

Update on FIT certificate nullification procedure

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Introduction

A significant component of the recently approved Proposal to Amend the Electricity Business Act for the Purposes of Establishing a Resilient and Sustainable Electricity System (for more details please see "[Cabinet approves Renewable Energy Act amendment bill](#)") is the nullification of feed-in tariff (FIT) certificates. The Ministry of Economy, Trade and Industry (METI) has recently published a series of notices that provide further clarity on how the nullification will take effect and METI's intention to create exemptions for certain FIT certificate holders.

A public comment period for the proposal took place from 7 September to 6 October 2020, following METI's most recent announcements on the nullification framework. The announcements are likely to be of interest because they suggest that:

- the threshold for maintaining a FIT certificate has been significantly lowered, depending on the project size; and
- even if the project does not meet the threshold within the given timeframe, there may be a grace period to remedy any deficiency.

Background

This is not the first time that METI has proposed a scheme to nullify approved FIT certificates. The current proposal comes after several attempts by METI in 2016 and 2018 to prevent project developments from remaining dormant after obtaining FIT certificates. While those regulations resulted in the nullification of FIT certificates for projects with a total output of approximately 20.7 million kilowatts (kW) by September 2019, METI expressed concern that there were many other projects that remained dormant.

July 2020 update

On 22 July 2020 a meeting took place between a joint committee comprising METI's:

- Subcommittee on Mass Introduction of Renewable Energy and Next Generation Electricity Networks;
- Strategic Policy Committee;
- Subcommittee on System Reform for Renewable Energy as Main Power Source; and
- Subcommittee for Sustainable Power Systems.

The committee provided some clarity on the rules for the expiration of FIT certificates, and shared its view that the timing of a nullification should firstly depend on whether the project's operation commencement deadline falls before or after April 2022 (the operation commencement deadline for most solar projects that have currently been traded in the market falls before April 2022).

Exemption

The committee also indicated its intention to exempt solar power projects from nullification. More specifically, the committee unanimously determined that solar power projects over 2 megawatts (MW) should be exempt

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from nullification if a construction planning notice in accordance with the Electricity Business Act is properly submitted by April 2022. For solar power projects that do not commence construction by April 2022, METI will consider whether nullification of their FIT certificate after the one-year grace period is appropriate. A notable feature of this exemption is that obtaining a construction planning notice is a relatively low threshold. A construction planning notice requires specific details of the construction and is generally submitted after most of the particulars of the project have become concrete. This represents a lower threshold to achieve compared with the actual commencement of operations.

The committee's decision to announce its intention to create this exemption was partly an attempt to address the difficulties faced by solar project developers in obtaining funding. Due to the lack of clarity in the nullification structure, lenders had significant concerns as to whether a particular solar project was at risk of losing its FIT certificate if the project failed to commence operation by a certain date. In response to such uncertainty, solar project developers had to address significant oversights and face investigation by lenders looking to manage such risk.

August 2020 and September 2020 updates

Following the 22 July 2020 update, METI announced a more structured scheme for nullification that effectively widens the scope of the exemption announced in the 22 July 2020 update to include projects other than solar projects. The exemption scheme provides a phased approach, whereby projects must obtain a construction planning notice within a certain timeframe from the FIT certificate grant date (the period until nullification) depending on their electricity generation method. If a project cannot commence operation by the conclusion of the period until nullification, the FIT certificate will become subject to nullification. The period until nullification will differ depending on whether the operation commencement deadline, as set under the current FIT regime, falls before or after 1 April 2022.

If the operation commencement deadline falls after 1 April 2022, the period until nullification for solar power projects will be as follows.

	Period until nullification
Power outage is less than 10kW	One year
Power outage is more than 10 kW and a grid connection work application has not been submitted to the applicable utility within one year from the operation commencement deadline	Four years
Power outage is more than 10kW and a grid connection work application has been submitted to the applicable utility within one year from the operation commencement deadline	Six years
Power outage is more than 10kW and a grid connection work application and construction planning notice ⁽¹⁾ have been submitted to the applicable utilities within one year from the operation commencement deadline	23 years

Each of the above periods until nullification will increase by an additional two years if the project is subject to an environmental impact assessment under the Environmental Impact Assessment Law.

For projects other than solar power projects with an operation commencement deadline after 1 April 2022, the applicable periods until nullification are as follows.

	Wind power	Hydro power	Geothermal power	Power from biomass
A grid connection work application has not been submitted to the applicable utility within one year from the operation commencement deadline	Five years	Eight years	Five years	Five years
A grid connection work				

application has been submitted to the applicable utility within one year from the operation commencement deadline	Eight years	14 years	Eight years	Eight years
Power outage is more than 10kW and a grid connection work application and construction planning notice ⁽²⁾ have been submitted to the applicable utilities within one year from the operation commencement deadline	24 years	27 years	19 years	24 years

Each of the above periods until notification for wind and geothermal projects will increase by an additional four years if the project is subject to an environmental impact assessment under the Environmental Impact Assessment Law.

For projects with an operation commencement deadline on or before 31 March 2022, METI's current proposal is to have three different categories of periods until nullification:

- For projects that have not submitted a grid connection work application to the applicable utility by 31 March 2023, the period until nullification lasts until 31 March 2023.
- For projects that have submitted a grid connection work application to the applicable utility by 31 March 2023, the period until nullification will be the number of years between the granting of the FIT certificate to the operation commencement deadline determined under the current FIT regime. For example, if a project is given three years from the FIT certificate grant to the operation commencement deadline, the period until nullification will be three years (from 1 April 2022 to 31 March 2025).
- For projects that have submitted a grid connection work application and a construction planning notice to the applicable utilities by 31 March 2023, the period until nullification will be the number of years between the granting of the FIT certificate and the operation commencement deadline determined under the current FIT regime plus 20 years (15 years for geothermal projects).

In addition, if the grid connection construction is delayed due to reasons attributable to the utility, the duration of the delay will be added to the period until nullification.

Next steps

While METI has not yet confirmed how it will manage this issue, project developers should be aware of these currently contemplated periods until nullification and identify which may be applicable to their respective projects and assess what filings may be necessary. It is hoped that these announcements from METI, which aim to clarify the issue of nullification, will help to ease financing restrictions and facilitate discussions between project developers and lenders.

For further information on this topic please contact [Ryoji Moroi](#), [Peter G Armstrong](#) or [Yukino Kanazawa](#) at Nishimura & Asahi by telephone (+81 3 6250 6200) or email (r_moroi@jurists.co.jp, p_armstrong@jurists.co.jp or yu_kanazawa@jurists.co.jp). The Nishimura & Asahi website can be accessed at www.jurists.co.jp.

Endnotes

(1) Section 48 of the Electricity Business Act. The need for a construction planning notice applies only to solar projects above 2MW.

(2) Section 48 of the Electricity Business Act. The need for a construction planning notice applies only to:

- wind projects above 500kW;
- hydro projects above 200kW with a maximum water usage of 1 cubic metre per second;
- geothermal projects with a steam power of 300kW, gas turbines of 1,000kW and internal combustion of 1MW; and
- biomass projects with a steam power of 300kW, gas turbines 1,000kW and internal combustion of 1MW.

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