



LS Power Group
Two Tower Center, 11th Floor
East Brunswick, NJ 08816

September 12, 2013

Technical Director
Reference Number: 2013-270
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Dear Technical Director:

We appreciate the opportunity to respond to the FASB's Exposure Draft of a Proposed Accounting Standards Update on *Leases (Topic 842)* (the "Exposure Draft"), and we commend the FASB for their continued effort to address this issue.

Background

Founded in 1990, LS Power Group is an employee-owned, independent power company with offices in New York, New Jersey, Missouri and California. We are a developer, owner, operator and investor in power generation and electric transmission infrastructure throughout the United States. Since our inception, we have developed, constructed, managed or acquired more than 28,000 MW of competitive power generation and 470 miles of transmission infrastructure, for which we have raised over \$22 billion in debt and equity financing.

LS Power Development has developed over 8,000 MW of power generation and 470 miles of long-distance, high-voltage transmission infrastructure throughout the United States, with a combined capital cost in excess of \$7 billion. We identify the need for new power generation and transmission infrastructure and work with our customers, including investor-owned utilities, electric cooperatives, municipal utilities, and regional power pools, to sell competitively priced electricity on a wholesale basis. Construction is presently underway on over 1,000 MW of power generation and over 470 miles of high-voltage transmission lines.

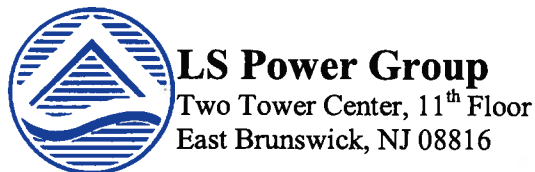
LS Power Equity Advisors is an established investment manager with \$4.3 billion in equity capital raised through its private equity investment funds. Its focus is to acquire operating power generation assets and utilize our development, operations, power marketing and financial expertise to improve their commercial and physical operations. Since its 2005 inception, the private equity investment funds managed by LS Power Equity Advisors have acquired over 20,000 MW of power generation capacity.

One of our business initiatives is to develop, construct, and maintain safe, reliable and efficient power plants at competitive values, and to sell the plants' energy, capacity and ancillary services to wholesale customers such as investor-owned utilities, electric cooperatives or municipal utilities (Load Serving Entities or "LSEs"). We absorb the risks and rewards of asset ownership so that the LSEs, can have a lower regulated asset base and a cost effective source of output. This keeps the downward pressure on the overall cost of electricity for the retail customers.

We are currently or have been in the past the off-take provider under numerous contractual arrangements, including power purchase agreements ("PPAs") and tolling agreements, which have or had contract durations varying from 1 to 30 years. These agreements encompass a combination of existing and newly constructed gas, coal, solar and hydro powered generation assets.

Comments

Our major comment is regarding the definition of a lease, and pertains to Question 1 in the Exposure Draft.



Generally, we do not believe PPAs, tolling agreements, and other executory contracts related to the output of these electric generating facilities should be included in the definition of a lease. These contracts do not contain the substantive economic attributes of leases. Although these contracts may depend on a specified asset, the wholesale customer (off-taker) does not obtain control of the asset. Because the contracts are negotiated to match usage and output over time, lease accounting adds additional complexity and burdensome costs to the financial reporting of entities that enter into these contracts.

We are in control of the power generation plant asset for its entire life cycle. We absorb the construction risk of the asset: we typically choose the site, obtain permits, and design the facilities. We negotiate and manage all of the engineering, procurement, and construction contracts and arrange for all of the fuel, water, and electric interconnections during the development and construction periods. We control the operations of the plant: we negotiate and manage the PPAs and tolling off-take agreements, manage the operations and maintenance of the plant, arrange for the fuel procurement for our PPAs, manage the major maintenance and retain the asset and the risk of ownership after the end of the contract period. Based on these factors, we control the asset during the period of construction and through the duration of the contract, and believe this is a decisive factor in the determination that no lease exists. We have not transferred the right to use the asset to the LSE, but rather we control the asset to deliver a product (i.e. energy, capacity and/or ancillary services) during the term of the agreement. The off-taker does not control the asset, but only has the right to receive or not to receive the products during the contract period.

The payments we receive, as the power producer, represent revenue for the power products (energy, capacity and ancillary services) we provide. The payments made by the off-takers are for the purchased cost of the power products (energy, capacity and ancillary services) that we deliver. As such, the appropriate accounting treatment is to record such payments as revenue and costs when incurred, and provide additional disclosure of contract terms in the footnotes to financial statements.

The Board provided examples of power purchase contracts in Example 5A and Example 5B (in paragraphs 842-10-55-34 through 55-41 of the Exposure Draft). We understand from these examples and from the definition of “control” in the Exposure Draft, the Board believes, as we do, that the transfer of control of the operation of a specified asset to the off-taker is one of the most important indications that an agreement contains a lease.

The examples place additional emphasis on the limited role of the off-taker in designing the plant as one of the indicative factors in determining transfer of control of the asset. In our experience, this factor is of little importance as the off-taker may in some cases specify fuel type (gas, coal, solar) and geographic location of the generation asset to be built, the technology/configuration of equipment used, or the quantity of power products to be purchased, but we retain the risks of ownership and make the decisions related to the both construction and ongoing operations of the power generation plant as previously described. It is the outcome of these decisions that most significantly affect the economic benefits to be derived from the use of the asset during the term of the contract and hence the off-taker’s role in design should not be viewed as transfer of control as defined in 842-10-15-10.

While we believe that all relevant factors should be taken into account in determining who controls the use of the asset, control of both construction and ongoing operations of the power generation plant generally would be the most determinative factors in assessing the right to control the use of the asset under PPAs and tolling agreements. We would appreciate guidance, in the examples or otherwise, to address and refine the specific application of these factors that constitute control consistent with the foregoing.



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We understand that the Board does not want to be overly prescriptive or create a “bright line” definition. However, since the accounting results are so different depending upon whether an arrangement is evaluated as a lease or not, the scrutiny over the definition of a lease and scoping is heightened. The Board should be sure to appropriately convey the economic nature of these arrangements in the accounting, and to provide adequate detail in order for constituents to interpret the provisions.

This is a significant issue for us. We believe that these contracts should not be treated as leases as long as control is not transferred to the off-taker, as we have outlined above.

We again thank the Board for the opportunity to comment on this Exposure Draft. If there are any questions regarding this letter, please do not hesitate to contact me to discuss.

Sincerely,

A handwritten signature in blue ink that reads "Joseph L. Myers". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joseph L. Myers
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LS Power Development, LLC

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