A New Market for Solar Energy in Georgia

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By unanimous votes in both the House and the Senate, the Georgia General Assembly enacted HB 57, the Solar Power Free-Market Financing Act of 2015, sponsored by Rep. Mike Dudgeon (R-Johns Creek).[1] In so doing, the General Assembly created a market for the financing of solar energy that did not previously exist in Georgia or any other Southeastern state.[2] The law has the potential for establishing Georgia as a clear leader in the Southeast in the development of distributed generation ("DG") solar energy projects. To understand how large a step was taken in the legislation, one must evaluate the state of the law prior to the passage of HB 57, and the chilling effect that situation had on development of DG solar projects in Georgia.

The Territorial Act of 1973

In the early 1970s, many parts of rural Georgia still did not have electricity. In order to encourage efficiency in extending electricity to unserved areas, and to avoid duplication of capital investment in transmission and distribution lines, the General Assembly enacted the Territorial Electric Service Act in 1973 ("Territorial Act").[3] Under that law, the Georgia Public Service Commission ("PSC") was directed to establish territories in which electric service providers ("ESP") were given the exclusive rights to the sale of retail electric service to the public.[4] The purposes of doing so were clearly set forth in the Territorial Act: "(1) to assure the most efficient, economical, and orderly rendering of retail electric service within the state, (2) to inhibit duplication of the lines of electric suppliers, (3) to foster the extension and location of electric supplier lines in the manner most compatible with the preservation and enhancement of the state's physical environment, and (4) to protect and conserve lines lawfully constructed by electric suppliers."[5]

The law contained certain exceptions in which limited competition for the sale of electric service was allowed. Thus, when an industrial or other large user of electricity first purchases electricity, any ESP can compete to sign the user up for electric service.[6] Once signed up, however, the customer is permanently required to obtain its electric service from that ESP.

Outside of those limited exceptions, following the effective date of the Territorial Act, the PSC set about assigning exclusive territories to the myriad ESPs in Georgia.[7] Provisions were also included for acquisition of new territories, and how to deal with situations where ESPs had overlapping distribution lines.

1. Definitions in the Territorial Act

Because the Territorial Act establishes a monopolized exception to what most would consider a free market economy, it is important to evaluate the meanings of the terminology used to set apart the market in which Georgia's ESPs were granted government-sponsored monopolies. Not all of the crucial terms, however, were defined in the statute or regulations.

The Territorial Act directed the PSC to designate "assigned areas" to "electric suppliers" "inside which the assignee electric supplier shall have the exclusive right to extend and continue furnishing service."[8] An "electric supplier" is "any electric light and power company subject to regulation by the [PSC], any electric membership corporation furnishing retail service in this state, and any municipality which furnishes such service within this state."[9] "Service" means "retail electric service."[10] Because the term "retail service" or "retail electric service" is the commodity over which ESPs were given a monopoly within their assigned areas, it would seem important to define what retail electric service is. The Territorial Act, however, failed to include a definition of that crucial term.

2. Case law defining the monopolized market

In 1971, the Georgia Supreme Court addressed the question of whether Atlanta Gas Light Company was acting as a public electric utility in contracting to furnish "total energy service," including electricity, to two 25-story buildings and a 70-story building in Peachtree Center in Atlanta. The Court noted that more than 16,000 people would be furnished the electric service in the three buildings. Finding that such a number of people constituted a "significant segment of the public," the Court found that the total energy service was subject to regulation by the PSC as furnishing electric service to the public.[11]

Neither that case nor any other published opinion in Georgia has addressed whether furnishing electric service to a single customer from solar panels located on the property of that customer constitutes "retail electric service" within the meaning of the Territorial Act. Published Opinions of the Attorney General of Georgia, though not binding on courts, do seem to indicate that such an arrangement would not be furnishing retail electric service, and therefore not prohibited under the Territorial Act. A 1969 opinion evaluated factors such as the extent of service, whether the seller holds itself out as ready to serve the public generally, and whether, in other ways, the seller has conducted itself as a public utility. The opinion concluded that the owner of a trailer park who sold electricity to his tenants was not involved in service to the public so as to subject him to the

jurisdiction of the PSC.[12] A 1972 opinion cited the factors described in the 1969 opinion, plus the "significant segment of the public" language from *Atlanta Gas Light*, and opined that furnishing electricity and steam to three companies involved in general manufacturing was not retail electric service subject to the jurisdiction of the PSC.[13]

Although few cases have been decided in Georgia addressing the meaning of the "retail electric service" as used in the Territorial Act, other States that enacted laws with similar purposes and language have addressed the critical issue of the breadth of the electricity market that was reserved exclusively to ESPs. The most recent and comprehensive opinion on the subject was decided by the Iowa Supreme Court in 2014 (referred to herein as "*Eagle Point*").[14] The Iowa Code defined a public electric utility as a company furnishing electricity to the public for compensation.[15] The Iowa Supreme Court in *Eagle Point* evaluated eight factors to determine whether a contract to sell electricity from solar panels to an onsite customer was service to the public so as to require regulation of the solar company as a public utility, and found that it was not.

3. Georgia's electric monopolies before HB 57

From the above rendition, one can easily discern that the scope of the electricity market reserved exclusively to ESPs was, to use Southern terminology, "clear as mud." Neither the General Assembly nor the courts had clearly defined the crucial terms that described the scope of the market carved out for the ESPs.

In this writer's opinion, the reason for the lack of clarity resulted from the technology of the generation of electricity and delivery to the homes and businesses of the State. The market model assumed centralized generation of electricity--usually in large coal-fired steam turbines, nuclear facilities such as Georgia Power's Plant Vogtle, and smaller but still important hydroelectric facilities such as Buford Dam. That centrally-generated electricity was then transmitted over transmission lines, and then distributed over distribution lines to individual homes, businesses, churches, schools, factories and other users of the electricity.

The market model did not contemplate that it would be technologically or economically practicable to generate the electricity on the site at which it would be used--at the home, church, school or restaurant that consumed the electricity--DG of electricity. While there has always been some DG of electricity--think a diesel generator used during a power outage--large scale development and implementation of DG electricity did not occur. The statutory language thus did not contemplate a market for large scale third party development and ownership of DG of electricity for sale to and use by the onsite homes, businesses or institutions.

It was thus inevitable that when technology and other factors drove down the cost of electricity generated onsite by solar panels installed on roofs, parking lots and in ground-mounted systems, a clash would occur between the ESPs whose businesses were built on the government-sponsored monopoly in electricity, and their customers who sought to benefit from onsite generation and sale of clean solar energy in their homes, businesses and institutions. The ESPs took the position that no electrons could be sold by one party to another, even if those electrons were sold to only one person or entity and never entered the transmission or distribution grids operated by the ESPs.

Many customers, however, understandably felt that in an economy built on free market principles, where that market provided choices for how they could purchase and use electric power on their own properties, they should be able to make those choices themselves. In Georgia and elsewhere, customers began signing up for solar systems paid for and owned by third parties, in which the owner of the solar system recouped its investment and made its profit from the sale of electricity to the customer under a so-called Power Purchase Agreement ("PPA")--generally a long term contract for the sale and purchase of electric power from the solar panels installed and owned by the third party. ESPs in Georgia, given their understanding of their exclusive right to sell electricity within their territories, generally contested such PPAs by sending cease and desist letters insisting that only the ESP could sell electricity within its assigned territory. The result was a freezing chill on the development of DG solar energy in Georgia and elsewhere in the Southeast.

Into this breach stepped Rep. Dudgeon and his Solar Power Free-Market Financing Act, which will be referred to for the balance of this article as HB 57.

4. HB 57

Purpose

The General Assembly's purposes in enacting HB 57 were:

- To facilitate investment in solar energy in Georgia
- To provide more opportunity for financing of solar energy in Georgia through utilization of financing options provided by the free market
- To allow reduction or elimination of upfront costs to the property owner in development of solar energy systems
- To allow businesses to offer financing of solar systems in which repayment of the cost is based on the electricity produced by the system, without their being regulated as electric utilities.[16]

Solar Energy Procurement Agreements

HB 57 establishes that the financing of a solar system under an agreement in which the cost is repaid based on the electrical output of the system is legal in Georgia, is not

regulated by the PSC, and cannot be interfered with by the ESPs in Georgia: "Solar technology at or below the capacity limit may be financed by a retail electric customer through a solar financing agent utilizing a solar energy procurement agreement ... ."[17]

"Solar technology" is defined as a system that:

- Generates electric energy that is fueled solely by ambient sunlight (i.e., solar panels)
- Is installed upon property owned or occupied by a retail electric customer
- Is connected to the electric service provider's distribution system on either side of the electric service provider's meter.[18]

"Capacity limit" is defined as "a peak generating capacity in alternating current that is no greater than (A) ten kilowatts, for a residential application; or (B) one hundred twenty-five percent of the actual or expected maximum annual peak demand of the premises the solar technology serves, for a commercial application."[19]

A "retail electric customer" is "a person who purchases electric service from an electric service provider for such person's use and not for the purpose of resale."[20]

A "solar financing agent" is any person "whose business includes the leasing, financing, or installation of solar technology."[21]

Finally, and crucially, a "solar energy procurement agreement" (SEPA) is "any agreement, lease or other arrangement under which a solar financing agent finances the installation, operation, or both of solar technology in which the payments are based on the performance and output of the solar technology installed on the property."[22]

Putting the statutory provisions and definitions together, a market has now been created in Georgia for "free-market" financing of DG solar systems in which third party investors and businesses can own and profit from solar energy systems built across the State, generating power that is used and paid for by the customer who owns or occupies the property served by the solar system. Company A can pay for, build and own the solar system on Customer's property, and Customer's payment can be based entirely on paying for the electricity generated by the solar system.

Limitations and Conditions

1. **Capacity limit.** Because the ESPs were concerned that the legislation could encourage the construction of excess capacity--leading to pressure for sale of that excess power "to the public"--a capacity limit for solar systems financed by SEPAs was included in the law. The limit of 10 kilowatts for residential systems was understood to be sufficient for the vast majority of residences, and was also based upon the standard safety breakers installed by electric utilities for residential service. For all other customers, the capacity limit allows for sizing the solar system at a capacity larger than the peak annual demand of the premises, and allows for expansion and new facilities by including "expected" peak demand in the definition.
2. **Compliance with applicable law.** The solar system must comply with building and electrical codes, and any other applicable laws and ordinances.[23]
3. **Notice.** The customer must give notice to the ESP at least 30 days prior to operating the solar system.[24] This is not a permit requirement--it simply requires the customer to notify the ESP; the customer does not have to await ESP approval.
4. **Multiple premises on a property.** A property that has multiple premises--e.g., a multi-tenant mall, or a school or university with multiple buildings--can have multiple solar systems to serve the separate facilities with electrical demands. In an important limitation, the law does not allow a single "solar technology" to be connected to multiple premises. Also, the cumulative capacity of the multiple solar systems cannot exceed the capacity limit for the premises they serve.[25] These restrictions will require careful technical and legal planning of solar systems financed by SEPAs that are intended to serve properties that have multiple metered facilities.
5. **Non-interference.** Solar systems financed under SEPAs in compliance with HB 57 "shall not be considered the provision of electric service to the public, retail electric service, or retail supply of electricity by the solar financing agent, and neither the retail electric customer nor the solar financing agent shall be considered an electric supplier within the meaning of" the Territorial Act.[26] Thus, such systems are not precluded by the retail electricity monopolies granted to ESPs within their territories in Georgia. Thus, "no electric service provider shall prevent or otherwise interfere with the installation, operation, or financing of solar technology by a retail electric customer through a solar financing agent pursuant to [HB 57]."[27]
6. **Interconnection.** ESPs are allowed to require the electric customer having a solar system financed under a SEPA to comply with certain safety, power quality and interconnection requirements set forth in O.C.G.A. § 46-3-64. For systems with a capacity no more than 10 kilowatts for a residential application and 100 kilowatts for a commercial application, the safety and interconnection requirements are those already provided under the Cogeneration and

Distributed Generation Act of 2001.[28] For larger systems, additional requirements may be imposed, at the cost of the customer or financing agent, but "only those necessary to protect public safety, power quality, and system reliability."[29] That is a new limitation, and is designed to ensure that ESPs do not impose unnecessary requirements that could chill or destroy the new market created by HB 57.

Conclusion.

The conditions and limitations that are contained in HB 57 apply only to solar systems financed under SEPAs. Any person or business can pay cash for, or otherwise finance, solar systems not in compliance with the provisions of HB 57. Thus, HB 57 is at its heart a financing measure--it clearly allows in Georgia the form of financing for DG solar systems that is most popular elsewhere in the country--so-called PPA financing.[30] Now known in Georgia as SEPA financing, it is expected that the new market in financing solar systems created by HB 57 will enable increased development of solar systems on homes, schools, churches, businesses, retail stores and other properties across the State of Georgia, because SEPA financing generally will reduce or eliminate upfront costs, and will allow customer control of electric rates by providing for payment for the electricity produced by the solar system at rates fixed in the long term SEPA. Some solar companies have already begun residential solar programs offering SEPA financing, while those companies and others are increasing efforts to offer solar energy systems to commercial customers like big box retailers and commercial and industrial property managers.[31] As a result, expect to see solar systems blooming across the State during the next year.

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(Endnotes)

1 Solar Power Free-Market Financing Act of 2015, *available at* http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/57.

2 NC Clean Energy Technology Center, "3rd party solar PV power purchase agreement (PPA)." Database of State Incentives for Renewables and Efficiency, March 2015, *available at* http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/3rd-Party-PPA_0302015.pdf. The Database of State Incentives for Renewables and Efficiency is the most comprehensive source of information on state and local governmental policies affecting solar energy and other renewable energy sources. It is operated by the North Carolina Clean Energy Technology Center at North Carolina State University and is funded by the U.S. Department of Energy.

3 O.C.G.A. § 46-3-1, *et seq*.

4 O.C.G.A. §§ 46-3-2, 46-3-4, 46-3-5, 46-3-6, and 46-3-7.

5 O.C.G.A. § 46-3-2.

6 "[O]ne or more new premises (but if more than one, such premises must be located on the same tract or on contiguous tracts of land), if utilized by one consumer and having single-metered service and a connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment)." O.C.G.A. § 46-3-8(a).

7 There are a total of 97 electric utilities in Georgia: Georgia Power Company, Savannah Electric and Power Company, the Tennessee Valley Authority, plus 41 electric membership corporations ("EMCs"), https://georgiaemc.com/georgia-emc, plus 53 electric systems run by Georgia municipalities, http://www.psc.state.ga.us/electric/electric.asp.

8 O.C.G.A. § 46-3-3(1).

9 O.C.G.A. § 46-3-3(3).

10 O.C.G.A. § 46-3-3(9).

11 *Atlanta Gas Light v. Pub. Serv. Comm'n*., 228 Ga. 347, 351-352 (1971).

12 1969 Ga. Attorney Gen. Op. 69-27.

13 1972 Ga. Attorney Gen. Op. 72-84.

14 *SZ Enter., LLC d/b/a Eagle Point Solar v. Iowa Util. Bd.*, 850 N.W.2d 441 (Iowa 2014), as corrected (Aug. 14, 2014)

15 Iowa Code § 476.1.

16 O.C.G.A. § 46-3-61.

17 O.C.G.A. § 46-3-63(a).

18 O.C.G.A. § 46-3-62(14).

19 O.C.G.A. § 46-3-62(2).

20 O.C.G.A. § 46-3-62 (11).

21 O.C.G.A. § 46-3-62(13).

22 O.C.G.A. § 46-3-62(12).

23 O.C.G.A. § 46-3-63(a)(1).

24 O.C.G.A. § 46-3-63(a)(2).

25 O.C.G.A. § 46-3-63(e).

26 O.C.G.A. § 46-3-65(a).

27 O.C.G.A. § 46-3-63(b).

28 O.C.G.A. § 46-3-50, *et. seq*.

29 O.C.G.A. § 46-3-64(b).

30 *See* Solar Energy Industries Association, "Third-Party Solar Financing," *available at* http://www.seia.org/policy/finance-tax/third-party-financing.

31 *See, e.g.,* Market Watch, "Hannah Solar Launches Hannah Home Energy in Partnership with Sonnenbatterie Inc.," October 7, 2015, *available at* http://www.marketwatch.com/story/hannah-solar-launches-hannah-home-energy-in-partnership-with-sonnenbatterie-inc-2015-10-07.