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Ontario Power Authority Announces First Review of Feed-In Tariff Program

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THE FIT PROGRAM AND BIENNIAL REVIEW

On October 31, 2011, the Ontario Power Authority (OPA) announced its review of the Feed-In Tariff Program. This is the first comprehensive review of the program since its launch by the Ontario government in September 2009 under the *Green Energy Act, 2009*, which was passed into law on May 14, 2009. The OPA is responsible for implementing the FIT Program. More information on programs under the *Green Energy Act* can be found in our *Blakes Bulletin: Ontario Launches Programs to Implement its Green Energy Act* and other bulletins on our website.

The FIT Program is North America's first comprehensive feed-in tariff pricing model for renewable electricity production and is a centrepiece of Ontario's bid for an international leadership position in clean energy. The FIT Program was intended to offer stable prices under long-term contracts for energy generated in Ontario from renewable sources, such as bioenergy (biomass, biogas and landfill gas), wind, solar photovoltaic (PV) (groundmounted or rooftop) and waterpower (naturally flowing water).

Section 10.1(a) of the FIT Rules provides for the OPA to conduct regular biennial reviews of the FIT Program. Under this section, the FIT Program, the FIT Rules, the form of FIT Contracts, and the FIT Price Schedule are subject to amendment.

FOCUS AREAS OF FIT REVIEW

In our October 2011 *Blakes Bulletin: Green Energy Remains a Priority as Liberals Retain Power in Ontario*, we identified a number of issues that could potentially be raised during the anticipated FIT Review. One of these issues was the relatively high (by international standards) prices paid for the power generated by rooftop solar PV systems under the FIT Program. The continually and rapidly falling prices of solar photovoltaic systems (more than 50% since 2007) have led other FIT jurisdictions such as Germany to move to more frequent (e.g., semi-annual) reviews and price degression approaches to the tariffs, and have resulted in FIT prices substantially below those which had been offered in Ontario. In a recent announcement, Germany is reported to be further reducing its FIT prices for 2012, following its aggressive approach to FIT pricing.

Another issue which we expected to be addressed in the FIT Review relates to the limits on the authority of local municipalities to review and block the development of FIT projects. The *Green Energy Act* limited the role of municipalities in order to streamline the approval and implementation of such projects. However, several municipalities have expressed concerns about large-scale wind projects and have passed resolutions calling for a provincial moratorium on wind farms and an independent health study.

The statements made by the OPA in its announcement of the FIT Review are consistent with these expectations. The OPA has announced that it will, among other things, consider: FIT price reduction; ensuring the long-term sustainability of clean energy procurement; continuing to build on the success of Ontario-based manufacturing and clean energy job creation; consideration of new technologies and fuel sources; and local consultations and the renewable approval process (REA).

More specifically, the OPA has stated that it intends to consider price degression approaches and price model assumptions, alignment with the *Long-Term Energy Plan* and the *Supply Mix Directive*, participation and eligibility rules and the broader sustainability of the system. The OPA is also going to consider implementation issues, but has provided less information about this aspect of the FIT Review.

We expect the OPA will make significant changes to the FIT Program as a result of the review, and that the revised program will likely reflect the experience and learning under other established and successful FIT programs, such as that in Germany. The reconciliation of the competing demands for the timely review and approval of FIT projects with the desire of local communities to have greater input into the approval process,

CONT'D ON PAGE 2

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Blakes Bulletin
November 2011
Energy/CleanTech

CONT'D FROM PAGE 1

and the steps to be taken to overcome the roadblocks to the connection of existing systems to the grid, are among the important challenges that the OPA – and potentially the Ontario Energy Board, in the case of the connection issues – will have to address. We also hope that the revised program will facilitate more widespread community participation in FIT projects in order to better integrate the FIT Program and local energy production at the community level, with a view to building a broader base of long-term support for the FIT Program.

APPLICATIONS SUBJECT TO CHANGE FROM FIT REVIEW

One aspect of the FIT Review which has raised concerns among the renewables industries, FIT project applicants and other stakeholders, and has resulted in market uncertainty, relates to the retroactive application of the revised pricing model and rules. While the FIT Review will not affect the holders of existing FIT Contracts, the revised prices and rules will apply retroactively to Capacity Allocation Required applications submitted June 5, 2010 or later, and Capacity Allocation Exempt applications submitted December 8, 2010 or later. The review will also apply to all applications currently on the Priority Ranking List, and all applications submitted after October 31, 2011 (the date of the announcement of the review).

In the case of microFIT applications, the review will affect applications submitted on or after September 1, 2011. MicroFIT contract holders, conditional offer holders, and applications submitted on or before August 31, 2011 will not be affected.

While the FIT Review will update the FIT Program to more accurately reflect current (and typically declining) costs, the retroactive application of the FIT Review may have potentially negative effects on FIT applicants who have made significant investments and/or commitments on the basis of pricing assumptions which will likely be invalidated as a result of the FIT Review. Only time will tell whether decreases in system costs will be sufficient to offset costs or commitments made to secure access rights to FIT project sites or other costs incurred in connection with the development of FIT applications. In this regard, while *Section 7.1(a) of the FIT Rules* states that the prices on the Price Schedule may be revised in accordance with the FIT Review, developers may have interpreted *Section 7.1(b) of the FIT Rules* – which sets the time of the Time Stamp on the applications which have been accepted without having been in the FIT Production Line or the FIT Reserve as the relevant time for determining the applicable Price Schedule – as suggesting that the changes to the prices for such projects would not be given retroactive effect.

We note that the OPA has offered to refund the FIT application fees, which are not usually refundable, for applicants who wish to withdraw their FIT applications as a result of the OPA's announcement of the FIT Review. While this may be of some assistance, FIT applicants who find that they have been adversely impacted by the FIT Review may wish to consider whether *force majeure* or other legal doctrines might apply to leases, supply contracts and other commercial contracts entered into on the assumption that the FIT Contract would reflect the Price Schedule prior to the announcement of the FIT Review.

TIME-FRAME FOR SUBMITTING APPLICATIONS TO OPA

The FIT Review will be a two-way process and consultation with stakeholders, and will take place through multiple channels including written submissions and meetings throughout the period from October 31 to December 14, 2011. The OPA has made an online portal available until December 14, 2011 for online surveys and written submissions – click here to access the portal.

Written submissions can also be made to FITsubmissions@powerauthority.on.ca. Stakeholders may wish to take advantage of this opportunity to communicate their views and concerns to the OPA.

Members of Blakes are actively involved in the FIT Review process.

For further information or assistance with the preparation of submissions, please contact:

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