Request for Approval of the Minister of Finance
Pursuant to Section 28 of the *Financial Administration Act* (Ontario)

1. MINISTRY REQUEST

On March 2, 2017, the Premier announced Ontario's Fair Hydro Plan (the "ONFHP"), under which the government proposes to take steps to lower electricity bills on an after-tax basis by 25 per cent for a typical residential customer relative to what those bills would otherwise have been without the ONFHP. This proposed 25 per cent rate relief measure would be inclusive of the 8 per cent rebate that is already in effect under the *Ontario Rebate for Electricity Consumers Act, 2016* and the savings that are anticipated to result from the proposed shifting of the Ontario Electricity Support Program ("OESP") and the Rural or Remote Rate Protection program ("RRRP") costs from ratepayers to provincial revenues. Changes to the Global Adjustment ("GA") are also proposed to be a component of the 25 per cent rate relief under the ONFHP.

The Government is proposing to introduce legislation to enable the implementation of the ONFHP (the "Proposed Legislation"). If the Proposed Legislation is passed, the implementation of the ONFHP will require the participation of the Ontario Power Generation ("OPG") and the Independent Electricity System Operator ("IESO") among other government entities. Both the OPG and the IESO have each requested an indemnity covering their respective corporations, directors, officers and employees in relation to their respective roles in carrying out the implementation of the ONFHP if the Proposed Legislation is passed.

The Ministry is seeking the approval of the Minister of Finance to provide these indemnities, in the forms attached as Appendix "A" and Appendix "B" (collectively the "Indemnities" and individually the "Indemnity"), on behalf of the Crown to the OPG and IESO, respectively.

Timing:

Approval is sought by June 1, 2017. The Indemnities are required in conjunction with the coming into force of the Proposed Legislation, if passed.

2. RECOMMENDATION

Approve the giving of the Indemnities to OPG and IESO on the condition that such Indemnities shall only come into effect at the date upon which the proposed legislation is passed.

3. BACKGROUND

OPG – Role in Implementation of ONFHP

The OPG will play a central role in the implementation of the ONFHP, particularly with respect to the implementation of the GA refinancing component of the ONFHP.

As part of ONFHP, it was announced that a portion of the GA would be refinanced in order to fairly allocate costs across present and future generations of electricity consumers with respect to investments made to decarbonize (i.e., phase-out coal) and modernize Ontario's electricity system (i.e., build and maintain a reliable electricity system). This would result in a deferred GA amount that OPG is expected to fund from a special purpose entity that OPG creates (i.e. a financing entity). It is likely that risks associated with carrying out this role would fall outside of the scope of OPG's usual business/operations risks and would arise solely due to the OPG's role in implementation of the ONFHP. This is particularly true with respect to any securities offerings of OPG's financing entity. Products are expected to be offered into the Canadian and U.S. Markets. As a result, pre-existing indemnities and protections do not adequately protect OPG, its directors, officers and employees.

Providing the requested Indemnity to OPG would help facilitate OPG undertaking its role with respect to the implementation of the ONFHP.

IESO – *Role in Implementation of ONFHP*

The Proposed Legislation, if passed would impose certain obligations and requirements on IESO to carry out various activities in relation to the implementation of the ONFHP such as the deferral of costs related to the GA, the creation of a regulatory asset in relation to the GA financing component of the ONFHP, the conveyance of that asset to OPG's financing entity and providing a servicing role in recovering OPG's funding costs from future ratepayers. IESO may also be required to play a role in potential securities offerings of OPG's financing entity. If so, this may come with heightened exposure to liability for the IESO. IESO has expressed concern that all of this drives an increased risk of liability to the IESO, its directors, officers and employees, which is over and above typical operations risks and arises solely due to the ONFHP.

Providing the requested Indemnity would help facilitate the IESO's undertaking of the activities requested by the Minister in order to facilitate the implementation of the ONFHP.

4. ANALYSIS SUPPORTING RECOMMENDATION

(a) Why the Indemnities are being sought?

(i) Indemnities are required to facilitate IESO and OPG in carrying out their respective roles in implementing the ONFHP

Commented [HM1]: OPG/IESO input required on this regarding the specific risks they are concerned about.

The provision of the Indemnities to the IESO, OPG and their respective directors, officers and employees is required in order to facilitate the carrying out of implementation of the ONFHP in the event that the Proposed Legislation is passed. Both OPG and the IESO are anticipated to carry out activities that fall outside the scope of their typical business activities and corporate mandate. This creates the risk that such activities could be perceived as not being carried out in "good faith" or in the best interest of the corporation thereby exposing OPG and/or the IESO to increased liability (statutory protections from liability only extend to "good faith acts". This is further described in section (ii) below). If the indemnities are not provided, this could impact the OPG and IESO directors' willingness to undertake such activities jeopardizing the successful implementation of the ONFHP. Both the IESO and OPG have specifically asked for these Indemnities in order to allow them to carry out their roles in implementing the ONFHP.

Providing OPG and the IESO with the requested Indemnities will provide them with assurance against liability in order to allow them to comprehensively carry out their respective roles in the successful implementation of the ONFHP.

To the extent that a claim would be covered under any other indemnity provided to OPG or IESO by the Province, or provided by OPG or IESO to their directors, officers and employees, these Indemnities would not apply. Language to address any possible duplication is included in the attached Indemnities.

(ii) Statutory Immunity does not preclude a person from bringing an action or other civil proceeding

Subsection 19(1) of the *Electricity Act, 1998* provides IESO directors, officers and employees with the following protection from liability:

> "No action or other civil proceeding shall be commenced against a director, officer, employee or agent of the IESO or a member of a committee or panel established by the board of directors of the IESO for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under any Act, the regulations under any Act, the IESO's licence, the IESO's by-laws or the market rules, or for any neglect or default in the exercise or performance in good faith of such a power or duty."

The *Electricity Act, 1998* does not contain a similar statutory immunity for OPG's directors, officers, employees or agents. However, under subsection 39(2) of the Proposed Legislation, a statutory immunity is provided to the OPG's employees. This provision states:

> "No action or other civil proceeding shall be commenced against any employee of the Province or Ontario Power Generation Inc. for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under [the Proposed Legislation], the regulations or for any alleged neglect or default in the exercise or performance in good faith of such a power or duty."

Subsection 39(2) of the Proposed Legislation provides that nothing in subsection 39(1) limits the effect of subsection 19(1) of the *Electricity Act, 1998.*

The statutory immunities provided under the *Electricity Act, 1998* and the Proposed Legislation prohibits/would prohibit an action or other civil proceeding from being commenced against the enumerated protected persons under the respective provisions for any act done in good faith in the exercise or performance of their duties. Nothing precludes a person from bringing an action or other civil proceeding against these persons causing them to incur costs in defending the claim (for example, arguing that the act was not carried out in "good faith").

The immunity from suit provisions outlined above, are qualified by the words "for any act done in good faith in the exercise or performance or intended exercise or performance of a power or duty under this Act…" This is a question of fact that needs to be considered by a court of competent jurisdiction. As such, statutory immunity would not necessarily be a bar to litigation and does not ensure that the IESO and OPG's employees, officer or directors (as applicable) would not become embroiled in litigation.

In the case of OPG, there is no similar statutory immunity explicitly provided for its directors or officers, so the risk of litigation is greater for these individuals in the even the Proposed Legislation is passed.

For the reasons mentioned above, the Indemnities requested under this application would ensure that if a claim is brought against OPG or IESO's directors, officers, and employees as a result of carrying out their roles in implementing the ONFHP (despite the statutory immunities provided or that will be provided if the Proposed Legislation is passed), they are protected for any costs, losses etc. subject to the limitations provided for in the Indemnities.

(b) Description of the risk and any risk mitigants.

The ONFHP is a novel program, the first of its kind in Canada. Because the work to be undertaken by OPG and IESO in carrying out their roles in implementing the ONFHP will fall outside of the usual operations/business risk that these corporation's face, there is a risk that these corporations may be subject to increased liability specifically due to their roles with the ONFHP. This risk arises in part because of the kind of market that OPG, and IESO indirectly, are to participate in, and the steps that investors could take to protect their investments.

The risk to the Province of giving the Indemnities is undeterminable at this time, but any such risk may be mitigated by the following factors:

1) In the case of the IESO, the existence of a statutory immunity under subsection 19(1) of the *Electricity Act, 1998* may mitigate against a liability arising against its directors, officers and employees, but as mentioned, does not eliminate such risk.

2) In the case of OPG, the proposed statutory immunity under subsection 39(1) of the Proposed Legislation may mitigate against a liability arising against its employees, but as mentioned, does not eliminate such risk.

3) The Indemnities is limited specifically to claims arising in relation to IESO and OPG's respective role in implementing the ONFHP in the event that the Proposed Legislation is passed.

4) The Indemnities do not apply with respect to claims for which coverage is provided and paid under insurance, for which indemnity is already provided and paid to the OPG or IESO or its respective directors, officers or employees, or is brought about by the dishonesty, gross negligence or willful misconduct of the director.

A contingent liability table is attached as Appendix "C"

(c) Scope of liability in the Indemnities

The Province would agree to indemnify and hold harmless the IESO and OPG as well as their respective directors, officers and employees from any claims, liabilities, costs or losses that might arise to the corporation, him or her (respectively) as a result of their direct roles in carrying out activities related to the implementation of the ONFHP.

The Indemnities would not apply with respect to claims:

(a) for which coverage is provided under an insurance policy or claims fund to the extent that the protected person is actually so indemnified or covered under such policy or fund; or

(b) for which other indemnities are already provided to the protected person to the extent that the Protected Person is actually so indemnified by such indemnities;

(c) brought about or contributed to by a Protected Person's dishonesty, gross negligence or willful misconduct if a judgment or other final adjudication adverse to the Protected Person establishes that there was dishonesty, gross negligence or willful misconduct on the Protected Person's part which was material to the cause of action as adjudicated; or

(d) 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.

The Indemnities would not apply with respect to claims for which coverage is provided and paid under insurance, or which are covered by another indemnity already provided, for claims brought about by the dishonesty, gross negligence or willful misconduct of the persons protected under the Indemnities, or for claims arising from circumstances where the corporation, director, officer or employee did not have grounds for believing that their conduct was lawful in the case of a criminal or administrative action or proceeding that enforces a monetary penalty.

(d) Effect of failure to obtain section 28 approval

If the requested Indemnities are not provided, this could impact the OPG and IESO directors' willingness to fully undertake their roles in implementing the ONFHP thereby jeopardizing the successful implementation of this plan in the event the Proposed Legislation is passed. For example, IESO directors may not be willing to carry out certain activities that would fall outside of the scope of its typical business activities and mandate if they view these as creating a risk of liability. Providing the Indemnities, would give OPG and IESO, along with their directors, officers and employees to more confidently carry out their role in implementing the ONFHP.

APPENDIX "A"

PROPOSED INDEMNITY AGREEMENT FOR OPG
(Attached as a separate document)

APPENDIX "B"

PROPOSED INDEMNITY AGREEMENT FOR IESO

(Attached as a separate document)

APPENDIX "C"

CONTINGENT LIABILITY TABLE
(Attached as a separate document)