Request for Approval
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.

On May 11, 2017 the Government introduced Bill 132, which, if passed would enact 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, subsidiaries (in the case of OPG), agents (in the case of IESO), directors, officers and employees in relation to their respective roles in carrying out the implementation of the ONFHP if the Proposed Legislation is passed.

Commented [PMK1]: This seems out of date now.
Commented [HM2]: I've updated

The Ministry is seeking the approval pursuant to section 28 of the *Financial Administration Act* (Ontario) 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 Ontario's Fair Hydro Plan (ONFHP)

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 the 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 a special purpose entity created by OPG (i.e. a financing entity) is expected to finance. 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. Examples of these risks include, without limitation:

- liability as a promoter under Canadian securities laws (or the equivalent, if any, under other applicable securities laws);
- secondary market liability under Canadian and/or other applicable securities laws;
- liability the signatories to the prospectuses will have (i.e., the individuals signing the prospectus); and
- liability of OPG as the Financial Services Manager under any of the transaction agreements (e.g., the Financial Services Management Agreement, the Administration Agreement, the MSSA, the Master Trust Indenture and any Supplemental Indentures).

As a result, pre-existing indemnities and protections do not adequately protect OPG, its subsidiaries and each of their respective directors, officers and employees as explained further below.

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, particularly for offerings into the US market. 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 [HM3]: OPG/IESO input required on this regarding the specific risks they are concerned about.

The provision of the Indemnities to the IESO, OPG, OPG's subsidiaries, and each of their respective directors, officers and employees, as well as IESO's agents 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 which existing indemnities would address. 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". In addition the statutory protections do not indemnify for costs relating to defending a claim. This is further described in section (ii) below). Examples of specific risks to OPG include, without limitation:

- liability as a promoter under Canadian securities laws (or the equivalent, if any, under other applicable securities laws);
- secondary market liability under Canadian and/or other applicable securities laws;
- liability that the signatories to the prospectuses will have (i.e., the individuals signing the prospectus); and
- liability of OPG as the Financial Services Manager under any of the transaction agreements (e.g., the Financial Services Management Agreement, the Administration Agreement, the MSSA, the Master Trust Indenture and any Supplemental Indentures).

Examples of specific risks to the IESO include without limitation,

- liability for its role in potential securities offerings of OPG's financing entity. This may come with heightened exposure to liability for the IESO, particularly for offerings into the U.S. market. It is not clear whether the statutory protections would apply federally or in the U.S. context. If they would not extend to a U.S. claim, for example, it would support the need for a separate indemnity for the IESO.

If the indemnities are not provided, this could impact OPG and the IESO's 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 and IESO to any of its subsidiaries (in the case of OPG), agents (in the case of the IESO), directors, officers and employees, these Indemnities would not apply. Language to address any possible duplication is included in the attached Indemnities.

Existing indemnities previously provided by the Province to OPG have been limited to specific directives provided to OPG by the Province (e.g., in connection with the Bruce Lease). Accordingly, the scope of the existing indemnities provided by the Province would not cover the ONFHP. The IESO does not have any other indemnity from the Province.

(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, or each of its subsidiaries, their directors, officers, or employees 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 the protected persons 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 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 protected persons.

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 lossess:

(a) for which coverage is provided under an insurance policy to the extent that the protected person is actually spaid under such policy for those losses; or

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

(c) is the result of the Protected Person's dishonesty, gross negligence or willful misconduct, but only 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;or

(d) 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 [PMK4]: Why is the carve out limited to 'gross' negligence vs just negligence?

Commented [HM5]: Gross negligence is used to be consistent with the OBCA requirement.

Commented [PMK6]: Small point, but I think this should say 'protected person' since people other than directors would be covered.

Commented [HM7]: I've changed the reference accordingly.

OPG's indemnity, with respect to clause (c) above, further provides that the Province agrees that it does not intend that any failure by a Protected Person to conduct a reasonable investigation with respect to advising the OPG about misrepresentations in any prospectus, registration statement or other securities/offering document, shall constitute "gross negligence" or "wilful misconduct" for this purposes of clause (c) above and does not disentitle the protected person from the Indemnity. This language has been included at the request of OPG in order to provide additional clarity to limit the OPG's liability with respect to carrying out any investigation of securities/offering documents.

The Indemnities would not apply with respect to losses for which coverage is provided and paid under insurance, or which are covered by another indemnityunder which the protected person is already so indemnified; 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 protected persons 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)