

A Hot Topic: a look at the feed-in-tariff scheme

In these increasingly cost-conscious times, businesses are considering ways to improve revenues. One recent development which has the additional benefit of being “green” in this equally eco-conscious climate is the feed-in-tariff scheme (FITS).

This came into force on 1st April 2010 and requires electricity suppliers to pay small-scale generators (whether businesses, landlords or private house-holders) for electricity they produce from renewable sources whether on commercial or residential property meeting the following criteria:

- *generation of no more than 5 mW of electricity from solar photovoltaic cells (solar panels) or wind or hydro power or anaerobic digestion or micro combined heat & power (“the installation”)*
- *the installation is accredited and registered in the central FITS register*
- *the FITS generator must “own” the installation*

Who Pays?

FITS payments are made by electricity suppliers not the Government. The generator receives a fixed sum for each kilowatt hour (kWh) of electricity generated and either a guaranteed rate per kWh for surplus exported to the national grid or if preferred the open market rate for such exported power. The minimum tariff paid is fixed by the Secretary of State and is currently 3p per kWh (adjusted in line with the Retail Prices Index) and monies are payable for the tariff life-time which varies according to the type of technology – 25 years for solar panels, 10 years for micro combined heat & power systems and 20 years for the rest.

Accreditation

For several reasons it is financially advantageous to obtain accreditation for a FITS installation sooner rather than later. The longer left, the lower the starting rate for the generation tariff, particularly for technologies (including solar panels and wind technology) where the installation and operating cost are likely to reduce in the future. Also if the up-take of the scheme is wider than predicted we may see a reduction by the Government in the overall tariff scale. The scheme permits periodic tariff reviews with the next due in April 2013 but the Government has already announced an intention to “rebalance” the scheme in favour of more cost-effective lower-carbon technologies and could easily bring forward the review date. Indeed the Renewable Energy Association announced on 30th November 2010 that the Government has decided to “cap” FITS payments for 2014/5 at £360m (down from £400m) Any reduction in tariffs will only affect new projects; those already accredited will continue to receive payments at the originally assessed rate subject to annual RPI adjustment.

Sub-letting

Increasingly there are companies offering to pay for the capital cost of installation of the technology (usually solar panels or a wind turbine) who will then receive the FITS payment in return for either rent or access to low-cost electricity. Any surplus sold to the Grid attracts payments which again could be retained by the generating company or shared with the landowner, depending on the terms of their arrangement. With power costs rising, the lure of cheaper electricity will be attractive to a homeowner.

However there are hurdles to be overcome. If the property is mortgaged, lender's consent will usually be required. Lenders, particularly of highly-g geared residential properties, may not want to compromise the re-sale value of the property in case they need to repossess and sell in a hurry and some buyers may be put off by the idea of the lease arrangement either because of the access rights which will need to be included or concerns about ongoing repairs during the lease term or perhaps most importantly the requirement for removal of the equipment and reinstatement of the premises at the end of the term. For any lease of commercial premises, contracting out of the Landlord & Tenant Act 1954 provisions are a must for any owner.

Insurers too will need to be informed and the question of who bears any additional premium addressed.

Where to site the equipment?

Not all sites will be suitable for a FITS installation. Rooftops in urban areas often generate too erratic a wind pattern for a turbine whilst a south-facing property in the South of England stands the best chance of sufficient sun for a solar panel to be effective. However overhanging trees may also render a site unsuitable, as may development of an adjacent property. The latter could occur during the life of the lease and the only solution may be to permit the FIT generator to terminate the lease and remove the equipment. In commercial leases a Landlord may not want to permit such a break right, e.g. where they receive rent rather than cheap power. In such a case the right to break could be triggered by the income stream for the generator say falling below a specified level.

Drafting Thoughts

It is early days and currently there is no industry standard precedent FITS lease.

Any drafting will need to consider:

- access requirements
- the type of technology involved and its specific requirements
- the exact area to be leased (which may need to include specified airspace and particularly a plan if the installation is on a sloping-roof)
- planning and any other third party consents needed
- that equipment fixed in a sufficiently permanent way is presumed by common law (which cannot be overridden in a lease) to be a fixture, owned by the landowner. If not demised then it may be that the installation is "owned" by the landlord rather than the generator. However suppliers seem more inclined currently to pay the registered generator ignoring such legal technicalities.

Please note that the above is a summary only of the scheme. Pitmans accept no liability for any reliance on this article.

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