

IN THE COURT OF APPEAL
CIVIL DIVISION

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim Nos.CO/10734, 11055, 11091/2011

The Honourable Mr Justice Mitting

BETWEEN

THE QUEEN
on the application of

- (1) SOLAR CENTURY HOLDINGS LIMITED
- (2) HOMESUN HOLDINGS LIMITED
- (3) FRIENDS OF THE EARTH LIMITED

Respondents

and

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Appellant

and

- (1) ENCRAFT LIMITED
- (2) ARDENHAM ENERGY LIMITED
- (3) SECOND NATURE PARTNERSHIP
- (4) MORECAMBE BAY COMMUNITY RENEWABLES LIMITED
- (5) OUSE VALLEY ENERGY SERVICES COMPANY LIMITED

Interested Parties

SKELETON ARGUMENT IN REPLY
FOR THE SECRETARY OF STATE

I. Introduction

1. The submissions made by the Respondents ultimately focus on a single point - the fact that the proposal made by the Secretary of State was to change the tariff rate (from 1 April 2012) vis-à-vis installations with an eligibility date falling on or after 12 December 2011 (referred to as the reference date). On the Respondents case, the fact that the proposal identifies a reference date that falls before the date on which the new tariff would come into effect has the following consequences.
 - (1) The proposal falls outside the scope of the enabling power at section 41 of the Energy Act 2008.
 - (2) The proposal is a proposal to make a retrospective change.
 - (3) The proposal is manifestly unfair (and therefore unlawful), and rendered the consultation process unfair.
 - (4) The proposal is a proposal to act inconsistently with the requirements of ECHR Article 1, Protocol 1 (largely because it is a proposal to act inconsistently with the section 41 enabling power - see Respondents' Skeleton Argument at §107).
2. The Secretary of State disputes each of these propositions. The reasons are set out below. However, what becomes clear is that each of the points relied on by the Respondents leads back to the question whether the proposal made by the Secretary of State is consistent with the powers available to him under section 41 of the Energy Act 2008. If the proposal is consistent with the section 41 power, none of points (2), (3) or (4) above renders the proposal unlawful.

II. Submissions

- (1) The proposal is not unlawful by reason of retrospective effect*

3. The Respondents' analysis is to the following effect.
 - (1) Under the present terms of the FIT scheme, when an eligible installation is accredited, the consequence is that with effect from the date of accreditation (the confirmation date) the owner of the eligible installation (also referred to as the FIT Generator) obtains a "vested right" to be paid at the tariff rate then applicable.
 - (2) That right to payment exists for the period of 25 years from the confirmation date.
 - (3) For this purpose, the Respondents rely on the provisions of the 2010 Order, and the provisions of Schedule A to the Electricity Suppliers' Licence Standard Conditions, as each is presently formulated¹.
 - (4) Any interference with this "vested right" amounts to retrospective legislation².

4. The problem with this analysis is that it assumes the point that is in issue.
 - (1) Put generally, under the terms of Schedule A to the Standard Conditions, the electricity supplier is required to pay the FIT Generator the FIT Payment (i.e. the amount identified at Annex 2 to Schedule A) during the Eligibility Period (i.e. the period identified at

¹ Reliance is placed on article 4 of the 2010 Order which sets out Ofgem's responsibilities when considering accreditation of an eligible installation; and on article 10 which refers to the assignment of a tariff code by Ofgem to each accredited installation. See also, Standard Condition 33, and Schedule A at Part 1, and annexes 1 and 2.

² The Respondents contend that Mitting J accepted their case on retrospectivity. The Secretary of State disagrees (although he accepts that whether or not Mitting J did deal with the point does not affect the merits of either party's contentions on the point). The material part of Mitting J's reasoning is at Transcript page 20 line 1 (Appeal bundle, page 35), in particular at transcript page 21 line 21 - transcript page 23 line 7. This reasoning appears to address whether the proposal pursued a purpose permitted by section 41, and reach a conclusion that a proposal that had a reference date earlier than the date on which the proposal would come into effect was not a proposal that pursued any permissible statutory purpose. Mitting J does not appear to make than any discrete point on retrospection.

Annex 1 to Schedule A). A more detailed explanation of the scheme (both legislation, and provisions made pursuant to the legislation) is at Annex A to this Skeleton.

- (2) However, pursuant to section 41(1) and (3) of the Energy Act 2008, the Secretary of State has the power to amend both the provisions of the 2010 Order, and the Standard Conditions in the Electricity Suppliers' Licence.
- (3) Thus (for example), it is open to the Secretary of State to amend Annex 2 to Schedule A and thereby affect the FIT Payment. It follows that if it is necessary to identify the FIT Generator's "vested right", that right is no more than a right to receive the FIT payment as from time to time specified by the Secretary of State.
- (4) The Respondents contend (Skeleton at §25) that the "intention" of the scheme was that the tariff applicable as at the confirmation date of an eligible installation would apply to that installation for the whole of the Eligibility Period. It is accepted that this was the view expressed by the previous Secretary of State in the February 2010 response to consultation document. Given the reasons for this position, it is also accepted that the present Secretary of State would not lightly depart from that position. But none of this goes to the scope of the power under section 41 of the 2008 Act, which is the sole issue in this appeal. (In fact no legitimate expectation is raised in this case. Even if this was a live issue in this appeal it would not follow from any statement made by the Secretary of State or his predecessor that the Secretary of State is unable to use his section 41 power to depart from that position, regardless of the circumstances. What was said in February 2010 cannot be construed as any form of binding promise not to take such a step, at any time in the future, in any form, regardless of the circumstances.)
5. In these circumstances, the contention that with effect from the confirmation date each FIT Generator has a "vested right" does not of itself assist. Given

the Secretary of State's power under section 41 of the 2008 Act any current entitlement arising pursuant to the existing terms of the 2010 Order and/or the Standard Conditions in the licence will always be subject to the exercise of the section 41 power. It follows that what is really in issue in this case is the scope of the section 41 power: specifically whether the proposal made is consistent with that power.

6. Similarly, seeking to label the proposal as "retrospective" does not advance the argument as to its legality in any sensible manner.
7. In fact the proposal is not retrospective. If the proposal is adopted it will only apply to electricity generated on/after 1 April 2012. In this respect the proposal is clearly a prospective proposal. The Secretary of State accepts that his proposal is to apply the new tariff to the class of eligible installations with a confirmation date on/after 12 December 2011. However, the only point that gives rise to is whether it is open to the Secretary of State in exercise of his powers under section 41 of the 2008 Act, prospectively, to amend the tariff payable in the course of the Eligibility Period (as for the identified class of eligible installations, the Eligibility Period will have commenced on 12 December 2011). The proposal to act in that way is not a retrospective proposal.
8. The case law on retrospection relied on by the Respondents (Skeleton at §§66 - 71) does not assist.
9. *First*, what the Respondents seek to rely on is a principle of statutory construction - i.e. that a provision in legislation is assumed not to operate retrospectively: see, generally, Bennion (5th Edition), Code Sections 97 - 101 at pp. 315 - 326. This rule of construction has no application to the proposal made in the consultation document published by the Secretary of State.
10. *Second*, even if the principle of construction is applied to the proposal made by the Secretary of State, that proposal is not objectionable on grounds of retrospectivity. The fact that if put into operation, the proposal would (for the

future) alter the consequences of accreditation in that a lower tariff would be payable, is not of itself objectionable: see Bennion (at p. 317).

11. *Third*, the case law relied on by the Respondents does not even assist vis-à-vis the construction of the enabling power at section 41 of the 2008 Act. As is clear from the speeches in *Wilson v First County Trust Limited (No 2)* (see Respondents' Skeleton at §§68 - 69), even where the legislation in issue is said to interfere with an existing right, the underlying principle is that of fairness. On this, see in particular, *L'Office Cherifien v Yamashita Limited* [1994] 1 AC 486 per Lord Mustill at pp. 524B - 525H.

11. On the facts of the present case, the section 41 power is plainly in terms that are sufficiently broad so as to permit the Secretary of State to change the tariff payable in respect of an eligible installation after the confirmation date (and in the lifetime of the Eligibility Period). The common law principle of construction, as explained by Lord Mustill, would not operate so as to prevent the section 41 power being used to the effect that the Secretary of State has proposed.

(1) In a significant majority of factual scenarios there might well be no sound reason for exercising the power to this effect - hence, for example, the statements made prior to the making in the 2010 Order in the February 2010 response to consultation at §§71 - 76 (and those referred to by the Respondents at Skeleton §§27 - 29).

(2) However, this does not mean that it is beyond the power of the Secretary of State to exercise his section 41 power to this effect if he considers that circumstances warrant such an approach. In the present case, as at October 2011, the Secretary of State considered that circumstances were such that some departure from the previous position should be made - as explained in the October 2011 consultation document.

(3) Thus the Secretary of State's submission is that the fairness or otherwise of the proposal does not fall to be considered. But even if

any question of fairness did arise, the proposal as made, is a fair proposal. Even though the proposal would mean a reduction in tariff for some eligible installations during the Eligibility Period, it remains a highly conservative proposal. It will only affect eligible installations with a confirmation date on/after 12 December 2011. The proposal was announced 6 weeks prior to that date. The reasons for the proposal are set out in the consultation document. Given these reasons, the proposal is, in the round, a fair proposal in the sense described by Lord Mustill.

- (4) Moreover, it is only a proposal, which is subject to further consideration by the Secretary of State in light of the responses to the consultation exercise. The Respondents seek to rely on previous statements made by Ministers (past and present) as being inconsistent with the proposal in the October 2011 consultation document: see Skeleton Argument at §§27 - 34. The meaning of some of those statements, and the context in which they were made is open to debate; the significance of those statements for present purposes is certainly open to debate. However, regardless of any such debates on the significance of statements made on previous occasions what the Secretary of State has done now is (a) to raise head-on, and identify specific reasons for, a proposal to reduce the tariff payable during the Eligibility Period, for a small class of eligible installations³; and (b) to ask the public for their views on this proposal before any final decision is taken.

12. Conversely, the Respondents' contentions to the effect that the proposal has unfair consequences are not such as to make good the contention that the proposal is a proposal to act retrospectively (or is otherwise objectionable).

- (1) The Respondents do not challenge the proposed new rate; nor do they seek to challenge the application of that rate with effect from 1 April 2012. The complaint concerns the application of that rate from that

³ i.e., those with confirmation dates between 12 December 2011 and 31 March 2012.

time, to eligible installations with a confirmation date between 12 December 2011 and 31 March 2012.

(2) The adverse impact identified (variously at Skeleton §§11 - 12, and 57 - 62) is to the effect (a) that people who might have wanted to become accredited in advance of a change in the tariff might now not do so because there was not enough time to achieve accreditation prior to 12 December 2011; (b) the fact that the proposal has been made has given rise to uncertainty because the Secretary of State might decide to act on the proposal.

(3) As to (a), such a category of persons would exist even if the proposal had been to apply the new rates to eligible installations with a confirmation date (say) on/after 1 April 2012. Although the identity of the persons in this category would have been different, the fact that the category exists does not identify the proposal as made by the Secretary of State as a retrospective proposal. As to (b), such uncertainty is the inevitable consequence of any consultation exercise; if a Secretary of State is consulting on whether or not to do X, there is always the possibility that he will decide to do X. In the present case, the provisions of the 2008 Act required the Secretary of State to consult, hence the "uncertainty" that the Respondents complain of was expressly anticipated by Parliament.

13. The upshot of the above is that the actual issue in this case is not an issue concerning retrospectivity. What is in issue is whether the section 41 power extends to a decision to alter the tariff payable in respect of an eligible installation during the Eligibility Period for that installation.

(2) The proposal is not "manifestly unfair"

14. In this regard the Respondents rely on the matters summarised at paragraph 12(2) above, and they contend that for all practical purposes the proposal was a *fait accompli* because once the proposal had been made people had to act on

the assumption that the proposal would be put into effect. It was also unfair for the Secretary of State to formulate a proposal on the basis of a reference date of 12 December as this date was (a) prior to the close of the consultation period; and (b) in advance of any consideration of the Secretary of State's decision on draft modifications by Parliament. For these reasons, the Respondents contend that the consultation process itself was unfair. See Skeleton at §§14(iii) and 89 - 101.

15. In fact, there is no substance to these points.

(1) What the Secretary of State did in the consultation document was to put forward a proposal. There was no reason why this proposal (any more than any other proposal) could reasonably be considered a *fait accompli*. There is no challenge in this appeal to the effect that the Secretary of State has a closed mind.

(2) Whenever any proposal is put out for consultation persons potentially affected by it can be put in the position of deciding whether to order their affairs on the basis that the proposal will be adopted, or whether to order their affairs on some other basis. This is an ordinary practical consequence of consulting publicly.

(3) There is nothing odd in the circumstances of the present case. The fact that the 12 December 2011 reference date fell within the response period for the consultation exercise did not make the proposal any less of a proposal. Given the reasons for the proposal (as explained in the consultation document), the *proposal* in that form cannot sensibly be characterised as any form of abuse of power.

(4) Likewise, there is nothing in the point that the 12 December 2011 reference date preceded Parliamentary consideration of the Secretary of State's decision on draft modifications. Any changes to the present scheme will only come into effect following consideration by Parliament. As explained above the nature of the proposal is a change in the tariff rate for an identified class of eligible installations to take

effect during the lifetime of the Eligibility Period. If that proposal is adopted, when the section 42 Parliamentary procedure is undertaken it will remain open to Parliament to accept or reject the Secretary of State's decision on draft modifications on its own merits. The proposal as formulated in the consultation document does not in any respect pre-judge the outcome of the Parliamentary process.

- (5) The Respondents seek to rely on the judgment in *R v Liverpool City Council ex parte Baby Products Association* [2000] LGR 171. However, there is nothing in that judgment that is to the point. On the facts of that case Lord Bingham LCJ concluded that on proper construction, the provisions of the Consumer Protection Act 1987 precluded a local authority from issuing a press release which in substance performed the function of one or other of the notices which the local authority could issue under the provisions of the 1987 Act: see in particular at pp. 177C - F (submissions for the claimant); and 178E - 179B (reasoning accepting those submissions). The local authority had acted unlawfully because it had impermissibly circumvented the provisions of the 1987 Act. On the facts of the present case there is no question that the consultation exercise commenced by the Secretary of State was intended to (or did) circumvent any governing legislative scheme. Rather, the Secretary of State has acted in accordance with the statutory scheme: by section 42 of the Energy Act 2008 he was required to consult.

(3) *No additional point arises under ECHR article 1 Protocol 1*

16. This part of the Respondents' claim is parasitic on other contentions. It has no independent life.
17. *First*, the Secretary of State has done no more than make a proposal. Regardless of any other point made below, that proposal did not amount to interference with any right protected under A1/P1.

18. *Second*, the Respondents' contention that there has been interference depends on the prior assertion as to the nature of the "vested right" of the FIT Generator. In fact, there is no such "vested right" as the Respondents assert: see above at paragraph 4(1) - (3). The "right" that exists is to receive such payment as is from time to time set by the Secretary of State in exercise of his power under section 41 of the 2008 Act.
19. This conclusion is entirely consistent with the Strasbourg case law. A1/P1 protects property rights which exist under national law and prevents unjustified deprivation of or interference with that right. But if the content of the right changes under national law, A1P1 cannot be relied on to reverse the change. Thus some payments provided by the state are capable of being possessions, but this does not create any form of protected entitlement to any particular level of payment. It has been held that numerous state benefits are possessions. However, there is no right to a particular amount of benefit: *Stec v UK* [2005] 41 EHRR SE 295, para.53; *Nahon v UK* (Commission; application 34190/96). Rather, the property that is protected from unjustified interference is the right to payment of the amount provided for by the rules at the relevant time. Hence, on the facts of the present case, even if the proposal is implemented, there will be no interference unless the change is one that is not permitted in exercise of the section 41 power.
20. *Third*, the Respondents' contention that there has been unjustified interference with A1/P1 property is only to the effect that it is unjustified because it is not provided for by law. Thus this point too comes to no more than an assertion that the proposal made by the Secretary of State, if implemented, would not amount to a permitted exercise of the section 41 power.

(4) *The scope of the section 41 power*

21. This has been addressed in the Secretary of State's first Skeleton Argument for this appeal, by reference to the specific reasons relied on by Mitting J.
22. More generally, the following points may also be made.

23. *First*, the power itself (section 41(1)) is widely drawn. There is no relevant limitation at this stage of the analysis.
24. The list of kinds of modifications provided for at section 41(3) is non-exhaustive (as is shown by the use of the words "*may include*"). That list expressly includes provision to make modifications as to the circumstances in which payments are made (section 41(3)(a)) and as to the calculation of the amount of any such payment (section 41(3)(b)).
25. As to the facts of the present case, (1) there is express provision that modifications may make provision for circumstances in which a reduced payment may be made (s 41(3)(d)); (2) section 41(7) expressly provides for the powers to be exercised in relation to specified cases and that the powers may be exercised differently in different cases or circumstances (the current proposal would involve different provision for future payments for installations with an eligibility date on or after 12th December 2011 than would apply to those with an eligibility date before that (which is *intra vires* section 41(7)).
26. *Second*, the purposes in pursuit of which the section 41(1) power may be exercised are also widely drawn: see section 41(2)(a): "*establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity*". This is already addressed in the earlier Skeleton Argument.

JONATHAN SWIFT QC
PAUL NICHOLLS
JAMES CORNWELL

10 January 2012

11 King's Bench Walk,
Temple, EC4Y 7EQ.

Appeal No.C1/2012/0023

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ANNEX A

[Page references are to the 2 trial bundles, which the court has in addition to the appeal bundle.]

1. The purpose of this note is to set out a summary of the Feed-in Tariff ('FIT') Scheme.
2. The purpose of the FIT scheme is to promote take-up of small-scale low-carbon electricity technologies by the public and communities. By doing so it contributes to the United Kingdom meeting its target of generating 15% of energy from renewable resources by 2020 (see 2/17 at 35). The FIT Scheme is one of several methods of contributing to this target, although the principal measure to meet the target is the Renewables Obligation which incentivises larger-scale renewable electricity generation.
3. The FIT Scheme came into effect on 1st April 2010. It is an arrangement under which the Secretary of State requires electricity suppliers to purchase electricity from small-scale producers of low-carbon electricity at rates fixed by the Secretary of State which are designed to provide incentives to small-scale generators to become involved in electricity production. It was originally intended to bring households and other small producers into the electricity generation market (Response to 2009 Consultation - 2/125 at 130, para.1).
4. Small-scale generators can take advantage of this rate (the feed-in tariff, or "FIT") if they are accredited for the purposes of the scheme. The FIT comprises two elements: (a) the generation tariff (calculated by reference to the number of kW/hours produced by the installation operated by the small-scale producer and which is set at different levels depending on the low carbon technology used and the size of the relevant installation); and (b) the export tariff (calculated by reference to the number of kW/hours

provided by the small-scale generator to the electricity supplier and which is set at the same value regardless of the low-carbon generation technology used or the size of the installation). Each tariff is payable to the small-scale generator from the time that the installation is eligible in accordance with the provisions of the scheme. (See, generally, 2/125 at 130-133, 137-141, 148-153).

5. The FIT scheme supports a range of methods of electricity generation which include, but are not limited to solar PV. The range of technologies which the scheme was intended to support is set out in the 2009 consultation (2/17 at 26). The government has since, in July 2011, identified 8 technologies which it believes can deliver 90% of the 2020 target (2/303, para.15). Solar PV is not identified as one of them, although the government believes it has a role to play. However, the most popular technology for consumers applying for FIT Scheme payments is solar PV (2/295 at 297, para.1 and Minister's statement at 2/327).
6. The FIT Scheme is subject to the Levy Control Framework which sets a budget for the scheme for the current Spending Review period: the budget figures are set out at 2/305, para.21. (The figures for each year are cumulative.) This is the budget for all FIT Scheme payments, including not only solar PV but also all other means of generation.
7. Solar PV had traditionally had high installation and equipment costs when compared to other low-carbon generation technologies. For that reason the tariff level for solar PV was set at a higher level than other technologies when the FIT Scheme was introduced in order to incentivise generators to overcome these higher installation costs (see 2/125 at 151). Because the installation costs of the various low-carbon generation technologies were expected to reduce over the years (due to technological development, economies of scale in production as deployment increases, etc) the FIT rate for installations becoming eligible in subsequent years are set at lower

rates. Thus a lower rate is payable in respect of installations that become eligible in each successive FIT year (from 1st April 2012). This is a process called “degression” (2/125 at 148). The payment rate table in the document added to the end of the second bundle at the last hearing sets out figures for each year (2/471 at 474-476). The figure represents what it was envisaged (prior to the present consultation) would be paid for installations in each year. Thus the payments system envisaged that those who installed their systems later would start at a lower rate than those who installed their systems earlier. This reflected the anticipated fall in capital costs.

8. In setting the payment rates, governments had in mind rates of return, i.e. the value of income to be generated as a proportion of the capital investment in an installation. As originally envisaged, solar PV systems were expected to provide a return of about 5% (see 2/125 at 146-147).
9. The current consultation proposes a reduction in the generation tariff for solar PV from 1st April 2012, but it does not propose an alteration to the export tariff. The current proposals are also separate from the process of degression.
10. Although under the FIT Scheme the payment to the small-scale generator is made by the electricity supplier, the cost of the FIT is passed on to all electricity consumers thereby raising prices for consumers - it is, therefore, a subsidy paid by consumers. The cost of the FIT Scheme is therefore treated by HM Treasury as “imputed tax and spend” (2/211 at 214).

The statutory scheme

11. The legal basis of the FIT Scheme comprises: (a) sections 41 and 42 of the Energy Act 2008 (“the 2008 Act”) (2/402-406); (b) the provisions of the Feed-In Tariffs (Specified Maximum Capacity and Functions) Order 2010 (as amended) (“the 2010 Order”) 2/411-437); and (c) modifications made

by the Secretary of State to the Standard Conditions of Electricity Supply Licences (see, in particular, Condition 33 (“SLC33”), and Schedule A to Condition 33) (2/438-476).

12. The 2010 Order and the modifications to the Standard Conditions were made by the Secretary of State in exercise of his powers under section 41 of the 2008 Act, and in accordance with a negative resolution procedure in Parliament. If the Secretary of State decides to make changes as a result of the present consultation, this would entail further amendment to the FIT Scheme (by way of amendment to the 2010 Order and/or SLC33).
13. Section 41 of the 2008 Act provides for the Secretary of State to amend electricity supply licence conditions in relation to feed-in tariffs. It provides (in material part) that:

“(1) The Secretary of State may modify –

(a) a condition of a particular licence under section 6(1)(c) or (d) of the Electricity Act 1989 (distribution and supply licences);

(b) the standard conditions incorporated in licences under those provisions by virtue of section 8A of that Act;

(c) a document maintained in accordance with the conditions of licences under section 6(1) of that Act, or an agreement that gives effect to a document so maintained.

(2) The Secretary of State may exercise the power in subsection (1) for the purpose only of –

(a) establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity;

(b) requiring or enabling the holder of a distribution licence to make arrangements for the distribution of electricity generated by small-scale low-carbon generation;

(c) requiring the holder of a licence to make arrangements related to the matters mentioned in paragraph (a) or (b).

(3) Modifications made by virtue of subsection (1) may include –

(a) provision requiring the holder of a supply licence to make a payment to a small-scale low-carbon generator, or to the Authority for onward payment to such a generator, in specified circumstances;

(b) provision specifying how a payment under paragraph (a) is to be calculated;

(c) provision for the level of payment under paragraph (a) to decrease year by year in accordance with a formula published, or to be published, by the Secretary of State;

(d) provision about the circumstances in which no payment, or a reduced payment, may be made to a small-scale low-carbon generator;...

...

(7) The power conferred by subsection (1) –

(a) may be exercised generally, only in relation to specified cases or subject to exceptions (including provision for a case to be excepted only so long as specified conditions are satisfied);

(b) may be exercised differently in different cases or circumstances;...”

14. Section 41(4) contains various relevant definitions, including the following.

“small-scale low-carbon generation” means the use, for the generation of electricity, of any plant –

(a) which, in generating electricity, relies wholly or mainly on a source of energy or a technology mentioned in subsection (5), and

(b) the capacity of which to generate electricity does not exceed the specified maximum capacity;

“small-scale low-carbon generator” means an owner of plant used or intended to be used for small-scale low-carbon generation, whether or not the person is also operating or intending to operate the plant;

“specified maximum capacity” means the capacity specified by the Secretary of State by order, which must not exceed 5 megawatts; ...”

15. The sources of energy and technologies are defined by section 41(5) to include photovoltaics and solar power (as well as biomass, biofuels, fuel cells, water (including waves and tides), wind, geothermal sources and combined heat and power systems with an electrical capacity of 50

kilowatts or less). Article 3 of the 2010 Order provides for the specified maximum capacity to be 5MW.

16. Section 42 of the 2008 Act identifies the procedure to be followed when using the section 41(1) power (see section 41(10)). It provides, in material part, as follows.

“(1) Before making a modification, the Secretary of State must consult –

- (a) the holder of any licence being modified,*
- (b) the Gas and Electricity Markets Authority, and*
- (c) such other persons as the Secretary of State considers appropriate.*

...

(3) Before making modifications, the Secretary of State must lay a draft of the modifications before Parliament.

...”

17. Unless Parliament resolves not to approve the modification within 40 days the Secretary of State may make the modification (section 42(4), (5)).

18. The 2010 Order was made under section 41 of the 2008 Act. Articles 4-7 make provision as to the accreditation of FIT installations. Articles 8 and 9 provide for exceptions and limitations on the accreditation of FIT installations. Article 2 contains interpretation provisions, a number of terms used in the 2010 Order being defined by reference to their meaning in Schedule A to SLC 33.

19. Article 10 “Tariff Codes” (as amended) provides that:

“(1) The Authority must assign a tariff code to each accredited FIT installation in accordance with –

- (a) the descriptions of accredited FIT installation listed in the FIT payment rate table; and*

(b) the FIT year in which the eligibility date for the accredited FIT installation falls.

(2) Paragraph (3) applies in relation to an accredited FIT installation ("the relevant installation") if the FIT payment rate table specifies that two or more different FIT payment rates apply in different circumstances to accredited FIT installations of the same description, and with an eligibility date falling in the same FIT year, as the relevant installation.

(3) Where this paragraph applies, the Authority must assign to the relevant installation a tariff code which, in addition to the matters mentioned in paragraph (1), identifies which FIT payment rate applies to it."

20. The terms, inter alia, "eligibility date", "FIT payment rate table" and "FIT year" are defined as having the same meaning as is given to them in Schedule A to SLC33 (see Article 10(3)). The FIT payment rate table is at Annex 2 to Schedule A to SLC33. Schedule A to SLC 33 also provides that: "FIT Year" means "the year commencing on 1st April and ending on 31st March numbered sequentially from FIT Year 1 (being 1st April 2010 to 31st March 2011) to FIT Year 11; "FIT payment" means "as applicable, the Generation Payments and/or Export Payments"; and "Eligibility date" means:

"...the date as regards a particular Eligible Installation from which eligibility for FIT Payments commences which shall be the later of the date:

(a) as applicable, of

(i) receipt by the Authority [i.e. Ofgem] of a FIT Generator's written request for ROO-FIT Accreditation in a form acceptable to the Authority [i.e. for larger installations]; or

(ii) receipt by a FIT Licensee of a FIT Generator's written request for MCS-certified Registration [i.e. for smaller installations, in the case of solar PV 50kW or less];

(b) on which the Eligible Installation is Commissioned; or

(c) of Implementation"

21. Article 13 of the 2010 Order “Calculating and publishing FIT payment rates” (as amended) provides that:

“On or before 1st March immediately before the beginning of each FIT year (except FIT year 1), the Authority must publish . . . in accordance with clause 3.3 of Part 1 of Schedule A to Standard Licence Condition 33 the FIT payment rate table which is to apply for that FIT year (subject to the Secretary of State substituting a new FIT payment rate table in Schedule A to Standard Licence Condition 33).”

22. The final element of the legal basis of the FIT Scheme is the modifications to the Standard License Conditions to insert SLC33 and 34. SLC 33.1-3 requires that from 1st April 2010 a Mandatory FIT Licensee must comply with Part 1 of Schedule A to SLC 33 and a Voluntary FIT Licensee comply with Part 2 of Schedule A and that both comply with Part 3. SLC 33.4 provides that “where a licensee is either a Mandatory FIT Licensee or a Voluntary FIT Licensee, it shall make FIT Payments to FIT Generators or Nominated Recipients in accordance with the provisions of Schedule A”.

23. Clauses 3.3 to 3.5 of Part 1 of Schedule A (as amended) provide, in material part, that (2/471-472):

“3.3 The Mandatory FIT Licensee shall make FIT Payments in accordance with the Tariff Code and other information recorded in the Central FIT Register:

3.3.1 in respect of FIT Year 1, at the rates set out in the FIT Payment Rate Table at Annex 2 as it applied on 1st April 2010;

3.3.2 in respect of FIT Year 2, at the rates set out in the FIT Payment Rate Table at Annex 2 as substituted with effect from 1st August 2011;

3.3.3 subject to clause 3.4, in respect of each following FIT Year at the rates set out in the FIT Payment rates table which shall be published for each FIT Year by the Authority, which shall comprise-

(a) for FIT Year 3, the figures in the FIT Payment Rate Table at Annex 2 (as substituted with effect from 1st August 2011), and

(b) for FIT Year 4 and subsequent FIT Years, the figures in the FIT Payment rates table published by the Authority for the preceding FIT Year, adjusted (in either case) by the percentage increase or decrease in the Retail Price Index

over the 12 month period ending on 31st December immediately before the commencement of the relevant FIT year.

3.4 If the Secretary of State amends this Schedule by substituting a new FIT Payment Rate Table at Annex 2-

3.4.1 the Mandatory FIT Licensee shall from the date on which that amendment comes into force make FIT Payments in accordance with the new FIT Payment Rate Table at Annex 2, and any FIT Payment rates table published by the Authority for the FIT Year in which that date falls shall be superseded; and

3.4.2 the FIT Payment rates table to be published by the Authority for the following FIT Year shall comprise the figures in the new FIT Payment Rate Table at Annex 2, adjusted by the percentage increase or decrease in the Retail Price Index over the 12 month period ending on 31st December immediately before the commencement of the relevant FIT year.

3.5 The FIT Payments made by the Mandatory FIT Licensee shall be such that:

3.5.1 the Generation Payment shall be available to all FIT Generators with Accredited FIT Installations..."

24. Annex 2 to Schedule A contains the FIT payment rate table. This also contains notes on its interpretation (2/473). The FIT payment rate for an Eligible Installation of a description specified in the first column of the table is, subject to Note 2, the rate specified in the corresponding entry in the column for the FIT Year in which the installation's Eligibility Date falls, i.e. the year when the installation is accredited.

25. Clause 6 of Part 3 of Schedule A to SCLC33 provides that modifications to the Scheme shall be made in accordance with the provisions of section 42 of the 2008 Act insofar as such modifications fall within the scope of section 41 of that Act. Clause 7.1 provides that in the event of inconsistency between any provision of this Scheme and any order issued by the Secretary of State under sections 41 to 43 of the 2008 Act the latter shall prevail.

26. In summary then, a FIT licensee is required (all other things being equal) to pay a generator the generation and export tariff at the rates set in the FIT payment rate table in force at the time the payment is made.