

ENERGY Comments on OPG Draft

CONFIDENTIAL DRAFT

INDEMNITY AGREEMENT

THIS INDEMNITY AGREEMENT effective as of this 2017. day of June,

BETWEEN: Ontario Power Generation Inc.
(hereinafter the "Corporation")

OF THE FIRST PART,

Her Majesty the Queen in Right of the Province of Ontario as Represented
by the Minister of Energy

(hereinafter called the "Province")

OF THE SECOND PART

WHEREAS the Corporation and/or one or more of its subsidiaries may or, in certain circumstances is or will be required to, carry out certain activities with respect to (i) the *Ontario Fair Hydro Plan Act, 2017* (the “Act”), (ii) the regulations made pursuant to the Act, and/or (iii) the agreements (A) relating to any financing entity (as defined in the Act) and/or any debt issued by any such financing entity and/or (B) to which any such financing entity is a party (the Act, such regulations and agreements, collectively the “Fair Hydro Plan”).

AND WHEREAS the Corporation, its subsidiaries and each of their respective directors, officers and employees may face risk of liability due to or as a result of the Fair Hydro Plan.

NOW THEREFORE, in consideration of the sum of \$1.00 now paid by the Corporation to the Province and other good and valuable consideration (the receipt of which is hereby acknowledged), the Province hereby agrees:

1. To indemnify, defend and save harmless the Corporation, each of the Corporation's subsidiaries and each of their respective directors, officers, and employees (collectively the **"Protected Persons"** and individually, a **"Protected Person"**) from and against all losses, costs, damages, charges, expenses, demands, liabilities, taxes, fines, penalties, statutory payments, judgments and/or settlement amounts directly or indirectly suffered, sustained or incurred by any Protected Person, including any special, indirect, incidental, punitive, exemplary and/or consequential damages and/or loss of profits and damages in respect of economic loss and/or loss of opportunity, and all legal and other professional fees and out-of-pocket expenses (collectively, **"Losses"**), in relation to any civil, criminal, administrative, investigative and/or other claim, demand, action, suit, application, litigation, charge, complaint, prosecution, assessment, reassessment, investigation (formal or informal), hearing and/or

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other proceeding of any nature or kind whatsoever (any of the foregoing being a "Claim") arising, directly or indirectly, as a result of the Corporation's, any of the Corporation's subsidiaries and/or any such other Protected Person's activities, acts and/or omissions in the implementation of, or otherwise relating to, the Fair Hydro Plan (including, without limitation, where a Protected Person is acting, at the request of the Corporation, in a different capacity than as a director, officer or employee of the Corporation or a subsidiary of the Corporation).

2. ~~A Protected Person shall not be entitled to be indemnified in respect of Losses. This indemnity does not apply with respect to Losses, or a portion thereof of a Protected Person:~~

- (a) ~~for which coverage is provided under an insurance policy or claims fund to the extent that such Protected person is actually paid under such insurance policy or claims fund but only to the extent that a Protected Person is actually paid under such insurance policy for those Losses; or~~
- (b) ~~for which other indemnities are already provided to a Protected Person but only to the extent that the Protected Person is actually so indemnified for those Losses by such indemnities; or~~
- (e) ~~is the result of such Protected Person's dishonesty, gross negligence or willful misconduct, but only if such dishonesty, gross negligence or willful misconduct on the Protected Person's part has been established by a final and non-appealable judgment or other final adjudication adverse to the Protected Person; if and to the extent that a court of competent jurisdiction in a final, non-appealable judgment determines that the Claim associated with such Losses resulted from the gross negligence or willful misconduct of the Protected Person claiming such indemnity; for greater certainty, and notwithstanding Section 2(d),~~
- (d)(c) ~~the Province agrees that it does not intend that any failure by a Protected Person to conduct such reasonable investigation as necessary to provide the Corporation, a subsidiary of the Corporation or a financing entity, as applicable, with reasonable grounds for believing any prospectus, registration statement, offering document or any other document filed by, or on behalf of, a financing entity under applicable securities laws contained no misrepresentation shall constitute "gross negligence" or "willful misconduct" for purposes of this Section 2(c) or otherwise disentitle a Protected Person from indemnification hereunder; or~~
- (d) ~~in the case of a criminal or administrative action or proceeding that enforces a monetary penalty, if such action or proceeding arises from any circumstances in which a Protected Person did not have reasonable grounds for believing was reckless as to their belief that the Protected Person's conduct was lawful in the case of a criminal or administrative action or proceeding that enforces a monetary penalty.~~
- (e) ~~to the extent arising from any circumstances in which a Protected Person did not have reasonable grounds for believing that the Protected Person's conduct was lawful in the case of a criminal or administrative action or proceeding that enforces a monetary penalty.~~

Commented [A1]:

We understand this provision to mean:

If a Protected Person is found not to have conducted a reasonable investigation of the securities documents (i.e. where due diligence defence under securities law fails), this provision indicates that the Province does not intend for this failure to constitute a "gross negligence" or "willful misconduct" for the purposes of this clause and such failure would thus not disqualify the Protected Person from receiving indemnification.

We are further considering this language internally. Please provide an explanation of why this provision needs to be included in the indemnity and what risks it is aimed at mitigating.

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3. ~~In order to be entitled to indemnification hereunder in respect of any Losses, the~~ Each Protected Person shall:

- (a) ~~Upon becoming aware of a Claim(s) for which such Protected Person may seek indemnification hereunder, as soon as practicable, deliver to the Province (through the Director of the Legal Services Branch of the Ministry of Energy) a notice setting forth in reasonable detail the particulars of the~~any Claim(s);
- (b) upon written request of the Province, furnish to the Province copies of any document, or provide to the Province any information, that relates to the Claim(s) that is in the possession or under the control of the Protected Person (except to the extent that provision of same would cause the Protected Party to lose its entitlement to claim privilege with respect to same);
- (c) ~~take all reasonable steps, at the expense of the Province, necessary to secure and preserve the rights of the Protected Person in respect of the Claim(s); and~~
- (d) promptly take all reasonable steps to obtain indemnification to the fullest extent possible under insurance policies, or under indemnities provided by the Corporation, that are referred to in subsections 2(a) or (b) above.

~~A failure on the part of a Protected Person to take any of the actions provided in this section 3 shall not affect the rights of such Protected Person except to the extent that, as a result of such failure, the Province was actually prejudiced. A failure on the part of a Protected Person to take any of the actions provided in this section 3 shall not affect the rights of any other Protected Person.~~

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~~A failure to give prompt notice as provided in this section 3 shall not affect the rights or obligations of any party to this indemnity unless and only to the extent that such failure to provide such prompt notice has actually prejudiced the Province.~~

Commented [A2]: Changes made to align with IESO indemnity

4. The Province shall have the right to participate in or, where the Province has confirmed in writing to the applicable Protected Person(s) that ~~any~~all Losses in respect of a Claim will be ~~fully~~ indemnified under this indemnity agreement, assume control of the negotiation, settlement or defence of the Claim and in no event shall a Protected Person negotiate, settle, compromise or pay the Claim without the prior written consent of the Province, such consent not to be unreasonably withheld ~~or~~ delayed, ~~or conditioned~~. If the Province elects to so participate in or assume control of the negotiation, settlement or defence of the Claim, the applicable Protected Person(s) shall co-operate fully with the Province in connection with the same, and each applicable Protected Person shall agree to be represented by legal counsel chosen by the Province, unless, in the opinion of such legal counsel, there would arise a conflict of interest preventing such legal counsel from representing the applicable Protected Person. Where it is such legal counsel's opinion that a conflict of interest prevents that legal counsel representing a Protected Person, the Protected Person will be entitled, after consultation with the Province and acting reasonably, to obtain legal counsel of the Protected Person's choice, and the fees and expenses of the Protected Person's counsel incurred in the Protected Person's representation shall be Losses to which this indemnity extends.

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4.5. The Province shall not agree to any settlement of a Claim on behalf of a Protected Person without the Protected Person's written consent unless (i) the terms of such settlement require only the payment of money (by persons or entities other than the Protected Person) and include an unconditional, full release of the Protected Person, and do not require a Protected Person to admit any wrongdoing or take or refrain from taking any action and (ii) the Province has fully indemnified the Protected Person with respect to, and held the Protected Person harmless from and against, all Losses incurred by or on behalf of the Protected Person in connection with the Claim.

6. ~~For greater clarity, with respect to directors, officers and employees of the Corporation this indemnity shall only apply to Claim(s) that are referable to the period during which a director, officer or employee of the Corporation is actually a director, officer or employee (respectively) of the Corporation, and of which notice is received by the Province either during the period of time that the director, officer, or employee is a director officer, employee of the Corporation or after he or she ceases to be a director, officer, employee of the Corporation.~~

Commented [A3]: Re-inserted as discussed.

5.7. The Province shall reimburse or advance the funds necessary for the payment of Losses incurred in connection with ~~any a~~ Claim, including without limitation, the investigation, monitoring, defence and appeal thereof, in advance of the final disposition of such Claim, within ~~thirty ninety~~ (90) days of any request in writing by a Protected Person to the Province for such reimbursement or advance, accompanied by reasonable details and supporting documentation with respect to the Losses in respect of which such reimbursement or advance is requested of the Protected Person completing all steps outlined in paragraph 3 of this indemnity agreement. The Protected Person shall promptly repay forthwith to the Province any advances that are ultimately in excess of amounts necessary for payment of any such Losses or for which it is judicially determined that the Protected Person is not entitled to indemnification hereunder.

6.8. The Province hereby waives any claim it, as the shareholder of the Corporation, could otherwise make against a Protected Person, whether now or in the future, relating in any way to the Corporation's, any of the Corporation's subsidiaries and/or any such other Protected Person's activities, acts and/or omissions in the implementation of, or otherwise relating to, the Fair Hydro Plan (including, without limitation, where a Protected Person is acting, at the request of the Corporation, in a different capacity than as a director, officer or employee of the Corporation or a subsidiary of the Corporation).

Commented [A4]: This provision is problematic because it is essentially asking the Province to waive its right to bring a claim against the directors, officers, employees of the corporation, including claims of gross negligence or willful misconduct. This is a substantial "give" for the Province to provide.

As discussed, the Ministry is further considering internally.

7.9. The Province represents and warrants to each Protected Person as follows and acknowledges that each Protected Person is relying on the following representations and warranties in connection with ~~any and all of its activities, acts and/or omissions in the implementation of, or otherwise relating to, the Fair Hydro Plan (including where a Protected Person is acting, at the request of the Corporation, in a different capacity than as a director, officer or employee of the Corporation or a subsidiary of the Corporation) this indemnity agreement:~~

- (a) the Province has all necessary power, authority and capacity to enter into this indemnity agreement and to perform its obligations hereunder;

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- (b) all necessary actions have been taken by the Province or on the Province's part to authorize its execution and delivery of this indemnity agreement ~~and the performance of its obligations hereunder~~, and without limiting the foregoing, the Province has received all necessary approvals under the *Financial Administration Act* (Ontario) ~~(including approval of the Minister of Finance pursuant to Section 28 of the *Financial Administration Act* (Ontario)) and under the Act~~ required for it to enter into this indemnity agreement and perform its obligations hereunder;
- (c) this indemnity agreement has been duly executed and delivered by the Province and is a legal, valid and binding obligation of it enforceable against it in accordance with its terms, except as that enforcement may be limited by the provisions of the *Proceedings Against the Crown Act* (Ontario), ~~and~~ subject to bankruptcy, insolvency, reorganization, moratorium or similar laws now or hereinafter in effect relating to creditors' rights generally; ~~to~~ the application of equitable principles and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction; ~~to~~ section 11.3 of the *Financial Administration Act* (Ontario); and ~~to~~ section 43 of the *Financial Administration Act* (Ontario);

Commented [A5]: I've made some changes to this section – but there may be further changes based upon further internal discussions.

8.10. It is the intention of the Province to constitute the Corporation as trustee for the Protected Parties that are not party to this indemnity agreement of the covenants, waivers, representations, warranties and obligations of the Province under this indemnity agreement and the Corporation agrees to accept such trust and to hold and enforce such covenants, representations, warranties and obligations on behalf of such Protected Parties.

9.11. This indemnity agreement shall be interpreted and governed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

10.12. The provisions of this indemnity agreement and the benefit of all covenants, waivers, representations, warranties and other obligations herein contained shall enure to the benefit of the Protected Persons and the Protected Persons' heirs, administrators, executors and assigns as applicable.

NOW THEREFORE, the parties have executed this indemnity as of the _____ day and year of June, 2017 first above written.

ONTARIO POWER GENERATION INC.

By: _____

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO, AS REPRESENTED
BY THE MINISTER OF ENERGY

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By: _____

Glenn Thibeault
Minister of Energy

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