

July 23, 2013

VIA RESS AND COURIER

Ms. Kirsten Walli
ONTARIO ENERGY BOARD
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

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Dear Ms. Walli:

Re: Applications for Electricity Generation Licences – Feed-in Tariff Program

Met Fiera Solar LP [EB-2013-0235, 0236, 0237, 0238, 0239, 0240, 0241]

Under cover of our transmittal letter dated June 14, 2013, we submitted 7 applications for Feed-in Tariff Program (FIT) generation licences. Each of the 7 applications was submitted on behalf of a special purpose partnership created by Met Fiera Solar LP.

By letters dated June 21, 2013, one in respect of each of the 7 applications, the Board has acknowledged receipt of the applications. Each of the Board's letters also indicates the Board's view that the applications are incomplete.

In particular, the Board notes that the Ontario Power Authority (OPA) Notice to Proceed (NTP) provided with each application names a party other than the applicant as the party holding the OPA FIT contract. The Board requests:

"...proof that the OPA will be approving or has already approved assignment and notation (sic)¹ of this contract and the Notice to Proceed to [the licence Applicant]."

Additional Information

As explained in our June 14th transmittal letter, Met Fiera Solar LP has agreed to purchase from Recurrent Energy Lux Holdings s.à.r.l. (Recurrent) 8 ground mount FIT contracted solar generation facilities. With our June 14th letter we submitted applications

¹ We assume that the intended reference is to "assignment and notation" in respect of each of the OPA contracts.

in respect of 7 of these acquisitions. As further explained in our transmittal letter, the parties have agreed to transfer each of the facilities at a future date, and once the facility achieves commercial operation.

The OPA's FIT program rules specify that FIT contracts may only be assigned by the contract holder following the commercial operation date (COD) for the facility that is the subject of the contract. Attached to this letter are excerpts from Schedule 1 to Version 1.3.0 of the OPA's FIT contract form, being the General Terms and Conditions applicable to the OPA FIT contracts issued for each of the facilities to be transferred from Recurrent to Met Fiera Solar LP. The restriction on contract assignment prior to COD is set out in Section 15.5 of the Terms and Conditions.

The OPA's contract management web page confirms this FIT program requirement, and provides further details for a post-COD assignment process.² In particular, the OPA's web page advises:

Pursuant to Section 15.5(a) of the FIT Contract, contract assignments are only permitted following commercial operation of the facility. A post-COD assignment requires the consent of the OPA, which takes the form of a subsequent assumption and acknowledgement agreement to be executed by the OPA, the Supplier and the assignee. [Emphasis added.]

The OPA's web page further links to a *Notice RE: Post-COD Assignment* form. For the Board's assistance we attach a copy of that form. Following submission of the form, the assumption and acknowledgement agreement referred to in the OPA's contract management directions excerpted above is executed and issued by the OPA.

Section 15.5 of the FIT contract General Terms and Conditions further provides that the OPA shall not "*unreasonably withhold*" its consent to contract assignment. In our experience with assignment of OPA contracts, provided that the facility purchaser meets minimum program participation requirements (which Met Fiera Solar LP does), the process of OPA confirmation of contract assignment is a mechanical one.³ The OPA does not, however, provide, in advance of COD and the filing of the notice of assignment, confirmation that the OPA "*will be approving*" contract assignment.

We note that the OPA's *Notice RE: Post-COD Assignment* form focuses on information demonstrating the FIT contract assignee's operational and management experience in respect of the types of facilities being acquired. As noted in our June 14th transmittal letter, Met Fiera Solar LP is an equal partnership between the Metropolitan Life Insurance Company and Fiera Axium Infrastructure Canada II L.P, the latter being an

² <http://fit.powerauthority.on.ca/contract-management/other-contract-issues/contract-assignment/post-COD-assignment>

³ We have recently been counsel for another party in an OEB generation licence application related to the proposed acquisition of RESOP generation facilities. In that application [EB-2011-0030], the same issue was raised by OEB Staff. Our response on behalf of the applicant in that matter was filed by way of our letter dated February 15, 2011. The Board subsequently proceeded to process and issue the requested generation licence.

entity ultimately controlled by Quebec based infrastructure fund Fiera Axium Infrastructure. For the assistance of the Board, and in respect of Fiera Axium's operational and management experience related to the types of facilities being acquired, we provide below some additional information.⁴

Fiera Axium Infrastructure Canada L.P.'s current energy infrastructure assets include 352.8 MW of wind generation and 67.4 MW of solar PV generation located across southeastern Ontario. Fiera Axium's Ontario wind assets include the Harrow, AIM SOP, Plateau, Pointe-aux-Roches, East Lake St. Clair and Eriean wind farms. The fund's solar PV projects include: i) the Elmsley solar PV projects located in the township of Rideau Lakes near Ottawa having an aggregate generation capacity of 24 MW; ii) the Brockville and Beckwith solar PV projects located near Brockville and Ottawa having 20.0 MW of aggregate generation capacity; and iii) the St. Isidore solar PV projects located near Ottawa having an aggregate generation capacity of 23.4 MW. The output of all of these wind and solar generation facilities is contracted to the OPA.

We trust that the foregoing addresses the Board's request for further information, and that the 7 generation licence applications previously submitted can now be deemed complete and be processed. We await receipt of the Board's acknowledgement letter to that effect.

Additional Comments on Licencing Process

In our transmittal letter under cover of which the 7 licence applications filed to date were submitted, we outlined a requested process for licencing of the applicants. As has been our experience in the past⁵, our assumption is that the Board will issue "full term" (i.e. standard length) licences, but with the Schedule 1s incomplete pending written confirmation from the Applicant and Recurrent (the facilities seller) that the facility has been transferred. It would also be appropriate for the licencing decisions to indicate that, along with such confirmation from the parties, a copy of the *Assumption and Acknowledgement Agreement* executed by the OPA and effecting transfer of the FIT contract from the Recurrent to Met Fiera Solar LP, is to be filed, and that following filing of confirmation of the parties and of a copy of the executed *Assumption and Acknowledgement Agreement*, the Board will amend Schedule 1 of each of the issued licences to list the facility acquired. Issuance of a "full term" licence with the conditions outlined above would provide the commercial certainty required to satisfy the conditions of the financing agreements that are in place with the lenders to the projects, to enable the sale of the facilities from Recurrent to Met Fiera Solar LP.

We understand that in a previous FIT application (involving the same seller - Recurrent – being EB-2012-0482), the Board issued an "*Interim Decision and Order*" in respect of licencing the purchaser in that instance; Aurora Waubashene 5 Limited Partnership.

⁴ <http://www.fieraaxium.com/en/infrastructure-fund.html>

⁵ EB-2011-0030, see footnote 3, above.

The decision in that case recites that the applicant had requested “an interim electricity generation licence..in order for the applicant to meet its lenders’ condition of providing financing for the Project”. The decision in that case went on to note as follows:

In view of the time required to process an application in accordance with the Board’s established practice and procedures and the applicant’s need for a licence in order to satisfy specific conditions of its financing agreement with its lenders, I find that is in the public interest to make an order to issue an interim order [sic]....pending final disposition of the matter.” [Emphasis added.]

A licence titled “interim” was issued in that case on March 14, 2013 and for a term of 47 days (expiring April 30th). A letter filed by the applicant in that case, dated February 1, 2013, indicated that its acquisition of the subject FIT generation facility was to close on March 11, 2013, and that the applicant’s lenders required a copy of its electricity generator licence by February 21, 2013. It thus appears that the driver for the interim order in that case was insufficient time for the Board to fully process the licence application prior to the steps anticipated in the commercial transaction. It appears that the Board thus accommodated the applicant’s time constraints in those circumstances, issuing an “interim licence”, and then proceeding (on March 15; the next day) to issue Notice of the licence application, and then to proceed with the balance of the process.

We indicated in our June 14th transmittal letter that the commercial transactions to acquire the generation facilities that are the subject of the Met Fiera Solar LP licence applications are currently expected to close in November and December, 2013. As such, the applicants in this instance do not require a licence in advance of the Board following its established practices and procedures for licencing. The applicants thus request that the Board proceed in its normal process, and issue notices in respect of their licence applications as the next step in the process. Providing that the applications are in order the applicants request that the Board proceed to issue full (as distinguished from “interim” or short term) licences. In our client’s view, an “interim” licence will not provide the degree of commercial certainty appropriate to underpin the amount of borrowing and investment to which they have committed in their agreements with their lenders and with Recurrent as seller.

Further, we submit that issuance of a “full term” (i.e. of standard duration) licence by the Board in advance of, and to support, commercial closing of the instant transactions would be entirely appropriate, with subsequent completion and issuance of a completed Schedule 1 conditioned as indicated above and in our June 14th transmittal letter. The conditions for issuance of completed Schedule 1s would be;

- i. Filing of written confirmation from the applicant and the facility seller that the commercial transaction transferring the facility has closed.
- ii. Filing of a letter from the seller of the subject generation facility requesting that the seller’s generation licence in respect of the facility sold be cancelled.

- iii. Filing by the applicant of an executed copy of the OPA's *Assumption and Acknowledgement Agreement* in respect of the facility transferred.

Key from the applicants' perspectives in support of their commercial transactions is the knowledge that the Board's licencing process has been completed, and the Board has considered the applications and determined that it is in the public interest for the licences to be issued, with completion of the licence subject only to fulfillment by the applicants of the conditions set out in the decision. Once the Board has determined to exercise its discretion and issue the requested licences, fulfillment of those conditions are matters over which the applicant has some control, and is thus a commercially acceptable risk.

While we believe that issuance by the Board of licences of the standard length would be completely appropriate in the circumstances of the Met Fiera Solar LP applications, should the Board determine that a shorter term licence is required pending satisfaction of the licencing conditions, what would be critical from the commercial perspective of the applicants is for the licencing decision to be clear that upon satisfaction of those conditions the term of the licence will be extended (i.e. without further review by the Board of the public interest which determined the initial granting of the licences). In this respect, we submit that such licences, even if for a shorter term, would properly be considered as "full", as distinguished from "interim", licences.

To be clear, however, we continue to believe issuance of a full term licence with an incomplete Schedule 1, and with the three conditions noted above for subsequent issuance of a completed Schedule 1, would best address the transactional needs of the applicants while ensuring that the Board's requirements are met.

Yours truly,



Ian A. Mondrow

Enclosures

- c. Jiteendra Balchandani, Met Fiera Solar LP
Juan Caceres, Met Fiera Solar LP
Simon Ross, Recurrent Energy Lux Holdings s.à.r.l.
Irina Kuznetsova, OEB Staff



Ontario Power Authority

FEED-IN TARIFF CONTRACT (FIT CONTRACT)

Version 1.3.0 (March 9, 2010)

1. **CONTRACT IDENTIFICATION #** FIT-_____
2. **FIT REFERENCE #** FIT-_____
3. **CONTRACT DATE** _____
4. **SUPPLIER** _____
5. **SUPPLIER'S ADDRESS** _____ Fax: _____
 _____ Phone: _____
 Contact Person: _____ Email: _____
6. **SUPPLIER INFORMATION** Not a Non-Resident of Canada
 Non-Resident of Canada
7. **GROSS NAMEPLATE CAPACITY** _____ kW
8. **INCREMENTAL PROJECT** Yes No
9. **CONTRACT CAPACITY** _____ kW
10. **CONTRACT PRICE** _____ ¢/kWh Peak Performance Factor applies
 Peak Performance Factor does not apply
11. **(a) ABORIGINAL PRICE ADDER (as of the Contract Date)** _____ ¢/kWh Aboriginal Participation Level (if applicable) _____ %
- (b) COMMUNITY PRICE ADDER (as of the Contract Date)** _____ ¢/kWh Community Participation Level (if applicable) _____ %
12. **PERCENTAGE ESCALATED** _____ %
13. **MINIMUM REQUIRED DOMESTIC CONTENT LEVEL** _____ %



FEED-IN TARIFF CONTRACT (FIT CONTRACT)

SCHEDULE 1

GENERAL TERMS AND CONDITIONS

VERSION 1.3.0

compensation coverage. None of the Persons employed by either Party shall be considered employees of the other Party for any purpose. Nothing in this Agreement shall create or be deemed to create a relationship of partners, joint venturers, fiduciary, principal and agent or any other relationship between the Parties.

15.4 Binding Agreement

Except as otherwise set out in this Agreement, this Agreement shall not confer upon any other Person, except the Parties and their respective successors and permitted assigns, any rights, interests, obligations or remedies under this Agreement. This Agreement and all of the provisions of this Agreement shall be binding upon and shall enure to the benefit of the Parties and their respective successors and permitted assigns.

15.5 Assignment

- (a) Following the Commercial Operation Date, this Agreement along with all of the rights, interests and obligations under this Agreement (including for greater certainty those rights, interests and obligations relating to Environmental Attributes) may be assigned by either Party, with the prior written consent of the other Party, which consent shall not be unreasonably withheld, except as set out in Section 15.5(b) below and as provided in Article 11. Prior to the Commercial Operation Date, neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned by the Supplier.
- (b) For the purposes of Section 15.5(a), it shall not be unreasonable for the OPA to withhold its consent if the proposed assignment would (i) cause a Supplier to breach the obligation to own the Facility as set out in Section 2.7(a), or (ii) have or is likely to have, as determined by the OPA acting reasonably, a Material Adverse Effect on the Supplier's ability to perform its obligations under this Agreement.
- (c) Notwithstanding Section 15.5(a), the Supplier may, subject to compliance with Laws and Regulations and provided that there is not a Supplier Event of Default that has not been remedied, assign this Agreement without the consent of the OPA to an Affiliate acquiring the Facility; provided, however, that no such assignment by the Supplier or any of its successors or permitted assigns hereunder shall be valid or effective unless and until such Affiliate agrees with the OPA in writing to assume all of the Supplier's obligations under this Agreement and be bound by the terms of this Agreement, and the arrangements and obligations of the Supplier set forth in Article 5 have been met in accordance with the terms of Article 5.
- (d) Notwithstanding Section 15.5(a), where the Facility is a Rooftop Facility, the Supplier may, prior to the Commercial Operation Date, assign this Agreement with the prior written consent of the OPA, which may not be unreasonably withheld, in circumstances where the building or structure to which the Facility is affixed is being sold, transferred or otherwise conveyed to the proposed assignee of this Agreement.
- (e) If the Supplier assigns this Agreement to a non-resident of Canada as that term is defined in the ITA, and the OPA incurs any additional Taxes, at any time thereafter, solely as the result of such assignment, then payments under this Agreement by the OPA shall be reduced by the amount of such additional Taxes and the OPA shall remit such additional Taxes to the applicable taxing authorities. The OPA shall within 60 days after remitting such Taxes, notify the assignee in writing, providing reasonable detail of such payment

so that the assignee may claim any applicable rebates, refunds or credits from the applicable taxing authorities. If after the OPA has paid such amounts, the OPA receives a refund, rebate or credit on account of such Taxes, then the OPA shall promptly remit such refund, rebate or credit amount to the assignee.

- (f) If a valid assignment of this Agreement is made by the Supplier in accordance with this Section 15.5, the OPA acknowledges and agrees that, upon such assignment and assumption and notice thereof by the assignor to the OPA, the assignor shall be relieved of all its duties, obligations and liabilities hereunder.
- (g) The OPA shall have the right to assign this Agreement from time to time and all benefits and obligations hereunder for the balance of the Term without the consent of the Supplier to an assignee which shall assume the obligations and liability of the OPA under this Agreement and be novated into this Agreement in the place and stead of the OPA (except for the OPA's obligation in Section 15.5(g)(iii) which will remain in force), provided that the assignee agrees in writing to assume and be bound by the terms and conditions of this Agreement and further agrees not to make any material amendments to or terminate this Agreement after such assignment without the prior written consent of the OPA, whereupon:
 - (i) the representation set forth in Section 6.2(a) shall apply to the assignee with all necessary amendments to reflect the form and the manner in which the assignee was established;
 - (ii) all of the representations set forth in Section 6.2 shall be deemed to be made by the assignee to the Supplier at the time of such assignment and assumption; and
 - (iii) the OPA shall be relieved of all obligations and liability arising pursuant to this Agreement; notwithstanding the foregoing, the OPA shall remain liable to the Supplier for remedying any payment defaults under Section 9.3(a) and shall remain liable for any obligations and liabilities of the assignee arising from any OPA Event of Default, provided that any notice required to be given under Sections 9.3 and 9.4(a) is given on the same day to the assignee and to the OPA. The time periods in Section 9.3 shall not begin to run until both the assignee and the OPA have been so notified.

15.6 Change of Control

- (a) Other than in accordance with Section 15.6(b), no change of Control of the Supplier shall be permitted prior to Commercial Operation, except with the prior written consent of the OPA, which consent may be withheld in the OPA's sole and absolute discretion. Following Commercial Operation, a change of Control of the Supplier shall be permitted, provided that the Supplier, within 10 Business Days following such change of Control having effect, provides the OPA with notice of such change of Control and such additional information as the OPA may reasonably require regarding the names of the Persons who Control or otherwise indirectly or directly have an ownership interest in the Supplier, following such change of Control.
- (b) Provided there is not a Supplier Event of Default that has not been remedied, a change of Control of the Supplier prior to Commercial Operation, under one or more of the following circumstances, is permitted without the consent of the OPA, namely:



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 T 416-967-7474
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 www.powerauthority.on.ca

**FIT CONTRACT
 FORM OF NOTICE RE POST-COD
 ASSIGNMENT (UNDER 15.5(A)) FOR
 NON-CAPACITY ALLOCATION EXEMPT
 FACILITIES**

SUBMIT BY EMAIL (PDF WITH SIGNATURE) TO
FIT_Contract@powerauthority.on.ca

ADDING OR REPLACING FIT CONTRACT COVER PAGE INFORMATION

- The Authorized Signatory below is either a signatory of the FIT Contract, a person authorized to receive Notices, or the Company Representative. No other forms are required.
- The Authorized Signatory below is neither a signatory of the FIT Contract, a person authorized to receive Notices, nor the Company Representative. A Certificate of Incumbency (OPACM-FORM-18A/Corporation or OPACM-FORM-18B/General Partner) must be submitted with this form.

Date	
Legal Name of Supplier	
Name of Contract Facility	
Contract Identification #	(the "FIT Contract")
FIT Contract Date	
Commercial Operation Date	

This Notice is provided by the Supplier pursuant to the requirements of subsection 15.5(a) of the FIT Contract.

Pursuant to s. 15.5(a), after the date of Commercial Operation the FIT Contract may be assigned by a Supplier to an assignee with the OPA's written consent, which consent shall not be unreasonably withheld.

This Notice sets out the factors that are to be evaluated and applied by the Ontario Power Authority ("OPA") in assessing post-COD assignments with respect to Suppliers under the standard form of FIT Contract. The OPA reserves the right to request additional information, including, supporting documentation, in order to assess post-COD assignments.

The FIT Contract prohibits assignments of the contract prior to the date on which the Contract Facility reaches Commercial Operation.

AUTHORIZED SIGNATORY	
By: _____ Name: Title:	Date: _____

The factors to be evaluated and applied by the OPA in assessing post-COD assignments are set out below. The Supplier must provide reasonable evidence and information (where applicable) pertaining to each item below prior to determining if it is reasonable for the OPA to consent to an assignment.

(a) **What relevant operational experience does the assignee have?**

This factor addresses to what extent the assignee has experience in operating facilities comparable to the generation facility that is the subject of the FIT Contract with the OPA.

The Supplier should provide evidence pertaining to the assignee's experience in operating facilities comparable to the generation facility that is the subject of the FIT Contract.

This evidence should include information on any facility or facilities demonstrating the assignee's experience and qualification with respect to the operation of the Contract Facility, including the name, location and type of the facility and the capacity in MW.

(b) **What managerial experience in operating generation facilities does the assignee have?**

This factor addresses to what extent the assignee's employees or contractors have experience with operating facilities comparable to the generation facility that is the subject of the FIT Contract with the OPA.

The Supplier should provide evidence of three individuals employed by or contracted to the assignee, each of whom has, in a managerial capacity, operated a facility comparable to the Contract Facility. At least two of the individuals must be employees of the assignee. The other individual may be under contract to, or an employee of a firm that is under contract to, the assignee.

For each individual, the following information should be provided:

- (i) name of individual;
- (ii) years of experience in specified activity;
- (iii) type of experience;
- (iv) name, location and type of facility(ies);
- (v) capacity (MW) of facility(ies);
- (vi) names of members of project team for each facility; and
- (vii) supporting evidence, including resumes, curriculum vitae and any professional designation(s).

(c) **Does the assignee have a prior history with the OPA?**

If the assignee has dealt with the OPA in the past, it is important that the prior relationship between the assignee and OPA be a positive one. Also taken into consideration will be whether the assignee has ever defaulted on an OPA contract or other generation contract, as well as its previous claims or litigation history with the OPA or other similar entities. We may ask the assignee to disclose if it has defaulted on any other contracts and to disclose any and all past or present claims against the OPA.

(d) **What is the Ownership Structure of the assignee?**

This factor addresses the corporate structure of the assignee and presents the OPA with detailed information regarding the assignee.

The Supplier must provide details on the ownership structure of the assignee, specifically who controls the entity to whom the contract is being assigned.

The Supplier must provide details of the ownership structure of the assignee including a corporate structure chart and the associated partnership declaration and articles of incorporation of its partners. The Supplier should provide information regarding whether the assignee will own or lease the Facility.