

ENERGY & INFRASTRUCTURE BULLETIN

November 2018

Public Comment Invited on Proposed Changes to the Feed-in Tariff Scheme for Renewable Energy in Japan

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I. Introduction

On 22 October 2018, the Japanese Ministry of Economy, Trade and Industry (“**METI**”) initiated a public comment process to invite opinions and questions on the proposed amendments (the “**Proposal**”) to the feed-in tariff scheme under the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities (the “**Act**”).¹ All comments on the Proposal must be submitted by no later than 21 November 2018. In this bulletin, we briefly outline the Proposal.

II. Background

The feed-in tariff scheme for renewable energy (the “**FIT Scheme**”) in Japan encouraged the increase of contribution by renewable energy to the energy mix from 10% to 15% by 2017. However, for electricity consumers, it has cost them 1,800 billion yen (2.25 yen/kWh) in aggregate surcharges on their electricity bills. This increased cost for consumers far exceeds the equivalent cost to achieve a 5% increase of renewable energy in the energy mix in other countries.² The Proposal is intended to address the increasing cost to expand renewable energy in Japan by implementing certain measures that include reduction of the existing FIT rate and/or FIT period for certain solar power

¹ The original proposal and public comment format are available at <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=620118020&Mode=0> (Japanese language only).

² According to METI, the equivalent cost was 0.63 yen/kWh in Germany and 0.28 yen/kWh in the UK.

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projects (10kW or more) that have not commenced operation.³

III. Contents of the Proposal

The Proposal includes:

- (a) measures for pre-operational, METI-certified solar power projects of 10kW or more (see section IV below);
- (b) measures for (i) installation of storage batteries for overloading solar power projects (see section V.1 below) and (ii) change of biomass ratio (see section V.2 below); and
- (c) other measures (see section VI below).

According to the Proposal, item (a) will take effect on 1 April 2019 by way of amendment to the Enforcement Regulations for the Act and the METI Announcement (*kokujū*) (collectively, the “**Amendment Regulations**”), and items (b) and (c) will be implemented immediately upon promulgation of the Amendment Regulations.

IV. Measures for Pre-operational, METI-Certified Solar Power Projects

The following measures are proposed for solar power projects of 10kW or more that (i) were certified by METI between 1 July 2012 and 31 March 2015 and (ii) are not subject to the so-called “three-year rule”⁴ (*i.e.*, an interconnection agreement (*setsuzoku keiyaku*) (an “ICA”) was executed by 31 July 2016) (the “**Target Projects**”).⁵

1. “Receipt of Application for Grid Interconnection Construction Work” - A New Crucial Process for the FIT Rate and FIT Period

By way of background, the FIT Scheme was initially implemented in such a way that allows project companies to enjoy a fixed FIT rate at a time considerably earlier than when the project achieves commercial operation. Such framework took into consideration that financing, a crucial element that facilitates growth of renewable energy projects, required the FIT rate

³ The Proposal is based on the discussion held at the METI committee meeting held on 15 October 2018. Committee meeting materials distributed at the meeting (the “**Committee Discussion Materials**”) are available at http://www.meti.go.jp/shingikai/enecho/denryoku_gas/saisei_kano/009.html (Japanese language only).

⁴ Under the Act, solar power projects – of 10kW or more – with an existing METI certification and an ICA executed on or after 1 August 2016 must commence operations (*i.e.*, the sale of electricity) within three years from the date when the new METI certification is deemed granted pursuant to the recent amendment of the Act that came into force on 1 April 2017.

⁵ According to the Committee Discussion Materials, the target of the Proposal would be expanded every year to include all solar projects that have not begun operations for four years or more since the date when METI certification is granted.

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applicable to a certain project to be determined prior to analysing the project's bankability. Subsequently, in order to address the growing concern about increasing costs for electricity consumers, amendments to the FIT Scheme were made in stages for new projects so as to apply a more recent applicable FIT rate that reflects more accurate development costs. The Proposal intends to further the above initiative by introducing a new process where a transmission and distribution utility (the "**Utility**") accepts an application by the project company for commencement of grid interconnection construction work (*keitou renkei kouji chakkou moushikomî*) (the "**New Process**"). The underlying consideration for the New Process is that the FIT rate applicable to the Target Projects should be reviewed by taking into account, in principle, when the projects commence operation. For the Target Projects, the timing when the Utility accepts such application is crucial because it affects the existing FIT rate and FIT period as discussed in more detail in paragraph 3 below.

Precise requirements and procedures for the New Process are to be released by METI separately. However, according to the Proposal, it is assumed that in order to make the above application, the project company should be "fully prepared" so that the "Utility can automatically determine the earliest date to commence interconnection only on the basis of circumstances on the part of the Utility". The Proposal further states by way of example, that at the time of making the above application to the Utility, it is required at least that:

- (1) the project company has obtained the land use rights (e.g., negotiation with landowners being completed);
- (2) the project company actually obtained the permits and licenses necessary for development/operation of the project;
- (3) the environmental impact assessment process required by local ordinance (if necessary) is completed; and
- (4) there will be no amendments to the certified business plan after the above application.

According to the Proposal, all project companies of the Target Projects are required to submit the application under the New Process. Further, taking into account the time necessary for the Utility to process the application, the deadline for making the application will be sometime in the latter half of January 2019 for it to be accepted by the Utility on or before 31 March 2019.

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In practice, whether the application is accepted by this deadline is of critical importance to project companies.

Should any persons involved in the Target Projects have any questions or issues to be addressed regarding the New Process, they are highly encouraged to submit specific comments, questions and/or requests regarding the Proposal with a view to having the New Process being implemented in a reasonable fashion to the extent possible.

2. Certification of Change of Scheduled COD

According to the Proposal, if the scheduled commercial operation date (the “**Scheduled COD**”) changes on or after 1 April 2019, it will require certification by METI in respect of such change. However, METI certification for the change of Scheduled COD will be deemed granted when the New Process is completed (*i.e.*, when the Utility accepts the application). Therefore, there is no need to submit an application to METI for certification of the change of Scheduled COD.

3. Change of Applicable FIT Rate

One of the most significant components of the Proposal is that the existing FIT rate applicable to the Target Projects will be re-determined when the Utility accepts the application under the New Process as follows:

Completion of the New Process	Applicable FIT Rate
By the end of March 2019	No change from the existing FIT rate
On or after 1 April 2019 but on or before 31 March 2020	21 yen/kWh, being the FIT rate of fiscal year 2017

However, it should also be noted that if one of the following events occurs, the project company must re-submit the application under the New Process:

- (1) any contents of the application accepted under the initial New Process prove to be false;
- (2) any contents of the application documents submitted under the initial New Process require modification;
- (3) the Scheduled COD requires changes due to reasons that are not solely attributable to the Utility; or
- (4) the certified business plan requires amendment.

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As a consequence of such additional New Process, the FIT rate applicable to the Target Project will change to such rate that is determined by reference to the date when the subsequent New Process is completed. This means that the applicable FIT rate will be the rate of the fiscal year that falls two years before the date when the subsequent New Process is completed. According to the Committee Discussion Materials, the current “three-year rule” anticipates that projects become operational within three years from the date when the applicable FIT rate is determined, but also in most cases it is anticipated that projects will become operational within approximately one year of completion of the New Process (see paragraph 4 below). This is the basis on which the above framework to determine the new applicable FIT rate is designed.

The Proposal does not address any implications for the applicable FIT rate of Target Projects for which the New Process is completed on or after 1 April 2020. However, taking into account the discussion at the METI committee meeting, the FIT rate for the fiscal year two years prior to completion of the New Process will likely be applied.

4. New “One-Year Rule”

The Target Projects are not subject to the existing “three-year rule”, but the Proposal introduces a new deadline for the Target Projects to commence operations by the following dates (the “one-year rule”):

- (1) 31 March 2020 for Target Projects that complete the New Process by 31 March 2019; and
- (2) one year from the date of completion of the *initial* New Process if it is completed on or after 1 April 2019.

It should be carefully noted that even if a re-submission of the application for New Process becomes necessary and therefore the applicable FIT rate is changed (see paragraph 3 above), the deadline remains the same as designated by the above rule and will not be extended.

The consequence of any failure to satisfy the one-year rule is to be discussed by a separate committee at METI and is not clarified yet. However, similar treatment for such projects that fail to meet the existing three-year rule may equally apply and therefore the FIT period would be reduced by the number of months after the deadline until the commencement of operation.

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5. Summary

Under the Proposal, solar power projects will generally observe the following sequence:

- (1) Sourcing/Planning
- (2) Application for ICA
- (3) Grid interconnection arrangements
- (4) Execution of ICA with the Utility
- (5) Granting of METI certification
- (6) Land improvements
- (7) **New Process**
- (8) Commencement of operation

Generally, Target Projects will follow either of two possible scenarios:

Scenario A: New Process is completed by 31 March 2019	
Example	<p>The project company meets all of the following requirements and submits the application by the latter half of January 2019 to complete the New Process by the end of March 2019:</p> <ul style="list-style-type: none"> - land use rights are obtained and necessary licenses for the project are granted; - environmental assessment process (if necessary) is completed; and - no possible amendments to the certified business plan are foreseen.
Tariff rate	Not changed
Deadline to commence operation	31 March 2020
Scenario B: New Process is completed between 1 April 2019 and 31 March 2020	
Example	The project company does not meet any of the requirements listed under Scenario A by the latter half of January 2019
Tariff rate	21 yen/kWh
Deadline to commence operation	One year after completion of the New Process

In either scenario, the possibility of a FIT rate change still remains if re-submission of the application under the New Process is required:

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Scenario C: Re-submission of application under the New Process is required; subsequent New Process is completed between 1 April 2019 and 31 March 2020	
Example	Any of the following issues arise after acceptance of the initial New Process: <ul style="list-style-type: none"> - any contents of the application accepted under the initial New Process prove to be false; - any contents of the application documents submitted under the initial New Process require modification; - the Scheduled COD requires changes due to reasons that are not solely attributable to the Utility; or - the certified business plan requires amendment.
Tariff rate	21 yen/kWh
Deadline to commence operation	Original deadline under Scenario A or B applies (not extended)

V. Measures for Certain Amendments to Certified Business Plans

1. Installation of Storage Batteries for Overloading Solar Power Projects

The Proposal expands the scope of changes to the business plan for solar power projects that requires METI certification by including installation of new or additional storage batteries at solar power plants that satisfy all of the following requirements:

- (1) the project involves a solar power plant of at least 10kW but less than 2,000kW;
- (2) total capacity of the solar panels exceeds that of the inverter (so-called “overloading solar power projects”); and
- (3) the storage batteries are installed between the solar panels and the inverter.

Unless the reverse power flow from the storage batteries can be measured separately and will be sold outside of the FIT Scheme, the applicable FIT rate for the solar power plant will be changed to the latest FIT rate as of the date when such METI certification for change of business plan is granted.

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2. Change of Biomass Ratio

The Proposal also expands the scope of changes to the business plan for biomass projects that requires METI certification by including change of the biomass ratio or of the ultimate power output.

Any change of the certified biomass ratio after execution of a power purchase agreement (*tokutei keiyaku*) (a “PPA”) will trigger a change of FIT rate unless either of the following exemptions applies:

	Permitted Changes
Decrease of Biomass Ratio	FIT rate will not change as long as the total biomass ratio after the decrease remains at more than 60% of the original ratio.
Increase of Biomass Ratio	No increase of the total biomass ratio is permitted, but any such increase would trigger a change of FIT rate unless all excess power is sold outside of the FIT Scheme. However, the ratio of energy output generated from each type of biomass fuel to total renewable energy output of the project may be increased up to 120% of the original ratio without triggering a change of FIT rate.

In addition, the Proposal would allow the Utility to refuse to enter into a PPA unless the project company agrees to the following monthly maximum procurement:

	Maximum Procurement at FIT Rate (monthly basis)
Energy output generated from each type of biomass fuel	(Certified biomass ratio for same type of biomass fuel) x 1.2
Total biomass-derived energy output	Certified total biomass ratio

VI. Other Measures

The Proposal also includes:

- (a) publication of addresses and telephone numbers of the project company (excluding individuals) set forth in certified business plans; and
- (b) mandatory termination of the ICA if the project company fails to pay

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allocated construction costs for the grid interconnection by the due date.

These measures will take effect immediately upon promulgation of the Amendment Regulations.

VII. Conclusion

The recent rapid development of technologies in the renewable energy industry has brought into the limelight certain issues pertaining to the architecture of the FIT Scheme – some of which have been addressed by the previous amendment to the Act and regulations, but some have been left unattended. The underlying purpose of the Proposal is to achieve a good balance between the growth of renewable energy and the control of increasing costs passed on to consumer electricity bills, which would invite less objections.

On the other hand, the Proposal is likely to impose significant implications – change of FIT rate and FIT period – that are entirely unexpected for project companies and market participants, including sponsors who contribute substantial capital and financial institutions who provide financing, all of whom have been working on the development of projects on the basis of the existing FIT Scheme. If the Proposal entails any adverse effect on the profitability of existing METI-certified projects, it may impair confidence in the FIT Scheme as a whole and cause a negative impact on renewable projects other than those for solar power.

It is therefore encouraged that various participants in renewable energy projects examine the Proposal bearing in mind its underlying purpose, and proactively submit constructive opinions through the public comment process to contribute to the sound and fair development of the practice of the FIT Scheme in Japan.

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PUBLICATIONS

- Article "Round-table talk: Trends in global infrastructure markets and challenges of the Japanese market"
Publication THE ASSOCIATION FOR REAL ESTATE SECURITIZATION Vol.44
Author Masanori Sato

- Article "Rapid Expansion of Green Bonds Markets"
Publication The Finance
Author Katsuyuki Tainaka

- Article "Outlines and Key Considerations of Green Bonds"
Publication Junkan Keirijouhou No.1516
Author Katsuyuki Tainaka

- Article "Risks Associated with Stricter Enforcement of Environmental Regulations in China and Countermeasures"
Publication BUSINESS LAWYERS
Author Takahiro Homma

- Article "Trends in Stricter Enforcement of Environmental Regulations in China"
Publication BUSINESS LAWYERS
Author Takahiro Homma

- Article "Trends in Development of Environmental Regulations in China"
Publication BUSINESS LAWYERS
Author Takahiro Homma

- Article "Bill for the Act on the Partial Revision of the Act on the Rational Use of Energy - Promoting Efficiency by Supply Chain Coordination"
Publication Kankyo Business Online
Author Takuto Ichimura

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NEWS

➤ HCMC Office starts operation

Mori Hamada & Matsumoto (“MHM”) is pleased to announce that our Ho Chi Minh City Office has started its operation from August 1, 2018.

Our HCMC office is led by senior corporate partner, Takuya Eguchi, who specializes in general corporate, mergers and acquisitions, compliance and dispute resolution and has substantial experience in ASEAN and China-related transactions. He will work closely with our offices in Tokyo, Singapore, Bangkok, Yangon, Beijing and Shanghai to provide seamless support to our clients.

➤ Firm receives the “Family Friendly Award 2018” from the Daini Tokyo Bar Association

Mori Hamada & Matsumoto received the “Family Friendly Award 2018” from the Daini Tokyo Bar Association. The Family Friendly Award is awarded to those member firms that implement advanced and effective measures to promote a favorable work-life-balance.

For more information, please refer to the Chambers' website.

➤ **Important Notice:** Beware of fraud involving misrepresentation of the firm or impersonation of the firm's lawyers or staff

We have received information about instances of attempted fraud related to supposed inheritance cases that involve misrepresentation of the firm or impersonation of the firm's lawyers or staff. The firm is not involved in any of these cases.

If you receive any unexpected contact from a person who claims to represent Mori Hamada & Matsumoto or claims to be one of the firm's lawyers or staff members, please refrain from offering any prompt response, and adequately verify the identification of that person. Also, please contact the firm using the following contact details to share that information with us. Your assistance is appreciated.

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Tel: +81-3-5220-1800 (General Inquiries) (9:00-17:00)

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➤ 19 lawyers were selected as leading lawyers in asialaw PROFILES' "Asia law Leading Lawyers 2018"

- Banking & Finance
Toru Ishiguro, Ken Miura, Masanori Sato, Soichiro Fujiwara, Eriko Ozawa,
Takahiro Kobayashi, Naoki Ishikawa, Hiroki Kishi (Rising Star)
- Capital Markets
Toru Ishiguro, Masanori Sato, Yasuhiko Fujitsu, Katsumasa Suzuki
- Competition & Antitrust
Kenji Ito
- Construction & Real Estate
Hiroki Aoyama
- Corporate/M&A
Toru Ishiguro, Soichiro Fujiwara, Gaku Ishiwata, Atsushi Oishi,
Katsumasa Suzuki, Shuhei Uchida (Rising Star), Hidetomo Futami
- Dispute Resolution & Litigation
Yutaka Miyoshi
- Energy & Natural Resources
Takahiro Kobayashi
- Intellectual Property
Masayuki Matsuda, Yutaka Miyoshi
- Investment Funds
Ken Miura
- Labour & Employment
Chisako Takaya
- Projects & Infrastructure
Takahiro Kobayashi
- Restructuring & Insolvency
Soichiro Fujiwara
- Taxation
Atsushi Oishi

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➤ Firm receives awards at ALB Japan Law Awards 2018

Mori Hamada & Matsumoto earned 9 awards listed below at the ALB Japan Law Awards 2018 organized by Asian Legal Business (ALB), an internationally-recognized legal journal and a part of the Thomson Reuters Group.

Firm Categories

- Japan Law Firm of the Year
- Banking and Financial Services Law Firm of the Year
- Investment Fund Law Firm of the Year
- Tax and Trusts Law Firm of the Year

Deal Categories

- Japan Deal of the Year
Toshiba's Sale of Toshiba Memory Corporation
- Equity Market Deal of the Year
Toshiba's Share Placement
- M&A Deal of the Year (Premium)
Toshiba's Sale of Toshiba Memory Corporation
- Projects, Energy and Infrastructure Deal of the Year
Fukushima Natural Gas Power Plant Project
- Technology, Media and Telecommunications Deal of the Year
Toshiba's Sale of Toshiba Memory Corporation

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