



Workshop EE: Important Provisions for Your Next Supplier Contract

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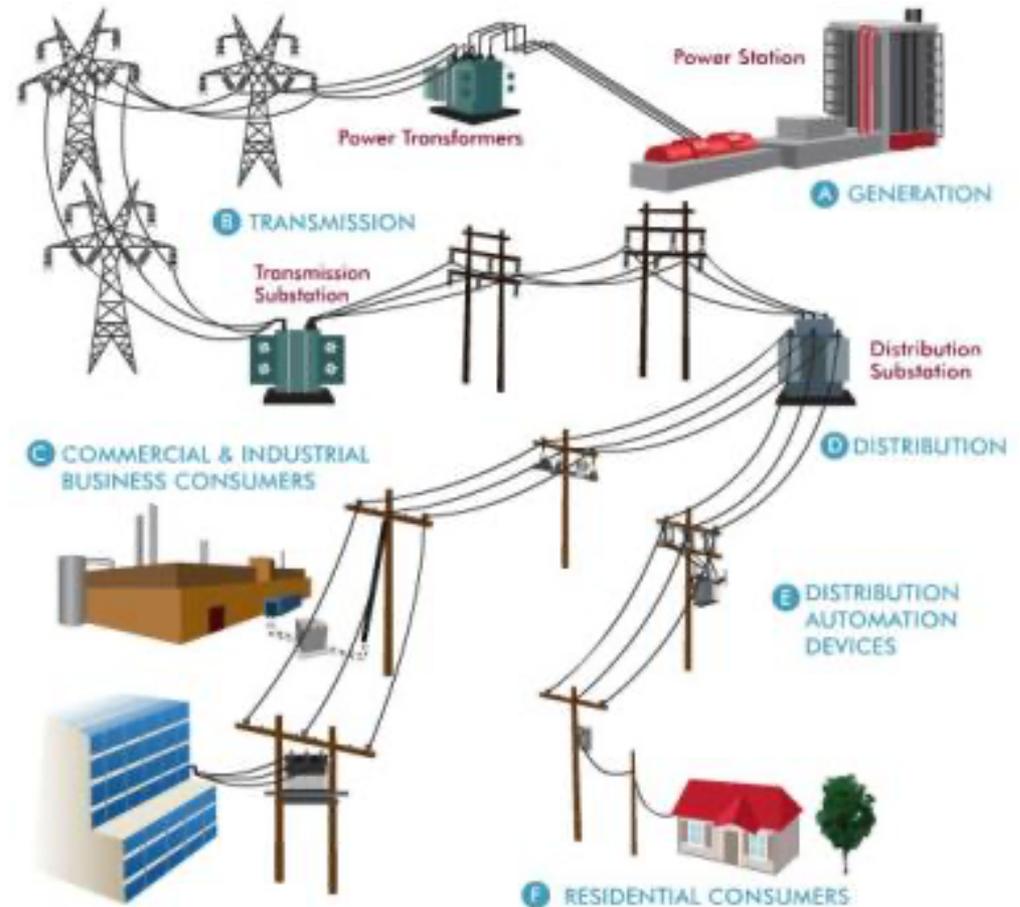


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Quick Introduction to Electric Generation

Billing Components

- Distribution
- Transmission
- Generation



Main Subcomponents of Electric Generation

- Energy
 - The electron.
- Ancillary Services
 - Services associated with grid reliability.
- Capacity
 - A generator's ability to generate, or a user's ability to curtail, during grid peak times.

3 Core Electric Generation Products

- Fixed
 - A customer pays a fixed price for energy regardless of how much it consumes, absent limiting contractual provisions.
- Block-and-Index
 - A customer pays a fixed price for energy for a kW block of power.
 - Every kW consumed above or below the block is reconciled in the spot market.
- Index
 - The price paid for energy is tied to the hourly spot market.

What is Capacity?

- Capacity is the amount of electricity available on the grid at any one time.
 - A generator's ability to produce or a user's ability to curtail.
- Electricity must be produced and consumed simultaneously.
 - Sufficient capacity during peak demand periods is necessary or the lights go out.
- Capacity costs in the PJM wholesale market are determined by a series of auctions.
 - The Base Residual Auction (BRA) is primary driver of any given delivery year's price.

Peak Load Contribution (PLC)

- A shopping customer's Peak Load Contribution (PLC) determines its allocation of capacity costs.
 - The customer's capacity "speeding ticket."
- A PLC is determined by a customer's average usage during five Coincident Peaks (CPs).
 - A CP is one of the five hours of the year when demand on the electric grid is at its highest.

Brakey Energy's Criteria for Evaluating a Supplier Offer

1. Price
2. Product
3. Contract Terms
4. Counterparty Risk
5. Customer Service



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Contract Considerations

Contract Basics

- 3 components to most generation agreements:
 1. Master Agreement;
 2. Sales Confirmation/Transaction Confirmation; and
 3. Pricing Attachment.
- As risk shifts from the customer to the supplier, the customer's costs generally increase.
- As risk shifts from the supplier to the customer, the customer's costs generally decrease.

Pricing - Questions to Ask

- What is included in the price?
 - Which components are fixed?
 - Which are passed through?
- What is the broker's commission (if applicable)?
 - Broker's commission is discretionary and incremental.
 - Probably will not be transparently shown in the contract, but should be disclosed if asked.
- When can the price change?
 - Swing or bandwidth
 - PLC change
 - Change in law
 - Holdover

Swing or Bandwidth Provision

- Allows the supplier to increase the fixed price or pass through additional costs if there is a change in kWh usage below or beyond a specified limit.
- Some agreements will also have an additional clause that requires the customer notify the supplier of material changes in usage.
- **Watch out for** a swing higher than your facility requires.
 - In general, higher swing = higher price premium.
 - Look at historical usage to minimize swing.
- **Sample language:** *If Customer has a change in usage of 20% or more for its facilities, then Supplier may pass through the resulting cost increase to Customer.*

PLC Change Provision

- Allows the supplier to upwardly adjust the contract price if the customer's capacity obligation increases.
- **Watch out for** this provision if you are contracting for fixed capacity costs.
 - Rarely labeled as a "PLC Change" section or similar, and may be hidden in the Change of Law section, Representations/Warranties section, or other.
- **Sample language:** *To the extent Customer's capacity obligation increases and Supplier incurs additional costs related to such capacity obligation increases, then Supplier shall charge Customer directly, at Supplier's costs, and Customer shall pay Supplier, for such additional capacity costs.*

Change in Law Provision

- Allows the supplier to increase the price if there is a change in law or regulation.
- **Watch out for:**
 - Language that is vague or open-ended;
 - Supplier's notice requirement; and
 - What happens if there is a decrease in the supplier's costs.
- **Sample language:** *If any new or change in law or regulation passed by any governmental authority, utility, Independent System Operator (ISO), Regional Transmission Organization (RTO), or other service provide alters Supplier's costs to perform this Agreement, then Supplier may alter the contract price.*

Impact of Delayed Capacity Auctions on All-In-Fixed Generation Contracts

- The BRAs for the 2022-2023 and 2023-2024 capacity delivery years have been delayed.
 - The clearing prices for these delivery years is yet unknown.
- With very few exceptions, Brakey Energy does not solicit all-in-fixed priced quotes for these delivery years.
 - We have observed that this has not stopped many brokers from having customers contract for all-in-fixed products that cover this time window.
- If you are contracting for an all-in-fixed product for these delivery years, it is critical to understand what contractual reopener provisions (if any) are included in the suppliers' contracts.

Holdover or Evergreen Provision

- Automatically renews the agreement unless either party takes action.
- **Watch out for** how the price is determined in the holdover period.
- Could be located in the master agreement or sales confirmation.
- **Sample language:** *This Agreement will automatically renew on a month-to-month basis at a market-based price determined by Supplier unless either party gives 30 days' written notice.*



Assignment Provision

- Allows one or both parties to assign the contract to another party.
- **Watch out for** limitations that only apply to the customer, not the supplier.
- **Sample language:** *This Contract may be assigned by Customer only with express written consent of Seller, which consent will not be unreasonably withheld or delayed. This Contract is assignable by Seller without Customer's consent subject only to any required regulatory approvals.*
- **Sample language:** *Neither Party may assign this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Notwithstanding the above, Supplier may, without the consent of Customer, assign this Agreement and its rights and obligations hereunder to any third party for the limited purpose of securing credit and financing or to any person or entity succeeding to all or substantially all of the assets of Supplier. Furthermore, either Party may, without the need for consent from the other Party transfer or assign this Agreement to an affiliate of such Party provided that such affiliate has equivalent financial capability to that of the assigning Party and agrees to be bound by the terms and conditions hereof.*

Provisions that Apply When Power Flow Ends from Supplier

- Possible scenarios:
 - The customer still owns the facility, but its electric usage drops to 0.
 - No damages with 100% swing if the customer keeps the meter in place.
 - The customer sells the facility to another company.
 - Check assignment language. Supplier usually has to approve the assignment. May require that the new company has similar financial standing.
 - The supplier sells its book of business.
 - Check assignment language. Assignment usually does not require the customer's consent. May require that the new supplier has similar financial standing.
 - Make sure that new supplier is aware of any special or unique provisions in your agreement.

Provisions for Unique Situations

- On-Site Generation
 - Some agreements prohibit the customer from operating on-site generation.
 - **Sample language:** *Customer warrants that Customer does not own any on-site generation, except for emergency back-up generation used when the utility is not capable of delivering electricity. If Customer intends to purchase on-site generation, then Customer shall provide Supplier with at least 30 days' written notice. Supplier may alter the contract price as the result of any new on-site generation.*
- NMB Pilot Program
 - In FE territory, if you are enrolled in the NMB pilot program or may enroll in the future, make sure your supplier agrees to handle.
 - **Sample language:** *Supplier shall use best efforts to enroll Customer in the Non-Market-Based pilot program outlined in FirstEnergy's Fourth Electric Security Plan, Supplemental Stipulation, Section V.A.2.*

Miscellaneous Provisions

- Choice of law
 - Which state's law hold? Should be location of your facility since energy is highly state-specific.
- Choice of venue
 - If suit is filed, are there any restrictions on where? Best for the customer to choose the venue where business is located.
- Arbitration clause
 - Can you immediately file suit?
- Waiver of class action lawsuit
 - Can you participate in a class action lawsuit against the supplier?
- Waiver of jury trial
 - Can you have a jury trial, or is a bench trial required?



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What Can Go Wrong

Potential Problems

- Supplier passing through debatable charges
 - Does the contract allow the supplier to pass through the charge?
 - Is the charge without markup?
 - Did the supplier follow proper notice requirements?
- Early termination by the customer or the supplier
 - What are the damages, if any? Could change based on which party terminates.
- Supplier default or assignment
 - Did the assignor follow the notice requirement, if any?
 - Is the assignee a comparable counterparty?
- Enrollment issues
 - Did the supplier enroll the customer in a timely manner?
- Evergreen issues
 - Did the customer give proper notice to end the agreement?
 - Is the price during the holdover fair?



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Case Study: Polar Vortex Surcharge by FES

Polar Vortex Surcharge

- FirstEnergy Solutions (“FES”) incurred increased costs from PJM to ensure reliable electricity supply during the 2014 polar vortex.
- FES passed through these costs to its business customers in fixed-rate contracts.
- Charge billed as the “RTO Expense Surcharge” and amounted to approximately 1% of the customer’s annual electric generation expenditure.



Effect of Regulatory Action

“If any ***regional transmission organization*** or similar entity, Electric Utility, governmental entity or agency, NERC and other industry reliability organization, or court requires a change to the terms of the Agreement, or imposes upon Supplier ***new or additional charges*** or requirements, or a change in the method or procedure for determining charges or requirements, relating to the Electricity Supply under this Agreement (any of the foregoing, a “Pass-Through Event”), Customer agrees that Supplier may pass through to Customer the additional cost to Supplier of such Pass-Through Event, under the procedure specified in Paragraph 32 below. For purposes of this Paragraph 31, changes include, without limitation, transmission or capacity requirements, new or modified charges or shopping credits, and other changes to retail electric customer access programs.”

Resulting Litigation

- Declaratory judgment actions in Cuyahoga County
 - *Lincoln Electric, et al. v. FirstEnergy Solutions Corp.*
 - *Swagelock Company v. FirstEnergy Solutions Corp.*
 - Both cases dismissed with prejudice.
- PUCO complaints
 - Power4Schools and others filed.
 - All complaints dismissed.
- Class action
 - *In re: FirstEnergy Solutions Corp., et al.*, No. 18-50757 (Bkctcy. N.D. Ohio).
 - Settled for \$12M.

Polar Vortex Class Action

- Class members: FES business customers that paid the RTO Expense Surcharge.
 - Companies that settled with FES independently not included.
- Class members started receiving settlement checks at the end of 2020.
- More info here: <http://www.polarvortexsettlement.com/>



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Questions?