



## FITs and starts

Social housing – January 2012

### Fighting FIT

**The Judicial Review of the Department of Energy and Climate Change's (DECC) Consultation on Feed-in Tariffs offers the prospect of a temporary reprieve for Solar PV developers and their customers, although, with DECC having lodged an application for leave to appeal against the decision, the sector remains dogged by uncertainty. DECC's application, together with the appeal itself, if DECC is granted leave to appeal, will be heard on 13 January 2012.**

In [R \(on the applications of Friends of the Earth Ltd and others\) v Secretary of State for Energy and Climate Change](#) the Court found that the introduction of changes to the FITs Scheme which would apply to plant completed before the changes had come into effect would be illegal. Since the proposal to make the changes was unlawful and had an immediate and significant impact, the proposal itself (and not just a decision made following the Consultation process) was capable of Judicial Review.

The proceedings focussed on DECC's proposal to introduce changes with effect from 1 April 2012 to FIT Tariffs for plant completed after 12 December 2011 - earlier than both the date on which the Consultation closed and any date on which the changes could come into effect following the Parliamentary approval process. The Consultation also proposed, with effect from 1 April 2012, closing the FIT to plant installed on buildings which do not achieve a given level of energy efficiency and to plant owned by persons who already own one or more other systems benefiting from FITs.

The proposed tariff change was held to be unlawful on the basis that the change was "to be made by reference to a date other than the date on which the changes were to come into effect". So if the decision

is upheld, it will not be possible for DECC to reduce the tariffs for plant completed before the changes in the supplier's licence conditions (which enshrine the FIT payment obligation) come into effect. To be effective, changes need to be laid before Parliament for 40 days without any resolution disapproving being passed, so changes affecting plant completed after 12 December 2011 - or any other date which occurs prior to the end of the 40 day Parliamentary review period - would not be permissible.

#### Comment

A full transcript of the judgement is not yet available but, according to Friends of the Earth, it does not require the Secretary of State to re-run the Consultation. That assertion is difficult to reconcile with the published report of the hearing, although it perhaps indicates that Friends of the Earth itself would not make a further challenge if the Tariffs were reduced for plant installed after the reduction is implemented. That does not exclude the possibility that one of the other applicants, or a new one, might launch such a challenge.

It looks unlikely that DECC will manage to introduce reduced Tariffs rates for plant completed between 12 December 2012 and the end of February 2013 at the earliest. Even if DECC's appeal was successful, DECC may be wary of introducing reductions with any element of retrospectivity about them as there could still be further challenges against any decision following the Consultation process, either in the Courts or during the Parliamentary procedure. If the appeal is unsuccessful the current rates could well remain open for plant completed prior to April 2012, to allow time for an accelerated re-run of the Consultation.

As reported, the judgement also appears to leave open the possibility of challenges to all of the proposed reductions: it is by no means clear that the Court would agree with DECC's contention that the reductions fall within the Secretary of State's powers under s41 of the Energy Act 2008 to make Supplier's licence amendments "for the purpose only of

establishing or making arrangements for the administration of a scheme of financial incentives to encourage small-scale low-carbon generation of electricity” on the grounds that, as a result of the Treasury’s cap on levy funded spending on energy policy, the changes are necessary to enable DECC to keep the FIT Scheme open for new installations in future.

Whether or not further legal challenges materialise, the long term looks bleak, not just for solar PV but all small scale renewables: Commenting on its decision to seek leave to appeal, DECC stated that “without an urgent reduction in the current tariffs..., the budget for the [FIT] scheme would be severely depleted and there would be very little available for future solar PV generators, or for other technologies.”

The risk that DECC may look for other ways to reduce the burden of FITs cannot be discounted. In particular, it should be borne in mind that State Aid approval has only been obtained for the first 10 years of the FIT Scheme, and that as yet tariffs have not been established for the period beyond March 2021. One thing is certain, investment support for small scale renewables is not going to improve any time soon, so those prepared to tolerate a degree of risk, should, as the saying goes, make hay while the sun shines. It will be a busy few weeks for the PV industry.

## More information

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To discuss your individual requirements, please contact Paul Brennan, Head of our Energy and Environment Team:



**Paul Brennan**

Consultant

T: 0870 600 1521

E: [paul.brennan@morgan-cole.com](mailto:paul.brennan@morgan-cole.com)

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