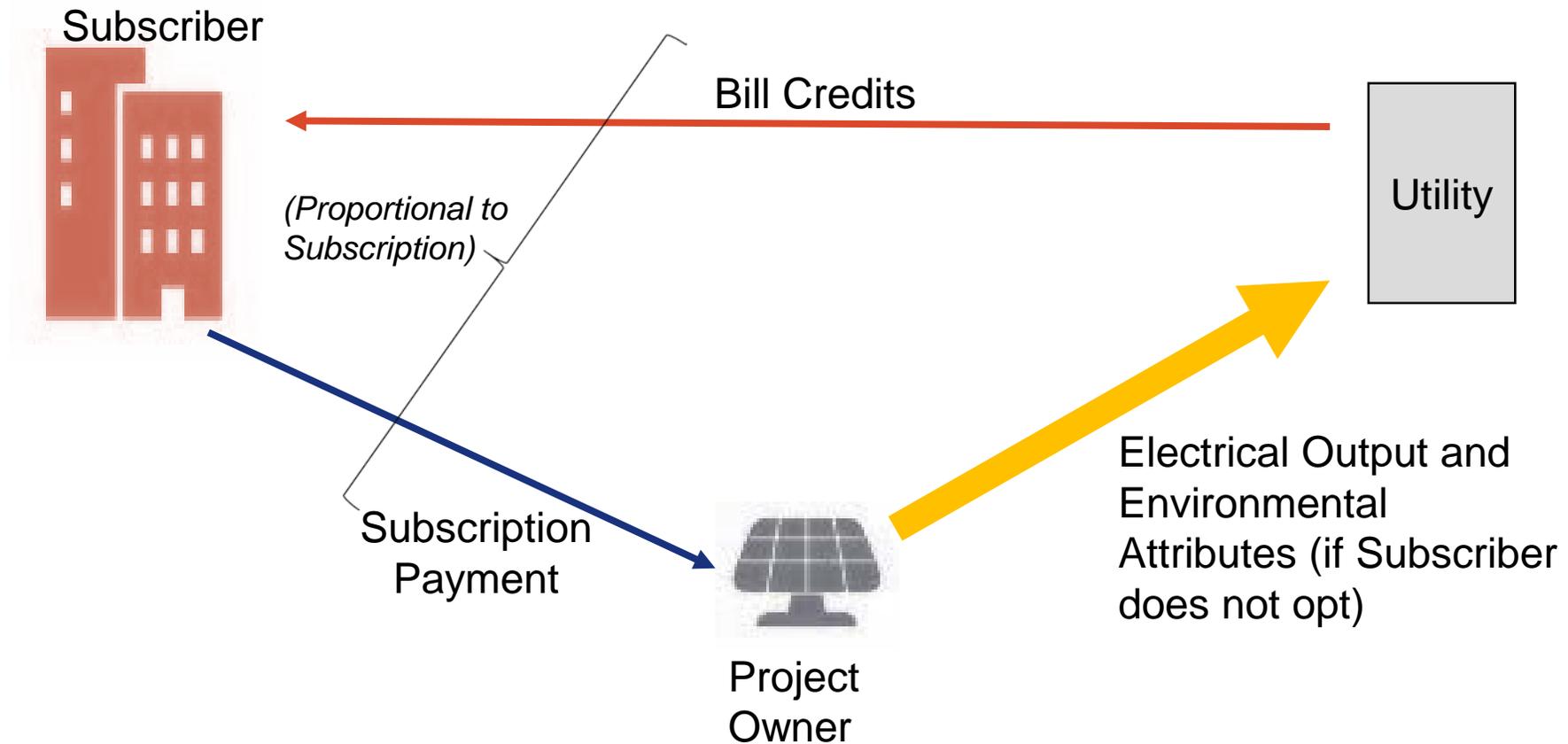
1. REC Acquisition *(continued)*



2. Community Solar

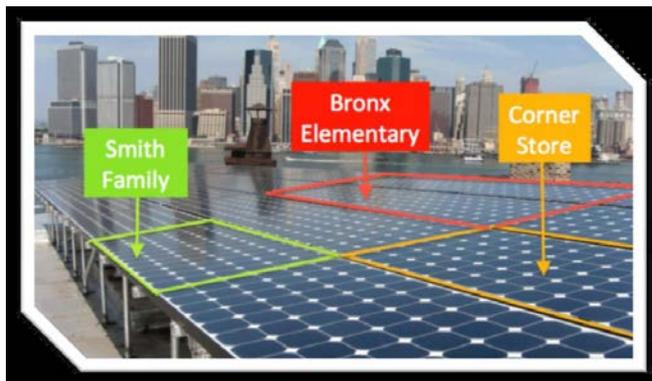
- Community Solar
 - Roles –subscriber or project owner (maybe both)
 - If project owner, can offer customers opportunity to be subscribers; however, assume project development, construction and operational risk.
 - PPA-like in that subscriber typically enters into long-term contract with project owner subscribing for a portion of remote solar facility in exchange for bill credits on retail electric bill
 - Most states now have community solar in various forms

2. Community Solar (continued)



2. Community Solar (*continued*)

- **Subscribe** for participation in a **portion** of a remote solar facility
 - Pay subscription fee to sponsor/owner of the solar project
 - “Virtual net metering”— receive bill credits from your retail utility based on output of the project
- Advantages as subscriber:
 - Avoid ownership and operation liability
 - Avoid O&M and administrative responsibility
 - Avoid interference with business operations and/or diminution of property value
 - Optimal installation locations (insolation, interconnection, access, etc.)
 - Possible economies of scale



2. Community Solar *(continued)*

Subscription Agreement—Contracting Considerations

- Primary Commercial Terms
 - Price—Fixed, Escalating, Retail Minus Discount, etc.
 - Allocation of RECs (affects price)
 - Conditions Precedent/Early “Outs”
 - Quantity—Restrictions based on customer’s retail load? Guaranteed output?
 - Term—Long-term commitment (e.g., Minnesota typically 25 years)
- Exit/Transferability if Subscriber Moves/Abandons Location
 - Termination or transferability rights?
 - State/utility location restrictions?
 - Liquidated damages for lost income?
 - Mitigation obligations (e.g., find replacement)?

D. ADDITIONAL CONSIDERATIONS

1. “Renewable” Marketing Claims

- **BE CAREFUL HOW YOU REPRESENT YOUR “GREEN” OR “RENEWABLE” EFFORTS!**
- “[U]nfair or deceptive acts or practices in or affecting commerce...are...declared unlawful.”
Section 5(a) of FTC Act, 15 U.S.C. Sec. 45(a).
- **FTC Green Guides, 16 CFR Pt 260**
 - Marketers should not make broad, unqualified general environmental benefit claims like ‘green’ or ‘eco-friendly.’
 - Broad claims are difficult to substantiate, if not impossible.
- Utilities that sell RECs to third parties are recommended to clearly identify such sales and the effects of transferring the right to claim credit for those RECs and related environmental benefits in annual reports or other publications/communications

FTC Green Guides Example

- Facts:
 - Solar panels are placed on the roof of building to generate power, and building owner advertises that it is "100% solar-powered."
 - Building owner, however, sells RECs based on the renewable attributes of all the power it generates.
- Guidance:
 - Even if building owner uses the electricity generated by the solar panels, it has, by selling the RECs, transferred the right to characterize that electricity as renewable.
 - The building owner's claim is therefore deceptive.
 - It also would be deceptive to advertise that it "hosts" a renewable power facility because reasonable consumers likely interpret this claim to mean that the building owner uses renewable energy.
 - It would not be deceptive, however, for building owner to advertise, "We generate renewable energy, but sell all of it to others."

2. Energy Storage

- If developing and owning, or if entering into PPA, consider adding storage component
- On PPA side, combined solar and storage can now be cheaper than electricity from natural gas; fully dispatchable in evening and night time hours reducing reliance on natural gas when renewable energy not available
- Cost of storage decreasing and deployment increasing
- Behind the meter storage used by utility customers for bill savings, increased self-consumption of distributed generation, and resiliency; for utilities, BTM storage reduces peak demand and alleviates stress on system

3. Hybrid Wind, Solar and/or Battery storage

- Combining wind and solar may be the future - enhances reliability of the system, increases energy production/net capacity, saves on capital costs and operating costs, and size of storage component can be reduced slightly as there is less reliance on one method of power production
- Cost-competitive with traditional generation
- 5MW hybrid project in MN in dispute with utility over how much utility will pay for the electricity; larger projects still on the drawing board (PPAs for utility-scale hybrid projects in place in OR and AZ)
- US hybrid market projected to grow from 2015's \$195 million to more than \$300 million by 2024

III. OBSERVATIONS

OBSERVATIONS

- Ownership or PPA
 - Each has its benefits and risks
 - Ownership is more involved, but control own destiny
 - PPA requires more reliance on a single third party – “Seller” under the PPA
 - Option to purchase in PPA provides flexibility
- Pressure will continue to mount to move more and more to renewables
- Various alternatives available with more to come
- Customary terms today may not be customary terms tomorrow

OBSERVATIONS

- Introduction of new technologies, including energy storage and advancements thereto, hybrid solar wind, etc. will result in additional changes
- Additional government incentives likely
- Customers will also continue to drive the movement to renewables

Any Questions?

Thank You

STINSON



Tammie Ptacek
612.335.7246
tammie.ptacek@stinson.com



Guy Smith
612.335.1762
guy.smith@stinson.com

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