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### Solar Rights for Texas Property Owners

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# Texas Law Review

## *See Also*

Response

Solar Rights for Texas Property Owners

Sara C. Bronin\*

After thirty years or so of near silence, legal scholars have recently begun to revisit issues related to solar rights.<sup>1</sup> Put simply, solar rights concern the ability of property owners to harness and utilize sunlight. As solar-collector technology has become more widespread, conflicts have arisen and a handful of disputes have become national news.<sup>2</sup> Picking up on these emerging tensions, legal scholars have begun to call for lawmakers to articulate solar rights regimes that promote, or at least clarify, property owners' solar rights.

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1. See, e.g., R. Lisle Baker, *My Tree Versus Your Solar Collector or Your Well Versus My Septic System?—Exploring Responses to Beneficial but Conflicting Neighboring Uses of Land*, 37 B.C. ENVTL. AFF. L. REV. 1 (2010) (advocating that disputes among neighbors regarding solar access be resolved using a first-in-time principle and an assessment about which use is less intrusive); Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 881 (2009) (proposing basic guidelines for solar rights regimes, including flexibility, analogy to water law, and assignment of the initial entitlement via liability rules); Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217 (2009) (analyzing three methods by which solar rights can be allocated); Joel B. Eisen, *Can Urban Solar Become a “Disruptive” Technology?: The Case for Solar Utilities*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53 (2010) (advocating for long-term, dependable financial incentives for the installation and use of solar collector technologies); Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851 (concluding that liability rules vested in neighbors are the best means of promoting solar rights regimes).

2. See, e.g., Felicity Barringer, *Trees Block Solar Panels, and a Feud Ends in Court*, N.Y. TIMES (Apr. 7, 2008), <http://www.nytimes.com/2008/04/07/science/earth/07redwood.html> (describing the fight of two homeowners in Sunnyvale, California, over access to sunlight—one for growing redwood trees, the other for powering solar-collector technology); Steve Hendrix, *Takoma Park Debates What's Greener: Shade Trees or Solar Panels*, WASH. POST (Jan. 12, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/12/AR2011011205528.html> (describing the story of Takoma Park, Maryland, homeowners who were required to plant fifteen trees in exchange for removing one tree on their property that would have blocked their planned solar collector).

In *A Proposed Solar Access Law for the State of Texas*, Jamie E. France contributes to the discussion by proposing a multifaceted legal regime for the State of Texas that promotes individual residential-property owners' ability to stake solar access claims.<sup>3</sup> Underlying her argument is the fact that Texas has "enormous solar potential" but has yet to enact a comprehensive solar access law.<sup>4</sup> She suggests that while state legislators and agencies have made significant efforts to facilitate large-scale solar projects, they have failed to facilitate small-scale projects that might be undertaken by residential users.<sup>5</sup> Governments might promote such projects through financial incentives, which Texas has been targeting to large-scale installations.<sup>6</sup> As Ms. France recognizes, however, an articulation of the nature and scope of financial incentives is best left to economists or others who could analyze the hard data.<sup>7</sup>

Ms. France rightly focuses instead on another mechanism by which solar projects might be promoted: a clear legal rights regime that favors those individuals who own, or who wish to install, solar collectors on their property.<sup>8</sup> She urges state lawmakers to craft legislation that fits this bill. Among other things, she suggests that lawmakers eliminate both preexisting and future deed restrictions that impinge on solar rights, restrict neighbors' ability to obstruct existing solar collectors, prevent homeowners' associations from limiting solar rights, and require localities to protect solar rights through zoning ordinances.<sup>9</sup>

Ms. France's note is, as notes are, fairly short, but it helpfully focuses on the way a solar access law might work in a single state. I agree with Ms. France's underlying claims and her overall approach. Accordingly, my Response will serve less as a thorough examination of differences than as a challenge to her (or others) to pursue three areas of further inquiry.<sup>10</sup> First, it

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3. Jamie E. France, Note, *A Proposed Solar Access Law for the State of Texas*, 89 TEXAS L. REV. 187, 195–201 (2010).

4. *Id.* at 187.

5. *Id.* at 187–88.

6. *Id.* Financial incentives may include, among other things: direct grants, low-interest loans, favorable utility tariffs, tax credits, and property and sales tax exemptions. For analyses of utility tariffs, for example, see Ben Carver & Sina Kian, *The California Solar Initiative: How Mandatory Time-of-Use Rates Chilled the Solar Energy Market*, 19 STAN. L. & POL'Y REV. 384 (2008) and David Grinlinton & LeRoy Paddock, *The Role of Feed-In Tariffs in Supporting the Expansion of Solar Energy Production*, 41 U. TOL. L. REV. 943 (2010).

7. See France, *supra* note 3, at 188 (declining to analyze financial incentives to promote solar energy).

8. *Id.*

9. *Id.* at 188–89.

10. Ms. France's note represents one of the very first forays into developing a state-specific statute, although at least one group, the U.S. Department of Energy Solar America Board for Codes and Standards, has developed a short, universal model code. See COLLEEN MCCANN KETTLES, SOLAR AM. BD. FOR CODES & STANDARDS, A COMPREHENSIVE REVIEW OF SOLAR ACCESS LAW

would be helpful if legal barriers to her specific proposals, and the means of overcoming them, were identified. Second, state-specific political conditions should be examined to assess the feasibility of her approach. Third, the means by which neighbors might collectively share solar energy facilities should be discussed as an alternative to stand-alone facilities serving just one user.

#### I. Overcoming Legal Barriers to Solar Rights in Texas

Ms. France's note and future state-specific solar rights proposals could be strengthened if they identified and assessed potential legal barriers to implementation. Without understanding possible challenges, it is difficult to know whether a proposal is truly feasible or how to best fortify it against an attack. Two examples illustrate my point.

The first relates to Ms. France's suggestion regarding the elimination of preexisting private property restrictions that negatively affect solar access. She says, "the Texas law should dissolve preexisting local covenants, restrictions, or conditions attached to property deeds that restrict the use or installation of solar energy systems . . . ."<sup>11</sup> She does not, however, identify some of the obvious legal challenges that might be brought if her proposal—which for simplicity I will call the *preexisting restrictions proposal*—were actually enacted.

Federal and state takings clauses, for example, might serve as bases for legal challenges. The federal Takings Clause, enshrined in the Fifth Amendment of the Constitution, provides "[N]or shall private property be taken for public use, without just compensation."<sup>12</sup> The Texas Takings Clause provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."<sup>13</sup> Texas courts interpret the two clauses similarly,<sup>14</sup> and I will discuss only the applicability of the federal clause to Ms. France's proposal.

Arguably, implementation of the preexisting restrictions proposal would constitute a taking for a public use, requiring government to pay just compensation to affected property owners. More specifically, the proposal could be characterized as a regulatory taking, which the Supreme Court has

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IN THE UNITED STATES: SUGGESTED STANDARDS FOR A MODEL STATUTE AND ORDINANCE 12–14 (2008), <http://www.solarabcs.org/about/publications/reports/solar-access/pdfs/Solaraccess-full.pdf>.

11. France, *supra* note 3, at 198.

12. U.S. CONST. amend. V.

13. TEX. CONST. art. 1, § 17.

14. *See, e.g., City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238 (Tex. 2002) (stating that "[t]he federal takings clause is substantially similar" to the state Takings Clause, and proceeding to treat both using the same analysis); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1996) ("[T]he state and federal guarantees in respect to land-use constitutional claims are coextensive.").

defined as a regulation that “goes too far” in restricting a property owner’s ability to fully utilize her property.<sup>15</sup> The Court articulated its three-factor test for regulatory takings in *Penn Central Transportation Co. v. City of New York*.<sup>16</sup> A court must weigh the character of the challenged regulation, the economic impact of the regulation on the property owner, and the nature and extent of the regulation’s interference with the property owner’s “distinct investment-backed expectations.”<sup>17</sup> Using a *Penn Central* analysis, a court might find that a regulatory taking was effected on a property owner whose ability to infringe on her neighbors’ solar access was unexpectedly eliminated by the adoption of the preexisting restrictions proposal because the character of the restriction was far-reaching and reduced her property’s resale value, and because the property owner purchased the property with the expectation that she would not have such a restriction. A thorough discussion of this prospect should be included in an expanded analysis of Ms. France’s proposal, and any adjustments to the proposal to ensure greater resistance to a takings challenge should be made.

A second possible legal challenge to Ms. France’s proposal relates to her suggestion that the State of Texas require localities “to protect homeowners’ solar access rights when designing zoning ordinances.”<sup>18</sup> Ms. France fails to emphasize that, if enacted, this requirement must be drafted to resist challenges by localities that are designated as home rule cities. Home rule cities have populations over 5,000 and draft charters under which they are self-governed.<sup>19</sup> In home rule cities, any action not prohibited by or contrary to the U.S. constitution, the Texas constitution, or state statutes is allowed. (General law cities, by contrast, have populations under 5,000 and draw their power directly from state statutes, and they are limited to those powers expressly granted by the state.<sup>20</sup>) In 2008, 340 cities in Texas, representing a large percentage of the population of the state, had opted for home rule status.<sup>21</sup>

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15. *See, e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (recognizing for the first time that a far-reaching regulation may violate the Takings Clause and requiring that the State of Pennsylvania provide compensation to the extent that a state statute infringed on the ability of coal companies that owned subsurface mineral rights to certain properties to fully benefit from their ownership of such rights).

16. 438 U.S. 104 (1978).

17. *Id.* at 124.

18. France, *supra* note 3, at 200.

19. *See* TEX. CONST. art. XI, § 5 (“Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters.”); TEX. LOC. GOV’T CODE ANN. § 9.001 et seq. (Vernon 2008) (dealing with adoptions of home rule charters by municipalities).

20. TEX. LOC. GOV’T CODE ANN. §§ 5.001 to 5.003 (Vernon 2008) (defining Type A, B, and C general law municipalities).

21. *See* Charles E. Zech, *An Analysis of Home Rule Charters* 69, 71 app. c (July 1, 2008) (unpublished research report, Texas State University–San Marcos), *available at*

Any state-imposed requirement on localities, such as the solar access regime proposed by Ms. France, must take the large number and special status of home rule municipalities into account. The Supreme Court of Texas has said that for a state statute to preempt existing local ordinances of a home rule city, the statute must be drafted with “unmistakable clarity.”<sup>22</sup> A statute will not invalidate an ordinance “if any other reasonable construction leaving both in effect can be reached.”<sup>23</sup> Moreover, courts must presume home rule charters “to be valid, and the courts cannot interfere unless it is unreasonable and arbitrary, amounting to a clear abuse of municipal discretion.”<sup>24</sup> The burden of a well-crafted, crystal-clear statute is thus imposed on state lawmakers. Ms. France should have addressed these rules of statutory construction squarely in her analysis in order to strengthen her proposal against potential challenges.

As a related aside, it might have also been useful for Ms. France to address the fact that Houston—the state’s largest city, representing about nine percent of the state’s population<sup>25</sup>—famously lacks a zoning ordinance.<sup>26</sup> Ms. France could have proposed separate rules for Houston, such as suggesting changes to its subdivision regulations. But omitting mention of the unique legal status of the state’s largest city prevents readers from obtaining a full perspective.

Different legal challenges may be brought against other aspects of Ms. France’s proposal. In providing these two examples, I am not trying to discredit her proposal, in whole or in part. Rather, I am writing to urge her—and future commentators proposing state-specific solar rights regimes—to

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<http://ecommons.txstate.edu/cgi/viewcontent.cgi?article=1282&context=arp> (identifying surveyed cities, including Corpus Christi and Fort Worth).

22. *Dallas Merchant’s and Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (considering the preemption of a zoning ordinance affecting the sites of sales of alcoholic beverages by the Texas Alcoholic Beverage Code).

23. *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17 (Tex. 1990) (internal quotation marks omitted) (quoting *City of Beaumont v. Fall*, 116 Tex. 314, 324 (Tex. 1927)).

24. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

25. *Population Finder: Houston City, Texas*, U.S. CENSUS BUREAU (2009), [http://factfinder.census.gov/servlet/SAFFPopulation?\\_event=ChangeGeoContext&geo\\_id=16000US4835000&\\_geoContext=01000US&\\_street=&\\_county=Houston&\\_cityTown=Houston&\\_state=04000US48&\\_zip=&\\_lang=en&\\_sse=on&ActiveGeoDiv=geoSelect&\\_useEV=&pctxt=fph&pgsl=010&\\_submenuId=population\\_0&ds\\_name=null&\\_ci\\_nbr=null&qr\\_name=null&reg=null%3Anull&\\_keyword=&\\_industry=](http://factfinder.census.gov/servlet/SAFFPopulation?_event=ChangeGeoContext&geo_id=16000US4835000&_geoContext=01000US&_street=&_county=Houston&_cityTown=Houston&_state=04000US48&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=population_0&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry=) (showing a population of 2,257,926 for Houston in 2009); *Population Finder: Texas*, U.S. CENSUS BUREAU (2009), [http://factfinder.census.gov/servlet/SAFFPopulation?\\_event=Search&geo\\_id=01000US&\\_geoContext=01000US&\\_street=&\\_county=&\\_cityTown=&\\_state=04000US48&\\_zip=&\\_lang=en&\\_sse=on&ActiveGeoDiv=geoSelect&\\_useEV=&pctxt=fph&pgsl=010&\\_submenuId=population\\_0&ds\\_name=null&\\_ci\\_nbr=null&qr\\_name=null&reg=null%3Anull&\\_keyword=&\\_industry=](http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&geo_id=01000US&_geoContext=01000US&_street=&_county=&_cityTown=&_state=04000US48&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=population_0&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry=) (showing a population of 24,782,302 for Texas in 2009).

26. See generally BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 23–76 (1972) (analyzing the impact of Houston’s lack of zoning).

thoroughly assess potential legal challenges so that proposals are designed to resist such challenges.

## II. Political Concerns

In addition to addressing legal challenges, any commentator proposing a state-specific solar access regime should address political issues related to her proposal. Ms. France's note, perhaps as a result of space constraints, lacks any substantive analysis of Texas's political climate. Yet the centerpiece of her proposal requires delicate balancing and aligning of political interests. She advocates the passage of laws that affect multiple levels of government and an array of interest groups, including homeowners, neighbors, taxpayers, and public utilities, among others. A description of the legislative process and the influence of interest groups could help a reader to understand the context and could help Ms. France more forcefully argue for her ideas.

Much of Ms. France's proposal would have to be enacted at the state level, which is the level of government most suited to address solar rights. This enactment would occur in the form of state statutes approved by the legislative and executive branches of government. Currently, the legislature and Governor Perry have supported certain kinds of renewable energy projects, such as large-scale wind farms and, to a lesser extent, large-scale solar projects.<sup>27</sup> As Ms. France points out, however, state politicians have not done much to support small-scale renewable energy installations by private individuals. A more thorough explanation of this reluctance to fund such projects is in order. What political forces would encourage politicians to support individual solar projects?

Another important part of the statewide political landscape is the \$27 billion budget shortfall for fiscal year 2011–2012.<sup>28</sup> How would politicians view a solar access law in light of that deficit? Might lawmakers attempt to tack revenue-generating provisions (such as a filing fee for solar easements,

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27. See Laylin Copelin, *Solar Rebate Legislation Could Have a Chance in the Legislature*, AUSTIN AM. STATESMAN (Apr. 21, 2011), <http://www.statesman.com/business/solar-rebate-legislation-could-have-a-chance-in-1424238.html> (noting the push for solar energy incentives by “big [solar] companies talking about bringing big money” but that the Governor pledged to “veto an approach that would have encouraged electric utilities to include nonwind, renewable energy in their mix of generation sources”); Kate Galbraith, *Solar Push in Texas Fails*, N.Y. TIMES GREEN BLOG (June 1, 2009), <http://green.blogs.nytimes.com/2009/06/01/solar-push-in-texas-fails> (characterizing Texas as “leading the nation in producing wind power”).

28. *Tripedia: 2011 Budget Shortfall*, THE TEX. TRIB., <http://www.texastribune.org/texas-taxes/2011-budget-shortfall/about/>. The Texas legislature's attempt to balance the budget has produced mixed results. See Ross Ramsey et al., *Liveblog: Texas Legislature Passes \$15 Billion in Cuts*, THE TEX. TRIB. (May 28, 2011), <http://www.texastribune.org/texas-taxes/budget/liveblog-texas-legislature-passes-15-billion/> (chronicling the debate surrounding the passage of \$15.2 billion in budget cuts over two years).

or special property taxes on solar energy systems) on to a solar access proposal? If so, how would these provisions hurt or help passage?

Omitted entirely from Ms. France's note is any discussion about interest groups that might oppose a strong solar rights regime. The boards of property owners' associations<sup>29</sup> would no doubt object to the part of Ms. France's proposal that suggests that their power be curbed.<sup>30</sup> She goes so far as to suggest that property owners' associations be prohibited from imposing even "reasonable restrictions" on solar energy systems.<sup>31</sup> Her far-reaching proposal seems unlikely to be successful. Associations have tremendous influence over lawmakers and would no doubt actively attempt to shape her proposed solar access regime. Current state statutes clarify the extent of their influence: Under Texas law, for example, associations can foreclose on properties subject to their jurisdiction—despite the general state constitutional protection against foreclosure on an owner-occupied home.<sup>32</sup> Given this level of influence, it is hard to imagine that Ms. France's proposals with respect to property owners' associations will ever be passed.

In addition to property owners' associations, other interest groups may also try to prevent Ms. France's proposals from becoming law. Localities may take issue with Ms. France's suggestion that they protect solar access rights when designing zoning ordinances.<sup>33</sup> Public utility companies that provide conventional (nonrenewable) energy may oppose Ms. France's proposal because of its potential impact on their customer base and revenues; to the extent that an individual uses solar power, she is not a customer of the public utility. Private interests involved in other renewable energy industries—such as Texas's thriving wind industry—may reject efforts to make solar energy more widely available.

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29. See TEX. PROP. CODE ANN. § 209.002 (Vernon 2007) (using the term "property owners' association" instead of "homeowners' association," and defining it as "an incorporated or unincorporated association that (A) is designated as the representative of the owners of property in a residential subdivision; (B) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision").

30. France, *supra* note 3, at 199.

31. *Id.*

32. See, e.g., *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987) (allowing foreclosure by a homeowners' association of contractual liens on homes of delinquent owners); see also TEX. CONST. art. XVI, § 50(a) (containing the so called "homestead exemption" to foreclosures, and stating that "[t]he homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for" certain debts, including due taxes); see also TEX. DEP'T OF HOUSING & COMMUNITY AFF., A STUDY OF RESIDENTIAL FORECLOSURES IN TEXAS, H.B. 1582, 79th Leg., R.S., at 35 (2006), <http://www.tdhca.state.tx.us/housing-center/docs/06-HB1582Rpt-Foreclosures.pdf> (observing that Texas leads the nation in total foreclosures and ranks sixth in the number of households with a mortgage per foreclosure); cf. TEX. PROP. CODE ANN. § 209.009 (Vernon 2007) (prohibiting associations from foreclosing if the debt securing the lien consists solely of fines or association attorneys' fees related thereto).

33. France, *supra* note 3, at 200–01.

A fuller discussion of these potential opponents, and any concessions needed to dampen their opposition, would strengthen Ms. France's proposals. Commentators following in Ms. France's footsteps to propose solar rights rules in other states should also be careful to analyze the political landscape.

### III. Neighborhood Solar Projects

Finally, I wanted to briefly touch upon the issue of the scale of solar projects. As Ms. France notes, too often public bodies focus on large-scale projects to the detriment of smaller installations.<sup>34</sup> Her proposal aims to solve the problems of individual residential property owners seeking to install solar panels. I would encourage her and other commentators to push their advocacy a step further. Specifically, I would encourage them to consider one mechanism by which property owners could share energy across property lines: the renewable energy microgrid.

Elsewhere, I have defined renewable energy microgrids as “small-scale, low-voltage distributed generation between neighbors for energy derived from sources such as solar collectors, wind power systems, microturbines, geothermal wells, and fuel cells, which have minimal negative impact on the environment.”<sup>35</sup> The microgrid presents an alternative to either individual installations that serve only one user and large-scale projects that serve entire cities or larger areas.

Some states explicitly prohibit microgrids. California, for example, has an “over-the-fence” rule, which prevents non-adjacent neighbors and more than two adjacent neighbors from sharing power generated by solar collectors.<sup>36</sup> Many more states simply ignore the issue or allow public utilities to have final say. Proposals on how to overcome barriers to microgrids—whether they take the form of reforms of public utility laws or new property rules—should be a key part of solar access regimes in any state.

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34. *Id.* at 187 (“[R]ather than focusing on what individual homeowners can do to harness this great solar energy potential, Texas has directed its efforts toward large-scale solar incentive projects.”).

35. Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547, 549–50 (2010) (footnote omitted).

36. See CAL. PUB. UTIL. CODE § 2868(b)(1)–(2) (Deering 2009) (defining an “[i]ndependent solar energy producer” as one that generates electricity for its own use or for the use of tenants or “not more than two other entities or persons per generation system solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto”); see also Tim Lindl, *Letting Solar Shine: An Argument to Temper the Over-the-Fence Rule*, 36 ECOLOGY L.Q. 851 (2009) (arguing for a more flexible and less restrictive version of the over-the-fence rule).

#### IV. Conclusion

In sum, I am pleased to see that commentators such as Ms. France are proposing state-specific solar rights legislation. Her work represents an important step forward as the discussion on solar rights begins to reemerge. This Response to her piece is intended to urge her and any others who may propose solar rights regimes to consider key issues—potential legal and political challenges, as well as rules that allow renewable energy sharing among neighbors—which would ultimately strengthen their proposals.