

## **THE ONTARIO GREEN ENERGY AND GREEN ECONOMY ACT, 2009**

### **I. INTRODUCTION**

On Monday, February 23<sup>rd</sup>, the Province introduced the proposed Green Energy and Green Economy Act (the "Act") into the legislature. The Act has been eagerly anticipated in this difficult economy. As set out in its Preamble, the Act is designed to encourage the growth of renewable energy projects and to remove barriers and promote opportunities to renewable energy projects and promote a green economy. The Act is also intended to ensure that the government, all publicly funded institutions, and all Ontarians use energy efficiently. The Act thus deals with both renewable energy and energy efficiency.

### **II. RENEWABLE ENERGY**

Advocates of green energy have identified three key barriers to major green energy production in Ontario (1) the current competitive bidding process and the low and undifferentiated prices and restrictive features of the RESOP Program; (2) transmission and distribution system constraints; and (3) the multi-tiered approvals process. The Act proposes major reforms to address each of these key barriers.

#### **Feed-In-Tariffs**

A feed-in tariff is a fixed price guaranteed to any green energy producer. It may vary according to type of green energy, the location of the energy generation, and other factors noted below.

Feed-in-tariffs represent a major shift in approach from both the competitive RFP process and the RESOP program (for smaller generators) used to date.

The Act empowers the Minister to direct the Ontario Power Authority to develop a feed-in-tariff program for renewable energy projects "under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require". A feed-in-tariff program is defined to mean "a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities, differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located". One example of a differentiating characteristic was mentioned by the Minister in his speech last Friday to the Toronto Board of Trade, namely that there will be separate tariffs for onshore and offshore wind farms. It is noteworthy that the Minister may require the OPA, in developing the program, to encourage the participation of aboriginal peoples and local communities in the development and the establishment of the program and to encourage domestic content (Ontario manufacturing).

The key to assessing this reform is the future tariff structure. The Act provides all necessary guidance to support this important reform, but is not sufficient to deliver it. Delivery

responsibility falls to the OPA, which has an uneven record in delivering expeditious programs. It may also be the case that the Minister delivers a future directive to the OPA on this program to set specific tariffs or otherwise expedite the establishment of this program.

In addition to feed-in-tariffs the Act delivers four major changes:

### **1. Opening Up Ontario's Electricity Transmission/Distribution System**

Presently generators' access to the transmission and distribution system is constrained by a lack of capacity in many parts of Ontario and a time-consuming approvals process due in part to lack of people at Hydro One. The Act makes it clear that the approval process for both connection and transmission and distribution infrastructure must be accelerated.

The Bill requires a transmitter or distributor to connect a renewable energy generator to its system if the technical and economic requirements prescribed by regulations, market rules, or orders and codes, are met. Regulations override codes and (Ontario Energy Board) orders where there is a conflict. Regulations will contain deadlines for connection assessments done by the distributors and the IESO as required by the Distribution System Code, and the market rules respectively. To improve system transparency on this point, transmitters and distributors must maintain and make public current information on their ability to accommodate renewable energy generation projects. Transmitters, distributors and the IESO must file quarterly reports with their performance levels connecting these generators.

The Act also requires that a utility must provide, in accordance with its license, priority connection access to its system for those renewable energy projects prescribed by regulation.

In order to ensure that the infrastructure is in place to accommodate this new priority, the Minister may also direct the Board to:

- take specified steps relating to the connection of renewable energy projects to the utilities' systems
- direct the utilities to enhance, reinforce, or expand their transmission and distributions systems to accommodate renewable energy projects
- comply with targets set by the Minister for the timely completion of its processes pursuant to which the utilities will seek to obtain approval to enhance their systems to accommodate such projects
- include in the transmission and distribution licenses a requirement to prepare plans to expand or reinforce their systems in a timely manner to accommodate more renewable energy projects and to implement the smart grid (see below), and, once such plans are approved by the Board or otherwise to implement the improvements

While not featured in the Act, the Ontario government owns Hydro One, the dominant transmitter in the province and can ensure that it expands its systems as required. A distributor is

entitled to recover its prudent costs of investments in facilities to enable renewable energy projects, from all its customers classes other than those classes that have been afforded rate protection by regulation. This provision provides the legislative basis for exempting low income customers from paying all or part of their incremental class revenue requirement, due to the new facilities.

The Electricity Act currently restricts the Minister's authority to make procurement related directives or other directives related to supply and capacity of any form of energy to the OPA once the OPA's first integrated Power System Plan is approved by the Ontario Energy Board. The Green Energy Act allows the Minister to continue to give such directives to the OPA indefinitely. The Act also broadens the scope of the subject matter of these directives, including for example, to determine whether the procurement will be competitive or not, the pricing and other economic aspects of the OPA's offers, with whom the OPA shall consult in the planning of energy supply, capacity, transmission systems, and, distribution systems (the latter not previously part of OPA plans) and, importantly, measures to facilitate the participation of aboriginal peoples in these projects including funding.

## **2. Creating New Categories of Generators**

The Act expands the parties who are eligible to own generation facilities in Ontario. Under the existing law electricity distributors, municipalities and co-ops cannot own generation facilities. The Act allows distributors to own renewable generation facilities that do not exceed 10 MW, or such other capacity as may be prescribed by regulation and a co-generation facility or energy storage facility that meets criteria provided by regulation

The Board may regulate the generation owned by a utility along with its traditional "monopoly" functions. The Act would also allow a municipal corporation (municipality), a municipal services board, a city board, or municipal services corporation, to own an electricity generation facility that does not exceed 10 MW or some other capacity provided in regulations. Finally the Act amends Co-operative Corporation Act to define a renewable energy co-operative, the business of which is restricted to generating electricity from one or more renewable energy sources and services ancillary to such generation projects.

## **3. Smart Grid**

Following closely upon the release of the Smart Grid Task Force Report, the Act introduces the concept of the "smart grid" into Ontario energy legislation for the first time, and places substantial responsibility with the Government of Ontario for promoting the development and operation of the smart grid. The Act defines "smart grid" to mean "the advanced information exchange systems and equipment that, when utilized together improve the flexibility, security, reliability, efficiency and safety of the integrated power system and distribution systems, particularly for the purposes of,

- (a) enabling the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system;

- (b) expanding opportunities to provide demand response, price information and load control to electricity customers;
- (c) accommodating the use of emerging, innovative and energy-saving technologies and system control applications; or
- (d) supporting other objectives that may be prescribed by regulation."

As noted above, the smart grid will, among other things, enable the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system. It will assist the integration into the grid of intermittent generators like wind and solar. The government was wise to introduce the smart grid provisions at this time. The Act provides that the government may make regulations implementing the smart grid, including the roles and responsibilities for development, implementation and standardization, the content of the standards, and the time for implementation. The objectives of the Ontario Energy Board have been changed to include the facilitation of the implementation of a smart grid in Ontario. Moreover, every utility's transmission or distribution license is deemed to include conditions requiring it to plan for, and make the investments necessary to develop and implement the smart grid on its system.

#### **4. Consolidated Renewable Energy Project Approval**

##### **(a) New Provisions**

Presently, a proponent of a green energy project contributing more than 2 megawatts (mW) to the grid faces multiple approvals under multiple environmental regimes:

- Environmental Assessment: approval under either the 2001 "Electricity Projects Regulation" or the 2007 "Waste Management Projects Regulation";
- Land Use: approval under a municipal zoning by-law or related by-laws passed by municipalities under the Planning Act or, where applicable, the *Niagara Escarpment Planning and Development Act*;
- Environmental Protection: approval under the *Environmental Protection Act* (EPA) for noise or air emissions or both, and /or waste disposal or waste management, or both; and
- Water Resources: approval, in rural areas, for sewage or stormwater management works, or both, under the *Ontario Water Resources Act* (OWRA), and possibly also water taking approval.

The Act (Schedule G to Bill 150) proposes to reform the *Ontario Environmental Protection Act* (EPA) administered by the Ontario Ministry of the Environment (MOE) to add a new Part V.0.1, "Renewable Energy". The central innovation provided by this new Part is the creation of a new MOE certificate of approval – for renewable energy. At first, this reform may seem odd since it adds a new approval to the already-large number of existing environmental approvals; however, the key to this innovation is the statutory guidance that the new permit is not an addition to the

existing array of approvals – to the contrary, the new approval is intended to replace most if not all other environmental approvals set out above, and makes provision for future regulations to add any other approval or permit or legal instrument to this list.

For those concerned with any future green energy projects and this consolidated approval, Schedule G contains a further innovation: a new right of appeal for persons other than the proponent of the approval. Persons concerned with a new renewable energy approval may appeal to the Environmental Review Tribunal for a hearing but only on the basis that the approval will cause “serious and irreversible harm to plant life, animal life, human health or safety or the natural environment”.

To implement a single consolidated approval, the Act (Schedule K to Bill 150) also introduces major changes to the *Planning Act*. Schedule K proposes to exempt a “renewable energy generation facility” and/or a “renewable energy project” from, among other things, official plans, zoning and other land use by-laws, and development permits. These exemptions also mean that such projects would no longer face *Planning Act* appeals to the Ontario Municipal Board.

Schedule L is also important to the issue of approvals. It proposes to amend decision-making and other criteria for approvals under statutes administered or supervised by the Ministry of Natural Resources (MNR), including approvals by conservation authorities, the Niagara Escarpment Commission, and the cabinet under the *Provincial Parks and Conservation Reserves Act*, 2006. Finally, the Act establishes within the energy ministry a Renewable Energy Facilitation office to facilitate the development of renewable energy projects in Ontario, by working with project proponents and the ministries to help the proponent understand and satisfy the approved requirements and procedures.

## **(b) Analysis of this Reform**

### **Strengths of the reformed approval process:**

- The Act proposes major reforms to multiple approval regimes across multiple ministries that currently apply to green energy projects.
- Key reforms are proposed to most environmental approvals by replacing multiple approvals with a single approval.
- Key reforms are proposed to the *Planning Act* by eliminating the authority of municipalities to apply land use powers to green energy projects, and thus also eliminating the authority of the Ontario Municipal Board to hear appeals from municipal decision-making under this Act.
- There is provision for public review and accountability by creating a new right of appeal where a new project approval appears likely to cause serious and irreversible harm to the environment and/or public health or safety.

**Weaknesses of the reformed approval process:**

- The Act makes no attempt to address weaknesses of the current environmental assessment regimes applicable to green energy projects – that provide process guidance, but no minimum standards.
- The Act makes no attempt to set out minimum standards or clear rules for the new renewable energy approval; instead, it preserves the broad discretion of the MOE approvals branch to make decisions as it sees fit and on its timetable.
- The Act does not demand consistency with or conformity to the provincial vision set out in cabinet approvals for the Growth Plan, Greenbelt Plan and the Provincial Policy Statement; instead, it seeks to narrow or exclude the application of these plans and instruments to green energy projects.
- Schedule L, respecting MNR statutes, is inconsistent with the delivery of a single, consolidated approval. Instead, it provides amendments to a number of other statutes that might trigger an approval requirement for a green energy project, and alters the decision-making criteria, but does not exempt a green energy project from the approval requirement. These include permissions by a conservation authority, and approvals under the Provincial Parks and Conservation Reserves Act, 2006.
- Although the government has highlighted in its announcements a new, 6-month approval process, Bill 150 does not appear to directly address this timeline. Moreover, absent significant reforms by regulation, Bill 150 does not appear likely to deliver this target with its failure to integrate environmental assessment with the renewable energy approval, its failure to set clear, inter-ministry standards, and its failure to integrate the renewable energy approval with approval regimes administered by the Ministry of Natural Resources.

**III. Energy and Water Conservation**

The Act repeals both the Energy Conservation Leadership Act, 2006, and the Energy Efficiency Act, and restates their provisions with modest modifications. For example, the Act provides that

- A person cannot sell or lease (beyond a prescribed term) real property without providing information relating to the energy consumption of prescribed residences or other buildings on prescribed classes of residences or other buildings on the property (an "energy audit").
- The Government may by regulation designate goods, services and technologies which promote renewable energy projects and energy conservation. Thereafter they can be used, in prescribed circumstances, notwithstanding any restriction imposed by a municipal or condominium by-law, an encumbrance on real property or in an agreement, or, in the case of renewable energy, projects or sources, prescribed by-laws, instruments or other restrictions.

- The government can require public agencies and prescribed consumers to prepare an energy conservation and demand management plans and require such plans to be updated regularly, and submitted to the Ministry. Public agencies include a Ministry of the Ontario government, an entity or class of entities, including municipalities, prescribed by regulation.
- Public agencies may be required to meet targets, energy conservation and demand targets and environmental standards.
- Energy plans must measure energy currently consumed by an agency's operations, describe planned measures, and expected savings.
- Agencies must take such energy efficiency plans, energy conservation target into account in their procurement and capital expenditure decisions as prescribed by regulation.
- The Ontario government will re-energize the energy management program for its own facilities.
- The Bill will reinforce the role of energy conservation and environmental integrity in the Ontario Building Code (the "Code"), and will review the Code with respect to the standards for energy conservation that it contains within 6 months of the day the schedule of the Green Energy Act which deals with the Code is proclaimed in force and at least every five years thereafter.
- The Act eliminates the Office of the Chief Conservation Officer for Ontario and requires the Environmental Commissioner to report annually to the Legislature on Ontario's progress in meeting its energy conservation and greenhouse gas emission reduction targets.

## **CONCLUSION**

The Act establishes some clear government priorities; getting more renewable energy projects by including first nations, municipalities, co-ops and utilities as program developers, removing the need for some approvals, and establishing a feed-in tariff regime; and a culture of conservation, to be achieved by getting the government's own conservation house in order, requiring conservation plans and targets from public agencies and distributors and perhaps others, and requiring audits before the sale of homes and other buildings. The smart grid will enable and encourage both renewables and conservation.

To realize its objectives the government has given itself substantial additional powers of regulation, and the ability to provide many more directives in many subject areas to the OEB and the OPA. These powers will allow the government to set the detailed terms of the renewable tariffs and the process through which they are accessed, to set targets for conservation and demand management for agencies and utilities, to establish the terms of the "preferred" and "guaranteed" access to the transmission and distribution system for renewable energy projects to direct the pace and shape of transmission investments, and much more.

While the objectives and the legal basis for achieving them are reasonably clear, timely implementation of the Act is dependent on the rapid production of a large number of regulations and directives.

Moreover, the bill is drafted in a manner that leaves many of the important decisions to be incorporated in regulations. For example, the right of connection of a renewable energy generator is subject to the "applicable technical economic and other requirements prescribed by regulation or mandated by the IESO market rules, or by an order or a code issued by the Board (Schedule B clause 8 introducing a new section 25.36(1)(b) to the Electricity Act of 1998).

Finally, the pace of implementation will depend on the implementing agencies and companies, including the Ministry, the IESO, the OPA, the OEB, and the utilities having enough resources of the right kind to deal with the myriad of new issues in a timely way, and being able and willing to work closely with each other to achieve the necessary results.

We understand that draft feed-in-tariffs should be available in about one month's time for comment by stakeholders with various transmission related directives to be available in a few months. We expect that the Bill 180 will receive priority, and will soon be referred to a legislative committee for public hearings.

If you would like further information with respect to the Act (Bill 150), please contact Tom Brett at 416-941-8861, Rod Northey at 416-941-8880 or Chuck Birchall at 613-842-7440.

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