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CHANGES TO ONTARIO'S FEED-IN TARIFF PROGRAM

The Ontario Power Authority ("**OPA**") launched its Feed-in Tariff ("**FIT**") program on October 1, 2009. The response to the FIT program has been greater than expected: as of February 4, 2011, the OPA had received applications for projects totalling 16,554 MW and had executed contracts totalling 2,625 MW of new, renewable generation. In part because of this overwhelming response, the OPA has adjusted the program in several material ways in the past few months. This bulletin provides a brief overview of the FIT program and describes the following program changes:

1) Removal of off-shore wind power from the FIT;
2) Extension of Milestone Date for Commercial Operation for FIT contract holders;
3) Change in microFIT rates for solar projects;
4) Exclusion of commercial aggregators from the microFIT program and addition of a new stream for aggregators;
5) Release of guidance for multiple projects on one property;
6) Change in rules regarding the connection process for capacity allocation exempt projects; and
7) Exclusion of behind-the-meter projects from the FIT.

Overview of the Feed-in Tariff and MicroFIT

The FIT program, and related regulatory changes introduced by the *Green Energy and Green Economy Act, 2009*, allow private developers of renewable power projects to connect to the public electricity grid and sell power to the OPA at preferential rates.

The program currently has two streams: the simplified microFIT stream for projects under 10 kilowatts and the comprehensive FIT stream for projects over 10 kilowatts. Both streams offer 20-year power purchase agreements with prices that depend on project size and renewable fuel type. All projects must meet domestic content requirements to ensure that significant economic benefit accrues to Ontario.

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Davis LLP's **Environmental, Energy and Resources Law** practice group comprises an integrated approach to legal issues surrounding environmental, energy, and resources areas. Our lawyers posses extensive experiences advising and representing clients in all aspects of these areas. The primary focus of this group is to provide clients with a well-rounded and strategic approach in advising legal matters in businesses related to corporate social responsibility on a local, national and international basis regarding all environmental, energy and resources matters. This, along with our cutting-edge approach to providing exceptional value-added service in the legal industry, results in a dedicated team focused on our clients' needs first and foremost.

Project owners in both streams must coordinate their connections with the operators of the relevant distribution or transmission systems. In addition, FIT projects are also subject to transmission and distribution availability tests to ensure that the grid can accommodate the project at the proposed point of connect. Smaller FIT projects (known as "capacity allocation exempt" projects) and all microFIT projects are exempt from this requirement, subject to the development discussed in section 6 below.

Finally, most projects require a Renewable Energy Approval ("**REA**") from the Ministry of the Environment, although some projects are exempt from this requirement.

Significant Program Changes

1) Removal of Off-Shore Wind from the FIT Program

The Government of Ontario announced on February 11, 2011 that it has not and will not approve off-shore wind projects. The OPA will no longer be accepting FIT applications for off-shore wind projects and will suspend those applications that it has already received.

The government news release did not say what will happen to projects that have already been awarded FIT contracts.

2) Extension of FIT Milestone Dates for Commercial Operation

On February 9, 2011, the OPA announced that it will offer to extend the Milestone Dates for Commercial Operation ("**MDCO**") in the FIT contracts of all suppliers who have not yet reached commercial operation. The MDCO is the contractual deadline for achieving commercial operation. Many project developers expected to miss their MDCOs, particularly as a result of delays by the Ministry of the Environment in developing and implementing the REA process. The delays were exasperating developers and complicating negotiations with sources of project finance.

Extending the MDCO will alleviate three significant risks for FIT project developers, specifically the risks of:

- achieving commercial operation after the MDCO, which shortens the effective term of the FIT contract because the 20-year term runs as of the MDCO, whether or not the project is operating;
- having the OPA terminate the FIT contract because the developer has not made a timely request for a Notice to Proceed, which must be received by the OPA no later than 6 months before the MDCO; and
- having the OPA reject a claim for Force Majeure that is based on delays in the REA process.

With respect to Force Majeure, several developers had taken the position that the REA delays constituted Force Majeure. In response, the OPA will require certain amendments to the Force Majeure provisions of the FIT contract as a condition of the offer to extend the MDCO. The OPA has indicated that the amendments will eliminate some types of Force Majeure claims, modify some types to be available only if the delay falls outside of a one-year moratorium, and permit certain types to be granted as usual.

The specific wording of the OPA's amendment offer have yet to be released.

The proposed offer is a relief to most FIT contract holders. However, it remains to be seen if some developers will take issue with it. The FIT program commenced with a "launch phase" in which connection capacity was allocated in part based on the developers' proposed milestone dates for commercial operation, with capacity being allocated to projects with earlier dates first. Developers who did not get contracts during the launch phase may take the position that the extension undermines the process used by the OPA to allocate these initial contracts.

3) Changes to microFIT Rates for Solar

Initially, all MicroFIT solar projects were guaranteed a rate of 80.2 cents per kilowatt hour regardless of whether the project was ground-

mounted or rooftop. As microFIT applications flooded in, the OPA took the position that the 80.2-cent price had been developed based on assumptions about the cost of installing rooftop solar, that ground-mounted solar was cheaper and that ground-mounted projects should therefore receive a correspondingly lower price. In August 2010, the OPA formally distinguished rooftop and ground-mounted projects under the microFIT Rules and established a new rate of 64.2 cents per kilowatt hour for ground-mounted projects. Rooftop solar MicroFIT projects continue to be guaranteed 80.2 cents per kilowatt hour.

This rate change applies to all applications received after noon on July 2, 2010; all those who received a conditional offer or submitted an eligible ground-mount application before this deadline will continue to be guaranteed the original rate of 80.2 cents per kilowatt hour.

4) New Rules for MicroFIT Aggregators

The goal of the microFIT program was to encourage homeowners, farms, First Nations, small businesses and community institutions to own and develop their own small renewable projects. However, commercial operators quickly realized that the relative ease of obtaining microFIT projects and the relative difficulty homeowners were having in financing the projects created an opportunity for aggregation. Commercial aggregators began offering homeowners the opportunity to receive monthly income from rooftop installations that the aggregator would finance, build and maintain.

In August 2010, the OPA announced that this type of aggregation was contrary to the purpose of the microFIT. The microFIT pricing had been developed from the bottom up based on assumptions about the costs that a homeowner would incur in installing projects. Aggregators had lower costs and may be receiving a windfall from the current microFIT pricing. The OPA therefore disallowed the future participation of aggregators in the microFIT program.

The OPA recognized that aggregators were contributing to the overall goal of implementing clean generation in the province. In February 2011, the OPA released draft rules for a new FIT stream specifically for commercial aggregators: the Commercial Feed-in Tariff ("**CFIT**"). The proposal offers rates that are lower than microFIT rates:

- 71.3 cents per kWh for rooftop solar, as compared to 80.2 cents for microFIT; and
- 44.3 cents per kWh for ground-mounted solar, as compared to 64.2 cents for microFIT.

The proposed contracts also allow for lender 'step-in rights' in the event of a supplier default. This feature, which is not found in the microFIT contracts, may make it easier for aggregators to finance their projects.

The OPA is accepting stakeholder comments on the draft CFIT Rules, Conditional Offer and Contract until February 18, 2011. Details are available on the OPA's microFIT website: microfit.powerauthority.on.ca.

The OPA plans to begin accepting applications for the CFIT program by March 2011.

5) Guidance for Multiple Projects on One Property

The FIT rules were expressly designed to prevent developers from dividing large projects into multiple smaller projects so as to obtain the more favourable price available to smaller projects. In light of the "anti-gaming" provision of the FIT rules, the OPA received many questions from developers who wished to pursue multiple projects on one property, either because the property had several buildings that were suitable for rooftop solar installations or because the developer wished to develop the project in phases. On August 4, 2010, the OPA released guidance to address whether multiple FIT contracts for the same technology would be permitted on the same property and, if so, how those projects would be treated with regard to pricing.

Subject to the exception described in the following paragraph, the guidance provides that only one FIT project per renewable fuel will be permitted on a single property. Despite this restriction, both rooftop and ground-mounted solar projects will be permitted on the same property under the FIT. Under the microFIT, only 10 kW of solar generation (whether rooftop or ground-mounted) will be permitted.

Despite the foregoing, where the OPA deems that multiple FIT projects on a single property do not constitute improper project splitting, the capacity of those projects will be aggregated to determine the FIT price applicable to all of the projects on the property.

In the case of phased developments, the price will be set based on the aggregate of the first batch of applications (which must be submitted on the same day). If aggregate capacity falls in the highest capacity tranche of FIT pricing, there is no limit on the number of subsequent applications that can be submitted for that property. However, if the aggregate capacity of the initial batch of applications is in a lower tranche, subsequent applications will be limited to the extent that the aggregate capacity of all initial and subsequent applications must not exceed the upper bound of the price tranche that applies to the initial applications.

The guidelines also provide that FIT and microFIT projects using the same fuel can be built on the same property, provided that the aggregate capacity is less than 10 kW. If a microFIT project with a capacity of 10 kW has already been proposed for a property, the OPA will not accept an application for a FIT contract on the same property.

6) Rule Changes for Capacity Allocation Exempt FIT Projects

The FIT rules provide that certain projects are exempt from the requirement to undergo the transmission availability test (and distribution availability test, if applicable) to determine whether the grid has the physical capacity to accommodate the project. To qualify as "capacity allocation exempt", a project must either be:

- no more than 250 kilowatts where the facility is connected to a less than 15 kV line; or
- no more than 500 kW where the facility is connected to a 15 kV or greater line.

Project proponents saw a significant advantage in avoiding the capacity allocation tests. As a result, the OPA received a huge number of applications for microFIT and capacity allocation exempt FIT projects.

The demand has been so strong that the capacity of these projects is exceeding the available grid capacity in many areas. As a result, as of December 8, 2010, the OPA modified the FIT rules to provide that capacity allocation exempt projects "must be deemed by the OPA to be capable of connecting at the proposed Connection Point." In effect, the OPA introduced a new type of capacity allocation test for capacity allocation exempt projects.

In February 2011, the OPA released guidance about this new requirement. The guidance identifies four thresholds that the OPA will apply going forward:

New capacity that can be accommodated at the connection point	Eligible types of project
5 MW or more	Any type of microFIT or FIT application
2 - 5 MW	Only microFIT and capacity allocation exempt FIT projects
< 2 MW	Only microFIT projects
0 MW	No projects

The OPA will also require capacity allocation exempt FIT applicants to obtain a Connection Impact Assessment from their local distribution company after the OPA issues a contract. Applicants for microFIT projects must have a connection offer from their distribution company before receiving a contract offer from the OPA.

7) Exclusion of Behind-the-Meter Projects

As originally conceived, the FIT program permitted projects to connect to the grid in parallel with any load-drawing facilities on the same property or in series with such loads (the latter also being referred to as "behind-the-meter" projects). Measurement Canada, which has jurisdiction in respect of electricity metering, took issue with in-series connections. As a result, the OPA prohibited behind-the-meter projects as of May 19, 2010.

Additional Information

The FIT, microFIT and CFIT programs, and the REA process and criteria, will continue to evolve in the coming months.

For the most recent developments, consult the Davis LLP Environmental, Energy and Resources Law blog at www.davis.ca or contact any of the Davis lawyers listed below.

Environmental, Energy and Resources Law Practice Group

Davis LLP's Environmental, Energy and Resources Law Group has a fully integrated network of legal advisory services that can assist our clients from anywhere in Canada, or elsewhere. We are able to provide service to successfully meet the demands of an ever-changing business market with high-level business legal strategies.

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