Ministry of the Attorney General
Briefing Note
Civil Law Division
Legal Services Branch – ENERGY/MEDG/MRIS/MOI/ADO

SUBJECT: The establishment and administration of the Affordability Fund Trust.

OVERVIEW: As part of the Ontario Fair Hydro Plan, the Ministry of Energy (ENERGY) has established an Affordability Fund (Fund) which will be accessible to Local Distribution Companies (LDCs). The Fund, funded through the tax base, will target those electricity customers who do not qualify for low-income conservation programs and who are unable to undertake energy efficiency improvements without financial assistance.

BACKGROUND:

ENERGY received Cabinet approval on March 1, 2017 for the creation of a new one-time government funded Affordability Fund in 2016/17 to provide relief to electricity customers who do not qualify for existing low income programs and cannot purchase energy efficiency measures without financial assistance.

On March 6 and 8, 2017, Treasury Board / Management Board of Cabinet (TB/MBC) and Cabinet respectively approved a Treasury Board Order in the amount of $100,000,000 to establish the Fund.

It was deemed most appropriate to establish a trust vehicle to deliver and administer the Fund. Accordingly, a Declaration of Trust (Deed) was made as of March 23, 2017 by Computershare Trust Company of Canada (Computershare) to establish the Affordability Fund Trust (Trust). Computershare is a large corporate trust service provider and will act as the interim Trustee for the Trust. Computershare will be replaced with a Board of Trustees with relevant expertise who will be responsible for distributing funds to LDCs across the province.

The trust structure establishes a non-controlled, independent entity to distribute funding to LDCs. The Trust is to include representation from several electricity distributors as well as social service agencies. The composition of the Board of Trustees will be selected based on their experience in delivery and oversight of conservation and low income programs.

ENERGY will flow $100 million to the Trust through a Transfer Payment Agreement (TPA). The TPA, effective as of March 23, 2017, was based on the OPS template and incorporates accountability, oversight and corrective action provisions in line with the Transfer Payment Accountability Directive.

Both the TPA and the Deed were prepared with input from internal and external legal counsel with expertise in establishing trust structures, the Ontario Provincial Controller and Hydro One.

How the Trust Works

The objective of the Trust is to distribute the funds to the beneficiaries, or electricity consumers, to be identified based on recommendations from LDCs based on factors listed in the Deed.

The current Trustee of the Trust is Computershare. However, on or before May 31, 2017, Computershare will be replaced by an independent, six-member Board of Trustees (Board), which will be appointed by Computershare based on the advice of an Advisory Committee established in the Deed. Three of the Board members will be representatives from separate electricity distributors, two will be representatives from separate social services agencies and one non-voting member will be a representative of the Government of Ontario. Upon the appointment of these six Board members, the mandate of the Advisory Committee expires.

The Deed confers broad powers and discretion to the Trustees to act in the best interest of the beneficiaries. The Trustees are expected to conduct themselves in good faith and give regard to guiding principles set out in the Deed and agreed to by the Province in the TPA (Principles) in exercising their duties under the Deed and the TPA in distributing funds to LDCs across the province, including Hydro One, for the benefit of beneficiaries.

The Deed will be subject to further modification by the Trustees, subject to the Province's right under the TPA to consent, not to be unreasonably withheld or delayed. The input and involvement of LDCs across the province is anticipated and integral to the success of the Trust in meeting its purpose. The Principles, which the Trustee is required to consider in the exercise of its discretion, are set out in both the Trust Declaration and the TPA. These Principles articulate considerations that the Trust and LDCs must have regard for in the administration of the Trust. The Principles are further set out in summary form in the paragraph below.

In addition, a Permitted Delegation Annex (Annex) forms part of the Deed. The Annex refers to an expectation that the Trust would rely on participating LDCs to assist with achieving the purpose of the Trust, including an expectation to engage administrative services agents (to provide administrative services to the Trust) and implementation agents (to provide other specified services to the Trust) for the purpose of the Trustees discharging their duties and obligations under the Deed. It is contemplated that the implementation services agreements will be with LDCs in order for them to fulfill their contemplated role in the program in accordance with the Principles; namely, to identify beneficiary payees based on selection factors such as a payee's lack of financial resources to undertake the contemplated electricity conservation measures, and a payee's demonstration that electricity bills represent a financial burden relative to its financial resources. The Principles recognize that funds may be allocated to beneficiaries unequally across the province, based on parameters including economic activity and electricity use. The Principles further recognize that LDCs are not intended to directly profit from distributions of funds, although LDCs are allowed to receive reasonable compensation and reimbursement of their actual out-of-pocket costs associated with their performance of the program.

The Annex outlines certain terms and conditions that are expected to be included in the implementation services agreements with LDCs. The first item requires the LDC to determine who and how many of its customers would be eligible to benefit from the program, in addition to what measures it would recommend for those beneficiaries, thereby determining the aggregate funding amount it expects to utilize. Thereafter, once the Trustees have confirmed this information and provided funds to the LDC, the LDC is to use those funds for the benefit of the identified beneficiary. This may include a reimbursement or rebate of the costs of applicable efficiency or conservation measures. Excess amounts would be required to be returned to the Trust. Finally, LDCs are expected to institute appropriate operational, administrative and record-keeping systems, including the establishment of a separate bank account for the purpose of the Trust program. Finally, LDCs would be required to provide customary indemnities to the Trust, against claims, damages and liability which may arise from a breach of the implementation agreement by the LDC or its representatives.

NEXT STEPS:

The Trust will engage with Hydro One as an initial administrative services agent and will have the discretion to engage with other entities as service providers to assist with administering the Trust.

Prepared on: March 31, 2017

Prepared By: Michelle Schachtschneider
Legal Counsel
Legal Services Branch – ENERGY, MEDG, MRIS, MOI and Accessibility

Approved by: Paul Johnson
A/Deputy Director
Legal Services Branch – ENERGY, MEDG, MRIS, MOI and Accessibility