

Blakes Bulletin

Energy/CleanTech

Update on Ontario's Renewable Electricity Sector

SHARON WONG, RICHARD CORLEY AND DAVID FELDMAN

There have been a number of developments in Ontario's Renewable Electricity sector over the last few weeks. Although the government's plan to promote renewable generation has run into a few snags, Ontario is moving ahead with the implementation, and even expansion, of its Feed-in Tariff Program (the FIT Program). This *Blakes Bulletin* will update you on the following recent developments:

- an Ontario court has dismissed a case seeking to strike down the provincial laws governing the location of wind turbines;
- in another case landowners are asking the Environmental Review Tribunal to revoke the Renewable Energy Approval (RE Approval) granted to an eight-turbine wind farm on the grounds that it will cause serious harm to human health;
- because it is taking longer than expected to obtain required approvals, the Ontario Power Authority (OPA) is offering to amend certain FIT contracts to extend the required date for commercial operation of new facilities;
- the Ministry of Environment announced a moratorium on offshore wind projects;
- the OPA announced a new program (CFIT) to allow developers to aggregate several small projects (e.g., rooftop solar) to qualify for a FIT contract; and
- the OPA announced a second round of FIT contracts for 35 additional solar projects, four new wind projects, and one water project.

The Ontario government launched the FIT Program in September 2009 under the *Green Energy and Green Economy Act, 2009*. The FIT Program offers stable prices under long-term contracts for energy generated in Ontario from renewable sources, including bioenergy (biomass, biogas and landfill gas), wind, solar photovoltaic (PV), and waterpower. The goal of the FIT Program is to develop renewable electricity generation in Ontario to help replace coal-fired generation in the province.

More information on the FIT Program can be found in the following *Blakes Bulletins*: *Ontario Announces 184 Feed-in Tariff Contracts for 2,421 MW of Renewable Energy* and *FIT Update – Community Energy Partnerships Program*.

LITIGATION FROM WIND OPPONENTS

As Ontario pushes forward with its plan to develop windpower in the province, local landowners who oppose wind development in their neighbourhood have been increasingly pushing back with lawsuits and other forms of legal action.

One notable case was decided by the Ontario Divisional Court on March 3, 2011. In *Hanna v. Attorney General of Ontario*, the plaintiff sought to strike down the new regulations establishing the criteria – such as the minimum distance a turbine must be located from a residence – for granting RE Approvals for wind projects. The plaintiff argued that the government failed to take into account the health effects of wind turbines when it passed the applicable regulations. The Divisional Court dismissed the case and upheld the regulations, finding that “the health concerns for people living in proximity to wind turbines cannot be denigrated, but they do not trump all other considerations.” The court was satisfied that the government had engaged in public consultation before it passed the regulations and complied with the necessary process. The court also noted that, under the regulations, residents with specific health concerns are entitled to raise their concerns before the province's Environmental Review Tribunal.

Wind opponents are already making use of that potential remedy. Residents of Chatham, Ontario are currently appealing to the Environmental Review Tribunal challenging the RE Approval granted to Suncor's 20 MW Kent Breeze wind project. The appeal hearing began on February 1, 2011 and is expected to conclude at the end of March, with the decision to be issued thereafter. As set out in Ontario's *Environmental Protection Act*, in order to succeed, the applicants must establish that it is more likely than not that the wind turbines will cause (a) serious harm to human health, or (b) serious and irreversible harm to plant life, animal life or the

CONT'D ON PAGE 2

CONT'D FROM PAGE 1

natural environment. The applicants argue that noise from wind turbines harms people nearby, causing sleep disturbances, stress, headaches, and other health problems. They claim that, at the very least, the evidence that wind turbines are safe is inadequate. Many expert witnesses are testifying for both sides. If the applicant succeeds in getting the approval revoked, it could seriously hamper onshore windpower development in the province.

TIME EXTENSION UNDER FIT CONTRACTS

FIT contracts have a stipulated schedule which has been creating unexpected difficulties for some developers. New onshore wind and solar facilities are supposed to achieve commercial operation within three years after the FIT contract is signed. However, developers cannot start construction of new facilities until they obtain their RE Approvals from the Ministry of the Environment and all other necessary permits. Before applying for an RE Approval, a developer must engage in community consultation and prepare environmental studies. It has been taking longer than was originally expected by the province to obtain RE Approvals and, as a result, some developers were at risk of missing the Milestone Date for Commercial Operation stipulated in their FIT contracts.

To solve that problem, the OPA recently offered to amend any FIT Contract for Suppliers who have not yet reached commercial operation, by extending the Milestone Date for Commercial Operation by up to one year. Suppliers who elect to accept this offer will have to waive certain *force majeure* rights that they would otherwise have under the FIT contract.

MORATORIUM ON OFFSHORE WIND DEVELOPMENTS

The FIT Program provided higher rates for offshore wind projects – wind turbines located in Ontario's lakes, such as a proposal to install turbines in Lake Ontario near the Scarborough bluffs – than apply to onshore wind projects. However, the Ministry of the Environment has announced that Ontario will not proceed with proposed offshore wind projects while further scientific research is being conducted. The OPA is no longer accepting FIT applications for offshore wind projects and existing applications were suspended. The Ministry stated that it wants to monitor the outcome of other wind projects in freshwater lakes before proceeding with development in Ontario because the use of turbines in lakes is only in early development worldwide.

COMMERCIAL FEED-IN TARIFF PROGRAM

The OPA also recently announced a proposal to extend the FIT Program to commercial entities who want to develop one or more smaller renewable energy projects that are each 10 kW or less. The new Commercial Feed-in Tariff Program (CFIT) will allow commercial aggregators, such as businesses that lease land or rooftops from individuals for multiple renewable energy projects, to obtain a FIT contract.

The FIT Program currently has only two streams:

- the FIT Program, for renewable energy projects that are over 10 kW, which is intended mainly for renewable energy developers, and
- the microFIT Program, for renewable energy projects that are 10 kW or less, which is intended mainly for homeowners and small businesses.

The OPA expects to begin accepting applications for the CFIT Program in March 2011. Once implemented, the CFIT Program will represent a potentially lucrative opportunity for commercial aggregators of multiple micro-generation projects in Ontario, who currently are not able to benefit from the OPA's feed-in tariffs.

Draft CFIT rules have been published by the OPA for comment. Blakes submitted comments to the OPA to help make it more market-friendly and commercially viable for aggregators, operators and lenders. We expect the final rules will be issued by the end of March 2011. Under the proposed rules, to be eligible for the CFIT Program, a project must be located in Ontario, generate electricity from a renewable source, and the project must connect to the electricity transmission grid via the local distribution system. The nameplate capacity for each generation facility must be no greater than 10 kW, but multiple facilities can be aggregated under one CFIT contract.

The contract price for CFIT projects will be as set out in the CFIT price schedule in effect at the time the contract is offered. The current proposal is that solar PV projects will receive 71.3¢/kWh for rooftop projects (compared to 80.2¢/kWh under the microFIT Program) and 44.3¢/kWh for ground-mounted projects (compared to 62.2¢/kWh under the microFIT Program). For CFIT projects other than waterpower projects, the length of the contract term will be 20 years, and for CFIT projects that are waterpower projects, the length of the contract term will be 40 years.

CONT'D ON PAGE 3

CONT'D FROM PAGE 2

Solar PV CFIT projects must achieve a minimum "Domestic Content Level" of 60%, which is consistent with the current FIT and microFIT rules. As with the FIT and microFIT Programs, the Domestic Content Level would be determined in accordance with the Domestic Content Grid for solar PV projects that are less than or equal to 10 kW.

Under the proposed rules, CFIT contracts will also include secured lender provisions to permit a lender to have step-in rights in the event of a supplier default to the lender. Such secured lender provisions were not included in microFIT contracts. The provisions in the CFIT contract were designed to satisfy lenders while maintaining an administratively simple program.

NEW ROUND OF LARGE-SCALE CONTRACTS

The OPA recently awarded 40 new FIT contracts for over 872 MW of renewable energy under the FIT Program. These FIT contracts provide for 257 MW of solar projects and 615 MW of wind projects: a combined output that could power 200,000 homes for a year. With these new FIT contracts, the FIT Program has now awarded a total 1,570 FIT contracts, representing a 3,565 MW supply of renewable energy.

The recent round of FIT contracts followed the completion of the Transmission Availability Test (TAT), which determines whether there is availability on the transmission system to connect new energy projects, and the Distribution Availability Test (DAT), which determines whether there is availability on the distribution system for distribution-connected projects. The OPA began conducting the TAT and DAT in October 2010 for the 324 large-scale FIT project applications submitted between December 1, 2009 and June 4, 2010; the delay in conducting the tests was attributed to the exceptionally high number of submissions that needed to be processed.

The OPA uses an Economic Connection Test (ECT) to identify projects that support renewable generation and meet economic requirements. Applicants who were not awarded FIT contracts will now be placed in a priority ranking list and proceed to the ECT. The OPA plans to award in the coming weeks a third round of FIT contracts for capacity allocation exempt projects (under 500 kW) for which applications were received between June 5, 2010 and December 7, 2010.

If you have any further questions regarding the FIT Program or the proposed CFIT Program or if you would like assistance with your FIT project, please contact any member of the Blakes Energy or CleanTech Groups.

Go to blakes.com/english/subscribe.asp to subscribe to other *Blakes Bulletins*.

NEW YORK CHICAGO MONTRÉAL LONDON OTTAWA BAHRAIN TORONTO AL-KHOBAR* CALGARY BEIJING VANCOUVER SHANGHAI* blakes.com

* Associated Office