A proposal to create Legislation.

Fair Hydro Plan Act, 2017, if enacted

EXPLANATORY NOTE TO BE ADDED BY LEGISLATIVE COUNSEL TO ANY FINAL BILL PRIOR TO INTRODUCTION.

[Insert explanatory note.]

ELECTRICITY ACT, 1998

1. (1) Section 1 of the *Electricity Act, 1998* would be amended by adding the following clause:

[Note: GGRA provisions have been removed for now. Please confirm if they should be re-inserted.]

(2) Clause 1 (f) of the Act would be struck out and the following substituted:

(f) to protect the interests of consumers with respect to the adequacy, reliability and quality of electricity service;

(f.1) to protect the interests of consumers with respect to the prices they pay for electricity, including protection of those interests through the Hydro financing initiative;

[Note: Since the Hydro financing initiative is a defined term and is clearly required to be implemented under the new substantive provisions of the Act, I'm still not sure why this needs to be addressed in the purpose clause. However, I have included a purpose provision as per your instructions.]

Article 1 – Purpose

The proposed new legislation will likely include a large number of provisions intended to support the "financeability" of the structure. As a result, it may make sense for (LSB is exploring the potential) the Bill to create a new stand-alone energy statute, much like the *Green Energy and Green Economy Act, 2009* created the *Green Energy Act, 2009*.

The new legislation would have a purpose clause that explains the objective of intergenerational fairness. This would be useful for the markets to see, and may

help support the validity of the legislation from a constitutional law perspective (charge vs. tax)

x. Subsection 2 (1) of the Act would be amended by adding the following definitions:

"Financing Entity" means the trust established by Ontario Power Generation Inc. under clause XX (a) or the entity prescribed for the purposes of clause XX (b); ("French")

"hydro financing initiative" means those policies of the Government of Ontario related to its decision to ensure costs to Ontario electricity consumers are allocated fairly over time, taking into account the useful life of new sources of and technologies for electricity; ("French")

[Note: I have applied the precedent of the "smart metering initiative" as per your instructions. Just want to reiterate my concern that the reference to government policies is really vague (which initiative/ policies? At which point in time?) and I think this could cause lots of confusion, particularly if the policies evolve over time. It could also have unintended consequences.]

[Note: To consider -- by describing the initiative as we have in the above definition, we are potentially linking the deferred amount to amounts that would otherwise be paid for by consumers as part of the GA. If the deferred amounts are not all about "the useful life of new sources and technologies" then the description of the initiative should likely be broadened. (For example, if some of the deferred amount may be used to cover high wholesale prices, one could argue that the initiative is NOT about allocating costs fairly over time… it's just about pushing the cost increase to future consumers without considering what is "fair" across the generations.]

Article 2 - Definitions

The new legislation will include many new defined terms. One important term will be "Funding Shortfall" (or equivalent wording). This will be the net reduction in cash flows to IESO as a result of the reallocation of a portion of the Global Adjustment to later periods of time. Currently, the "Funding Shortfall" would be limited to the Global Adjustment attributable to the procurement contracts, but this is a question that still has to be settled.

Another important defined term that is worth noting is "Replacement Event". This is an event under which the market would want to replace a person who has responsibility to take essential actions under the program (including LDCs, IESO and OPG), like invoicing and collecting amounts.

The triggering events are likely to include insolvency and breach of duty/obligation.

Another key defined term is "Transition Charge". This is the amount that will be calculated and applied to the "deferral consumers", based on the amounts of payments due under funding obligations incurred to cover the funding shortfall (i.e., what we have until now been calling "deferral repayments").

Another important defined term will be "Treasury Plan". This will be the written plan prepared by OPG relating to the sale of the "regulatory asset(s)" to the OPG Financing Entity (sometimes previously referred to as the "Financing Trust") and the debt issued by the OPG Financing Entity to the markets.

Another defined term will be "True-up Amount". This is a key provision for the market. It allows for a catch-up for estimate/actual adjustments and to address consumer non-payment credit losses.

A further defined term will be "Undertaking of the Province". This will be a promise by the Government not to impair the program. This will be expected by the market, even though it will be understood that there may be issues for investors to enforce the promise, or get damages if there is a breach.

x. (1) Subsection 6 (1) of the Act would be amended by adding the following clauses:

(q.1) to enter into agreements or arrangements with the Financing Entity;

(q.2) to engage in activities related to making payments to and receiving payments from the Financing Entity under Part V.2, as required under this Act, and to engage in related settlement activities;

Note: Is some of this covered already by clause (i)? Could we address this by expanding upon clause (i)? Trying to understand whether there is any potential overlap.]

(q.3) to engage in activities related to the [sale/disposition/conveyance/assignment] of the [right/regulatory asset] created under section XX, which activities may include,

[Note: As discussed, please confirm terminology.]

(i) incurring liabilities in relation to the [right/asset];

(ii) [selling/assigning/disposing of?] the [right/asset] to the Financing Entity;

(iii) assigning [the right/asset] to third parties;

[Note: I don't understand (iii) -- I thought the rights to the asset were being assigned to the trust and nobody else?]

(q.4) acting as a recovery agent for the Financing Entity in relation to [the right/asset];

x. (1) Subsections 25.33 (1) and (2) of the Act would be repealed and the following substituted [TBD].

[Note: As per our telephone discussion today (March 27), there seems to be ongoing debate about the policy direction:

1. Do you want to <u>amend the GAM</u> so that the money received from the FE and the money recovered by the FE are part of the initial GA calculation?

2. Do you want to leave the GAM section as is and add a requirement (in a new section) for the IESO to conduct additional adjustments for a subset of the payments referred to in s. 25.33? This second adjustment would be engaged in <u>after the existing GAM</u> is calculated. So it would be a further adjustment of what has already been adjusted under the GAM.

Until this fundamental question is answered, we would be removing the proposed amendments to s. 25.33.]

OPTION 2:

Deferral adjustments, 25.33 amounts.

25.33.2 (0.1) For the purposes of this section and sections 25.34 and 25.35,

(a) "authorized entity" means **[the hydro financing trust established by Ontario Power Generation Inc. for the sole purpose of financing the recovery of the balance in the deferral account, or]** such **[other]** entity as may be prescribed by regulation;

(b) "deferral account" means the deferral account established under section 25.34;

(c) "deferral amount" means the amount recorded in the deferral account for each month during the deferral and recovery period;

(d) "deferral and recovery period" means the period from May 1, 2017 to April 30, 2047;

(e) "deferral consumer" means a consumer who is a member of a class of consumers prescribed by the regulations for the purposes of sections 25.34 and 25.35;

[NTD: This will be set out in a new subection 4(3) of O. Reg. 95/05 and will reflect OREC-eligible consumers other than non-grid connected customers of IPAs (who would not pay a GA charge anyway). Note that this is not quite the same as "RPP-eligible" consumers.]

(f) "electricity supply cost" means the amount calculated according to the formula:

$$(A + B + C + D) - E$$

where,

A is the amounts paid by the IESO to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998,*

B is the amounts paid by the IESO to entities with whom the IESO has a procurement contract, as determined under the procurement contract,

[NTD: A and B use exactly the same wording as is set out in (a) and (b) of the existing ss. 25.33(1).]

C is

[NTD: C is the "net new" costs associated with the GA deferral. These are costs that the IESO will record in the GA deferral account established under s. 25.34, and that the IESO (or its assignee) will subsequently recover. These costs consist of the interest and financing-related admin costs associated with the GA deferral (which costs will be flowed through from the hydro financing trust to the IESO). These costs do not include the principal amount deferred and recovered, since that is already captured as part of A and B.

The "net new" costs in C will be recoverable solely from a newly prescribed class of consumers - deferral consumers (i.e. those consumers who will benefit from the GA deferral). The rules for the recovery of these costs will be part of a new subsection 4(3) of the RPP Regulation.]

D is any other amounts that may be prescribed by regulation,

[NTD: Paragraph D would give us flexibility to add new cost categories by reg. if/as needed now or later.]

[GGRA-related amendments are removed for the time-being]

and

E is any other amounts that may be prescribed by regulation;

[NTD: Paragraph E would give us flexibility to add new cost categories by reg.

Question for leg counsel: If in the future HOEP were to exceed contract prices and/or regulated rates, presumably the formula would still work (i.e. in such case the amounts for A and B would simply be negative amounts)?] ***[ntd-LSB: IESO appears to agree with that idea, based on our shared appreciation of how EA s.25.33 works today.]***

(f) "reduction period" means the period commencing May 1, 2017 and ending April 30, 2018;

(g) "RPP Regulation" means Ontario Regulation 95/05 (Classes of Consumers and Determination of Rates).

Electricity pricing adjustments
Adjustments by IESO

(1) The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by such classes of market participants in Ontario as are prescribed by regulation, reflect the electricity supply cost.

Adjustments by distributors and retailers

(2) Distributors and retailers shall, through their billing systems, make adjustments in accordance with the regulations that ensure that, over time, payments by such classes of consumers in Ontario as are prescribed by regulation, reflect the electricity supply cost.

[NTD: There will be two "classes of consumers in Ontario that are prescribed" for the purposes of RPP-"plus" deferral – the EA regulation that "prescribes" these two classes will refer to (or be aligned with) the two classes as described in the RPP Regulation. 1) The first class are the deferral consumers (see definition above), and 2) the second class (or defined base consumer) will be the "proxy" Toronto Hydro consumer whose bill will only be allowed to increase year-over-year according to rules prescribed in a new s. 6.1 of the RPP Regulation.]

Variance accounts

(3) The IESO shall, in accordance with the regulations, establish and maintain such variance accounts as may be necessary to record all amounts payable or receivable by it under this section and under sections 25.34 and 25.35, in accordance with such rules and requirements as may be prescribed by regulation. *[ntd-DAN: I left "this section"*

even though this provision is part of a new s.25.33.2 – did you want "this section" to refer to "section 25.33"? If so, then we'd add this to the list we've started referencing proposed new s.25.34 and s.25.35. Consider.]

[Drafting note: We can prescribe the different variance accounts that must be maintained, and the different amounts that must be tracked and accounted for, by the IESO. Among other things, the IESO will presumably need to establish variance accounts related to the GA deferral and payback, to take into account timing and other differences. Any financing costs associated with these variance accounts (over and above the financing costs passed through to the IESO by the authorized entity (the hydro financing trust) would be subject to Board scrutiny.]

Same, distributors and retailers

(4) Distributors and retailers shall, in accordance with the regulations, establish and maintain such variance accounts as may be necessary to record all amounts payable or receivable by them under this section and under sections 25.34 and 25.35, in accordance with such rules and requirements as may be prescribed by regulation.

x. The Act would be amended by adding the following sections:

Deferral account

25.34 (1) The IESO shall establish a deferral account to record, for each month during the reduction period and the deferral and recovery period, the difference between,

(a) the amounts that would be payable by deferral consumers in respect of the electricity supply cost for the month under section 6.1 of the RPP Regulation; and

(b) the amounts payable by deferral consumers in respect of the electricity supply cost for the month under section 6.2 of the RPP Regulation.

[NTD: IESO to confirm whether the differences between (a) and (b) would be recorded monthly.

Explanatory note: The Board will determine a rate under a new s. 6.1 of the RPP Regulation that will essentially follow the same process the Board uses to establish the RPP rate, except that it will establish a rate for the deferral consumers (which is a slightly broader class than RPP consumers). The Board will also determine a "proxy" rate for the deferral consumers, calculated according to a different set of rules set out in a new s. 6.2 of the RPP Regulation. The rules in s. 6.2 will establish the "proxy" rate for a "proxy" Toronto Hydro customer consuming an average of 750 kWh/mth, to achieve an all-in tax-included total bill amount reduction of approximately 17% (the bill reduction for GA deferral + 8% OREC will result in an all-in bill reduction for May 1, 2017 – April 30, 2018 of 25% over the May 1, 2016 – April 30, 2017 period). There will be

additional rules dealing with bill increases and full repayment of the GA deferral by April 30, 2047.]

Note that because we refer to the new provisions in the RPP Regulation, we will need to amend that regulation *before* the introduction of the proposed legislative amendments. Drafting of the proposed RPP Regulation amendments is underway.

Do we need to create a parallel provision requiring distributors and retailers to establish deferral accounts as well?]

(2) The IESO shall record interest on the balance of the deferral account at a rate or rates reflecting the costs incurred by the IESO, or by any assignee under section 25.35, to finance the amounts recorded in the deferral account.

(3) The IESO shall also record in the deferral account the costs incurred by the IESO to finance the amounts recorded in the deferral account.

[NTD: This is a placeholder for what we will need here. The concept is that ss. (2) and (3) will ultimately apply to the interest and admin costs incurred by the hydro financing trust (assignee of the right of recovery under s. 25.35) in providing funds to the IESO to finance the GA deferral. Those interest costs and admin costs will be fully recoverable through section 25.35, subject to Board scrutiny presumably limited to verifying the calculations. This is not intended to address interest and costs incurred by the IESO and recorded in the variance accounts established under ss. 25.33(5).]

Recovery of GA deferral amounts

25.35 (1) The IESO shall have the right to fully recover the balance recorded in the deferral account. **[The Board shall authorize?]** recovery of the balance from the deferral consumers over the deferral recovery period in accordance with the prescribed rules.

[NTD: What role should the Board play in determining the amounts recovered each year (within the smoothing parameters that are prescribed)? For e.g., could the Board set rates such that the year-over-year increase in the proxy Toronto Hydro customer's all-in bill was less than the maximum permitted under the prescribed rules?

The prescribed rules will be set out in the new s. 6.2 of the RPP Regulation, which will determine how much the "proxy" Toronto Hydro customer's monthly average bill can increase year-over-year (after the reduction period). Basically, for the first four years after the reduction period, the increase will be limited to CPI. For the balance of the deferral and recovery period, the increases will be limited to 10%, with an overarching requirement that the deferral amounts be fully repaid by April 30, 2047.]

Assignment of right of recovery

(2) The IESO shall have the right to assign**[, in whole or in part?,]** to **[one or more?]** authorized entities, the IESO's rights under subsection (1).

[NTD: This is largely a placeholder for what needs to be addressed here. We will need to determine how to characterize this transaction. For e.g., will it be an outright assignment? Will it be a series of assignments? Should it be characterized as a "sale"? How will this transaction be implemented – e.g. by way of a contract between the IESO and the Trust? We will need the input of external counsel and others to ensure that it adequately supports the contemplated financings.]

Payments to assignee

(3) In the event of an assignment to an authorized entity under subsection (2), the IESO shall, through its billing and settlement systems, make payments to the authorized entity of the full amounts paid to the IESO in respect of the rights assigned.

[NTD: This is largely a placeholder for what needs to be addressed here. Iin addition to requiring IESO to make payments to the authorized entity, do we need to include explicit provisions giving the assignee the right to recover the amounts in the deferral account that are covered by the assignment?

We will need provisions dealing with billing and payment as between the authorized entity and IESO. We will also have to decide whether the interest and admin costs incurred by the authorized entity will simply be passed through to IESO, or whether the authorized entity (or OPG) will have an opportunity to keep any profits made on financing activities (swaps, etc.) by establishing some sort of "reference rate" that IESO would have to pay (and that might be different than the rate(s) the authorized entity would have to pay). A middle ground that could be considered would be to cap the amount of profits the authorized entity (or OPG) could make.

Along similar lines, the amounts charged by OPG to the authorized entity to provide admin services should be subject to Board review (e.g. for reasonableness). This would not jeopardize the ability of the authorized entity to recover all of its costs (since it would affect the amounts OPG could recover from the authorized entity).

We also need to contemplate a provision that if there is a change of law by the Government of Ontario that materially adversely affects the ability of the authorized entity to fully recover the assigned deferral account amounts, then repayment of those amounts will be accelerated and become immediately due and payable.]

x. The Act would be amended by adding the following provisions after s.29:

Transition Charges -- Ratepayer Obligation to Pay a Transition Charge

s.29.0.1 (1) **Each consumer in the class of ratepayers to which this program applies (previously referred to as the “deferral consumers”) will have a direct statutory obligation to the OPG Financing Entity to pay its share of the deferral repayments (principal, interest, financing costs).**

Indebtedness of Ratepayers –

(2) This will be a debt owed by the consumer directly to the OPG Financing Entity. If it is not paid, the OPG Financing Entity can sue the consumer directly through the agreed procedures. This is identifying an explicit and identifiable revenue stream for the comfort of investors.

Separate tracking - distributors,

(3) This debt is separate from the debt owed by the consumer to its LDC, although the LDC will be the collection agent.

No set-off, etc. ***[see similar provision at EA s.29.0.3(2)]***

(4) This debt cannot be netted out against any amount owed by the LDC to the consumer (e.g. year-end credit to consumer on equal monthly billing).

Allocation of Ratepayer Payments

(5) If a consumer pays less than its total invoiced amount, the payment will be allocated pro rata between the deferral repayment and the amounts owing to the LDC.

Transition Charges are Irrevocable

(6). This is intended to prohibit any reversal of amounts that must be paid to meet the terms and conditions of the funding obligations to be incurred under the program.

> **The deferral repayments are due regardless of whether a financing obligation incurred under the treasury plan is consistent with government policy at the time a related payment obligation arises.**
>
> **If the Fair Allocation Plan is amended after a funding obligation is properly incurred, any inconsistency in the payment profile will not impair the existing funding obligation or the pass-through of related payment amounts as Transition Charges.**

Anti-avoidance; No-by-pass

(7) The idea here tracks the U.S. transactions, which say that the obligation of a consumer to pay Transition Charges cannot be “by-passed”. If a consumer leaves

the grid, he or she will still be obligated. See the highlighted text in the definition of "Ratepayer" for a sense of how this may be accomplished.

> **This concept is a key to a rated market financing and will need to be developed further.**
>
> **For example, self-generating customers could be charged a flat fee (for example, equal to the amount that would be payable by the "representative" Toronto Hydro customer that underpins the current government policy on the 25% or some other basis.)**

Distributor, agent for Financing Entity,

s.29.0.2(1) LDC is agent for the OPG Financing Entity. LDC must invoice the deferral consumer the deferral repayment amount - referable to the items described in "Finance Amount" (i.e., an amount already borrowed).

IESO - Calculation of the Period Transition Charge

(2) IESO will calculate the total amount of deferral financing that will be repayable in an applicable [e.g. 6 month] period.

(3) IESO will then determine the deferral repayments due from deferral consumers based on a prescribed methodology for allocating payments to individual deferral consumers.

Notice of Transition Charges, IESO to distributors

(4) IESO will then inform each LDC of the amount of the deferral repayments to be included in the invoices issued to each deferral consumer in the LDC's service territory.

Adjustments *[ntd: Consider – Deferral repayment amount final]*

(5) Deferral consumers cannot challenge the amount of the deferral repayment showing on their invoice unless there is a substantial calculation error.

Successors of Electricity Distributors –

(6) Any successor of an LDC will be bound by the same obligations as the original LDC re: billing and collecting deferral repayments.

Successors of IESO –

(7) Any successor of the IESO will be bound by the same obligations as the original IES re: billing and collecting deferral repayments from distributors *[ntd-LSB: what about from consumers?]*.

Appointment of an Alternative Invoicing Agent *[NTD – this provision may be moved closer to the powers/authorities of the OPG financing entity.]*

(8) If a "replacement event" (as defined in any payment obligation incurred to fund a deferral) occurs in respect of an LDC, the OPG Financing Entity can appoint someone else as the OPG Financing Entity's agent to collect deferral repayments. The LDC must sign whatever agreements and assignments are needed to enable the replacement agent to collect the deferral repayments from the LDC's deferral consumers.

Regulatory Asset Owner has Standing

(9) The OPG Financing Entity (or investors through their security) will be able to sue LDCs for failing to properly calculate or invoice the financing repayments.

29.0.3 Collections and Remittances [Collecting and Remitting Deferral Repayments]

(1) If a "replacement event" (as defined in any payment obligation incurred to fund a deferral) occurs in respect of an LDC or the IESO, the OPG Financing Entity can appoint someone else as the OPG Financing Entity's agent to collect and remit deferral repayments. The LDC (or IESO, as applicable) must sign whatever agreements and assignments are needed to enable the replacement agent to collect and remit the deferral repayments. "Replacement Events" are necessary to investors to safeguard against a person holding money in a distressed circumstance.

No Set-off, etc. *[see similar provision at EA s.29.0.1(3)]*

(2) The deferral repayments cannot be netted out against any amounts owed by the party responsible for collecting those repayments.

Sequestration,

(3) If any LDC or the IESO fails to remit deferral repayments, the OPG Financing Entity can get a court to order the LDC (or IESO, as applicable) to require them do so.

x. Subsection 53.1 (1) of the Act would be repealed and the following substituted:

Objects of Ontario Power Generation Inc.

53.1 (1) The objects of Ontario Power Generation Inc. include, in addition to any other objects, the following:

[Note: I know that the words "in addition to any other objects" appears in the current provision, but it seems very odd. This suggests that the objects are unlimited, which doesn't seem to be the intention but I could be wrong.]

1. Owning and operating generation facilities.

2. Establishing, operating and supervising the activities of entities for the purposes of supporting and promoting the government's hydro financing initiative.

3. Providing financial and other support to the IESO in its activities in relation to the hydro financing initiative.

4. Engaging in such financing, borrowing, lending and related activities and transactions to support the IESO with short-term or long-term financing.

5. Providing equity, not exceeding the prescribed amount, to support the financing capacity of the Financing Entity.

Subsidiaries

(1.1) Ontario Power Generation Inc. may create one or more subsidiaries in order to more efficiently conduct its activities or achieve its objects.

x. Section 53.2 of the Act would be repealed and the following substituted:

Rights of the Minister[1]

53.2 (1) The Minister, on behalf of Her Majesty in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Ontario Power Generation Inc. or any of its subsidiaries.

Agreements

(2) The Minister, on behalf of Her Majesty in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1).

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[1] FLS - this provision is based on s. 49 of the Act

x. The Act would be amended by adding the following Part:

PART V.2
HYDRO FINANCING INITIATIVE

FAIR HYDRO FINANCING PLAN

Establishment and adoption of the Fair Allocation Plan

A. 1 (1) The Minister of Energy [may/shall] establish a "fair allocation plan"

(a) The purpose of the plan is generally to try and reallocate the portion of GA attributable to the procurement contracts over the anticipated useful life of the generation assets under those contracts.

- **This is the intergenerational funding of the Green Generation Initiaitves.**
- **One policy question is whether the amounts deferred and the period over which the deferred amounts are repaid are to be limited to the portion of GA attributable to the procurement contracts and to the anticipated useful life of the [renewable] generation assets under those contracts.**

- From a constitutional validity perspective (and hence a financeability perspective) these limits are very important.

-Financial/economic modelling to verify this link is required.

Principles and Parameters,

(2) Based on this initial description (which is only illustrative to advance the initial stakeholder discussion), the Minister would determine the details of the "fair allocation plan", but must take into consideration the following principles:

- **The deferred GA costs should be spread over a period not exceeding the anticipated remaining useful life of the generation assets under the procurement contracts**
- **The plan should specify the length of the "reference periods", to identify which deferral consumers are responsible for which deferral repayments**
- **The share of the deferral repayments to be allocated to deferral consumers in each "reference period" should reflect a reasonable assessment of the remaining anticipated useful life of the generation**

assets under procurement contracts and perhaps to the benefits received by those deferral consumers from the procurement contracts (e.g. transition off coal)]

- **No deferral consumer group should bear an unreasonably disproportionate share of the deferral repayments. That could be limited to a maximum amount, determined on a formula basis, if it makes sense tot he stakeholders**

- **In making the allocations, real (i.e. inflation-adjusted) dollars should be usedThe fair allocation plan is made using forward-looking information and projections.**

- **If, after the fact, the Minister determines that a Ratepayer Group paid more than would otherwise would have been the case had the projections for such period been accurate or other considerations come to light, adjustments to the plan could be made.**

Attribution Methodology

(3) The program will need to define how deferral consumers will be allocated an appropriate share of aggregate adjustment amount.

Confirmation][Review] of the Fair Allocation Plan – [OEB?]

Confirmation][Review] of the Fair Allocation Plan – [OEB?]

(4) Consideration will be needed regarding the level of review and confirmation of the plan is needed or appropriate. For example, should the scope of review be limited to calculations only? If there is a need for review, then consideration will be needed as to who will be the reviewer and under what authority, etc.

THE TREASURY PLAN

Power to Prepare and Implement the Treasury Plan –

A.2 (1) The "Treasury Plan" will be prepared by OPG. It must follow the requirements set out in this Part. Accounting considerations will need to be factored into this delegation, as well as the degree of province input initially and on an on-going basis. [Note for leg counsel: We will need to create the necessary sub-delegation authority]

Required Terms and Conditions of the Treasury Plan

(2) The Treasury Plan will establish the basis for OPG making funding decisions, which will need to align with the Fair Allocation Plan.

Power to Review and Approve the Treasury Plan

(3) The Minister may designate one or more persons to review, and require changes to the Treasury Plan. (This review could also be given to the Minister.) *[NTD-: Assumin no role for OEB – confirm. Any role for MOF/OFA here?]*

Obligation to Apply IESO Remittances,

(4) OPG will need to ensure that pass-through amounts, transferred to it as agent for the OPG Financing Entity, are only used to repay the debt and related costs.

Non-Recourse,

(5) The Treasury Plan will provide that the investors and other contracting parties will not have recourse to the IESO, LDCs, agents, the OEB or the Province, except where such parties fail to comply with applicable law. This may be modified in the contracts under which a financing arises.

> NOTE: The documentation creating the Funding Obligations must expressly state that such obligations are not guaranteed by the Province.
>
> NOTE: See IESO/Stikeman's language for "Regulatory Asset" above.

Incurrences are Binding,

(6) A failure to implement the Treasury Plan will not impair the pass-through of the deferral amounts or the validity of an otherwise valid funding obligation.

- NOTE: Separate from the legislative provisions, we will also be preparing a very rough sketch of some of the items that might be included in the Treasury Plan direction.
- The sketch will be for illustration purposes only and will be for use in discussions with stakeholders including OPG and IESO.

Crown bound, actions prohibited,

A.3 (1) No Action to limit, alter, or impair or terminate Transition Charges, the Regulatory Asset or Collections – *[NTD: alternative -* Crown bound, prohibition against discriminatory action.

(2) The Province will be prohibited from taking or permitting any action to limit, alter, or impair or terminate Transition Charges, the Regulatory Asset or collections.

Undertaking and Agreement

(3) Under this Undertaking, the Province will agree for the benefit the OPG Financing Entity that it will not impair the value of the Regulatory Asset or the Transition Charges imposed under this Part. This "pledge" is in line with market expectations. Enforcement issues arise in this sort of undertaking, which will be assessed by the market and rating agencies based on the likelihood that a failure by the Province would lead to a successful damages claim. Unlike in the U.S., the law regarding such a claim is uncertain. Nevertheless, we expect that this sort of Undertaking will be requested in the legislation itself (i.e., requiring an act of the legislature to disavow – which is a higher bar than simply walking away from a contractual undertaking.

[Note: TBD where to place this Part within the Act and how to structure this Part. Temporary number (e.g. A1, A2, A3 etc.) has been used for now.]

FINANCING ENTITY

Financing Entity, established or prescribed

A1. (1) For the purpose of accomplishing the hydro financing initiative, the Minister may,

(a) direct Ontario Power Generation Inc. to establish and operate a trust; or

(b) direct Ontario Power Generation Inc. to [oversee? Administer?] an entity prescribed by the regulations.

[Note: Would the direction of the Minister include any additional instructions re timing etc.?]

Duty of Ontario Power Generation Inc.

(2) Ontario Power Generation Inc. shall comply with the direction of the Minister.

[Note: Once OPG takes action under A1 in accordance with the Minister's direction, what happens if at some point in the future, the Minister wants a different entity to take over the role of the FE? Is this a concern that needs to be addressed?]

Object of Financing Entity

A2. (1) The object of the Financing Entity is to finance the amounts required to accomplish the hydro financing initiative.

[Note: We are imposing several obligations on the Financing Entity (FE). As a practical matter, how will these obligations be enforced? Who will be responsible for meeting these obligations? (e.g. would there be directors or officers of the trust?). Or will the OPG be responsible for meeting these obligations as the body that establishes/manages the trust or oversees the designated entity?]

Activities

(2) To achieve the object, the Financing Entity shall engage in the following activities:
[Note: Just want to confirm that this should be "shall" and not "may".]

1. Borrowing funds from the Financial Corporation or from such other persons or entities [as may be prescribed?].

2. Investing funds.

3. Making payments and loans to the IESO or such other entity as may be prescribed in accordance with the regulations [or an order of the Board].

[Note: I think it would be best to specify whether the rules would be set out in a reg or in a Board order to avoid confusion.]
[Note: Should the "loans" language be removed, since you noted that the IESO is not "borrowing" from the FE?]

4. Receiving payments from the IESO or such other person or entity as may be prescribed in accordance with the regulations.

5. Issuing securities or debt ***[in the manner prescribed?].***

6. Engaging in any activities, including entering into such transactions, agreements or arrangements as may be prescribed and in accordance with the regulations.

Board review of expenditures, etc.

A3. (1) The Financing Entity shall, at least 60 days after the end of each fiscal year, submit its expenditures relating to its operations for the fiscal year including the expenses it has charged to Ontario Power Generation Inc. or the IESO, or that it has been charged by the Financial Corporation, in relation to those operations, to the Board for review.
[Note: The list of items that have to be reported on could be more prescriptive (e.g. specifying specific amounts to be set out) or it could also allow for the Board to specify

what it wants to see in the report. Let me know if you'd like to adjust the wording of the requirement.]

Board recommendations, etc.

(2) The Board may review the expenditures and charges referred to in subsection (1) and make recommendations to the Financing Entity as are appropriate in order to ensure the most efficient operation and management of the Financing Entity in order to protect consumers.

[Note: Rather than saying "in order to protect consumers", should this say "in order to achieve the object of the FE"? Or perhaps this could just be deleted altogether with no need for replacement language.]

Deemed assets, entity,

A4. Despite any other provision of this Act or the *Business Corporations Act,* the assets and liabilities which are resident in and form part of the property of the Financing Entity shall not form part of the assets and liabilities of Ontario Power Generation Inc. or any of its subsidiaries for any purpose.

[Note: You posed a question about excluding an OPG subsidiary from this rule. Please instruct.]

OBTAINING FINANCING

[Note: It will be important to read all of the provisions that follow against the provisions in the existing Act, to ensure there is no overlap/confusion being created due to potential interactions between existing authority and new authority. The drafting focus so far has just been to get the relevant substantive provisions into the draft without evaluating how they fit into the broader scheme of the Act.]

Ontario Power Generation Inc. to obtain financing

A5. (1) The IESO may direct Ontario Power Generation Inc. to cause the Financing Entity to engage in any of the following activities in order to accomplish the hydro financing initiative:

[Note: As a practical matter, how would OPG "cause the FE" to do these things? How is this different from "directing"?]

1. Financing, borrowing or lending to provide the IESO with short-term or long-term financing.

2. [Purchasing/receiving/obtaining the right created under section XX] and making any payments to the IESO that relate to the IESO's activities in support of the hydro financing initiative.

[Note: Not sure if the regulated assets would always be "purchased" or if other terminology might be needed. Please advise.]

3. Collecting from the IESO amounts that the IESO is required to pay in relation to its activities in support of the hydro financing initiative.

4. Assigning its [the IESO's?] rights to all or part of the regulatory assets established under section XXXX.

[Note: What is para. 4 about? If this is about forcing OPG to make the FE do things, then does this belong in the list? I thought that it was only the IESO that would be assigning the rights to the FE]

5. Such other activities as may be prescribed.

Same

(2) Ontario Power Generation Inc. shall comply with a direction under subsection (1) within the time specified in the direction [and any prescribed rules?].

IESO to enter into transactions

A6. (1) The IESO shall, in order to support the achievement of the hydro financing initiative, enter into transactions with the Financing Entity or any other entity for such amounts as are necessary to support the hydro financing initiative.

[Note: My understanding is that the need for "or any other entity" stems from the need to allow for the IESO to obtain temporary financing in the immediate term, before it is able to access the FE. Do you want to narrow this so that the IESO is only authorized to do this before the FE is up and running? Or do you want to keep it available on an ongoing basis?]

Same

(2) In entering into transactions under subsection (1), the IESO shall comply with the regulations.

RIGHT OF RECOVERY [CREATION OF REGULATORY ASSET]

[Note re the following provisions:
I found a provision dealing with the concept of "regulatory asset" in Bill 210 from 2002 (see s. 79.13 of the OEBA). It deems certain things to be regulatory assets but does not say much more. On the phone, you noted that the term "regulatory asset" does not have any legal meaning on its own but is just an accounting term that has been used to describe the statutorily created right of recovery. However, you also said that there may be a need to use this term in order to convey the intended meaning from an accounting perspective.

In order to ensure that the drafting captures the policy intent, please answer/address the following questions:

1. Should we be creating a statutory right of recovery or deeming certain amounts to be a regulatory asset? [NTD-LSB: Yes. The term "Regulatory Asset" has currency in commercial law (parliance) and since much of what we're doing is to support a securitization model, the term should remain for now. Further, the term "regulatory asset" was consistently referred to in the documents provided to ENERGY LSB by Blakes. Further, IESO/Stikemans offered up alternative language for the creation of a "regulatory asset" (as an intangible asset of sorts). You said you'd consult on whether the regulatory asset terminology is important to flag in the Bill.

2. You said you're not sure whether or not the Act will require the IESO to sell/assign the right. Please instruct. If it is optional for the IESO to sell/assign, then it seems that the right could in theory remain with the IESO (unless you are saying that the statute can just create the right of the FE to recover without any need for the right to be assigned/sold by the IESO… in which case please explain why we need to deal with the sale/assignment at all). Please clarify.

3. I'm assuming that if we are creating a right, then the right must be held by someone (e.g. the IESO) before it can be assigned/sold? So should the right be created in the Act for the IESO (e.g. the IESO has a right to recover the amounts from distributors and prescribed consumers) since the IESO would then sell/assign/transfer the right to the FE? The FE must also have the right to recover from the IESO itself, so that creates an extra complication.

4. Should there be some indication of when the right of recovery/regulatory assets will no longer continue to exist (e.g. once all of the amounts have been paid?). I notice that your instructions below about the debt indicate that the debt is no longer owing once the amounts are paid, but do we need to indicate that the regulatory asset also ceases to exist at that point?

Right of recovery created

A7. A right to recover the following amounts in full from the IESO, distributors and prescribed consumers is created.

1. The [deferred amount].

2. The amounts of costs relating to the operation or management of the Financing Entity, as are approved by the Board.

[Note: How will the Board be approving these costs? Is this related to the expenditure report submitted to the Board? That provision dealing with Board expenditures doesn't refer to any approval taking place… just a review and recommendations.]
[Note: Need to mention expenditures?]

3. Other amounts as may be prescribed or as may be approved by the Board.

Note: Are you going to be saying anything about how the interest will be calculated?

Sale [and/or?] assignment of [right? Regulatory assets?]

A8. (1) The IESO [may? Shall?], in accordance with the regulations, sell [and/or?] convey to the Financing Entity the right to recovery created established under section A7 on such terms and conditions as are provided for by the Financing Entity.

[Note: Your instructions include the terms “sell”, “assign” and “convey” -- which are correct?]

[Note: Your instructions suggested that something other than the “regulatory assets” may need to be assigned to the FE. Are you referring to the “warehousing” liabilities assumed by the IESO in the early days? What else would need to be assigned? Could these items be listed above in A7 or is there a reason why they need to be kept separate?]

Sale deemed final

(2) The sale and conveyance referred to in subsection (1) is deemed to be final for all purposes.

[Note: What is this intended to achieve? Is this based on precedent language that has been interpreted to have the desired effect?]

Debts

(3) For greater certainty, the [amounts to which the FE has a right of recovery] are debts owing by the IESO, distributors and prescribed consumers to the Financial Entity until the amounts have been fully paid and fully discharged.

[Note: Why is subs. (3) necessary? Isn’t it inherent in the sale of the regulatory assets that the FE would have acquired the future right to collect these amounts? Perhaps it is unclear that the amount can be collected from not just the IESO but from others down the chain. But isn’t that what the “right of recovery” section above is meant to cover?]

[Note: I haven’t checked to see how other similar provisions dealing with debts are drafted. Not sure we need the “for greater certainty” and also not sure what the distinction is between “fully paid” and “fully discharged”. This provision will need further consideration. You also noted that you may want to specify who determines when all obligations have been satisfied.]

IESO to recover amounts

A9. The IESO shall recover the amounts set out in section A7 from distributors and prescribed consumers, in accordance with […]:

Note: how are the requirements that would determine recovery for this subsection meant to interact with the GAM reg?

[Note: The following two subsections are placeholders. You noted that *the provision is going to have to evolve to deal with consumers who exit the grid (disconnect) completely either because they leave the province or they decide to generate their own electricity* *and completely disconnect. You also want to be able to prescribe* methods of ensuring that the amounts required cannot be "by-passed". I'll need to understand what is meant by "by-passed".]

Distributors liable

(x) The IESO and distributors are entitled to compensation for any shortfall in relation to the amounts the IESO must pay to generators, the Financial Corporation or other persons including prescribed persons, under section 25.33 resulting from the IESO's activities under the hydro financing initiative.

Consumers liable

(X) Prescribed consumers are required to contribute towards the amount of any compensation referred to in subsection (4) in accordance with the amounts and methods prescribed by the regulations and such amounts shall not be by-passed.

USE OF FUNDS TO REDUCE ELECTRICITY BILLS

[Note: Depending on how things land with s. 25.33, this might be a place to explain how the transactions between the IESO and the FE translate into reduction in the electricity bills of RPP consumers. Regulations could specify how the IESO would ensure that the short-term rate reductions that flow from the FE amounts are only received by the targeted class of consumers and that this same class of consumers is the only class responsible for the repayment of FE funds in the long-term.]

ALTERNATIVE LANGUAGE – REGULATORY ASSET -- PROPOSED BY IESO (STIKEMANS)

Regulatory Asset Created

A7. (1) There is hereby created and conferred upon the IESO a "Regulatory Asset" consisting of the right to recover, in addition to the amounts otherwise recoverable, in accordance with the Regulations, the aggregate of the following amounts [from distributors and] prescribed consumers. **[Quare: do we regard the Regulatory Asset as a single asset in a variable amount or as different assets arising on each deferral]:**

1. The [deferred amount, including interest accrued thereon].
2. The amounts of costs relating to the operation or management of the Financing Entity, as are approved by the Board.
3. Other amounts as may be prescribed or as may be approved by the Board.

(2) The Regulatory Asset created by (1), shall constitute, for all purposes, a property right, shall be transferable by the IESO in accordance with Section A8, and shall constitute an intangible in which a security interest can be created for purposes of the *Personal Property Security Act*.

Election to Transfer Regulatory Asset

A8. (1) The IESO shall, from time to time, in accordance with the Regulations, elect to transfer to the Financing Entity all or any portion of the Regulatory Asset, on such terms and conditions as IESO may determine.

(2) Upon any election by the IESO pursuant to (1), the Financing Entity shall pay to the IESO in respect of the Regulatory Asset, or the portion thereof in respect of which the election was made, an amount, not less than the Deferred Amount, determined in accordance with the Regulations.

(3) Upon any election by the IESO pursuant to (1), the Financing Entity shall become the person entitled to the benefit of the Regulatory Asset, or the portion thereof in respect of which the election was made, free and clear of any adverse claim (other than any such claim created by the Financing Entity) and shall be entitled to exercise all of the rights and remedies conferred by or arising in respect of the Regulatory Asset, or the portion thereof in respect of which the election was made, and the IESO shall cease to have any rights (except as provided in Section A9) to or in respect of the Regulatory Asset, or the portion thereof in respect of which the election was made, all as if the Regulatory Asset, or the portion thereof in respect of which the election was made, had originally been conferred upon the Financing Entity and not the IESO.

(4) Upon any election by the IESO pursuant to (1), the IESO shall have no further rights or obligations in respect of the Regulatory Asset, or the portion thereof in respect of which the election was made, and the Regulatory Asset, or the portion thereof in respect of which the election was made, shall not form part of the assets and liabilities of IESO for any purpose.

(5) The LG in Council may adopt regulations providing for the circumstances in which IESO shall make the election or elections provided for in (1).

Financing Entity may Grant Security Interest

A9. (1) The Financing Entity may, at any time after an election referred to in Section A8(1), create a security interest in favour of any person in all or any portion of the Regulatory Asset subject to such election, all on such terms and conditions as the Financing Entity may determine.

(2) Except as provided for in Regulations adopted pursuant to (3*), The Personal Property Security Act* shall apply to any security interest created pursuant to (1), except that the rights of the secured party on default shall be limited to receiving the amounts collected in respect of the Regulatory Asset, or the portion thereof subject to the security interest, as and when collected by the IESO in accordance with A10.

(3) The LG in Council may adopt regulations providing for the terms on which the security interest provided for in (1) can be created and perfected and for the priority of any such security interest.

IESO to Collect Amounts in Respect of the Regulatory Asset

A10. Subsequent to any election pursuant to Section A8, the IESO shall, as agent on behalf of the Financing Entity and any secured party, use reasonable efforts to collect the amounts owing in respect of the Regulatory Asset, or the portion thereof in respect of which the election was made, and shall promptly pay over to the Financing Entity or the secured party the amounts collected.

--------END OF IESO/BLAKES ALTERNATIVE LANGUAGE FOR REG. ASSET ---

------- BLAKES VERSION OF LANGUAGE FOR REGULATORY ASSET

The Regulatory Asset, Composition,

A7(1) The "regulatory asset" consists of the following:

- **present and future statutory obligation of:**
  - **deferral consumers - to make all deferral repayments (including interest and late payment fees)**
  - **LDCs - to invoice the deferral consumers for the deferral repayments and to remit the amounts collected to the IESO**
  - **IESO - to receive and remit the deferral repayments from LDCs to the OPG Financing Entity**
- **All deferral repayment amounts collected**
- **All amounts in LDC or IESO deferral payment bank accounts**

Validity of Dispositions
(2) This section is reinforcing by statute the "sale" of the asset to the Financing Entity. This has been an important feature of the legislation in other jurisdictions in similar circumstances. Specifically, it says that "Dispositions" of the Regulatory Asset are "true sales", and not subject to challenge. This is an essential requirement for a securitization transaction. This provision identifies possible grounds for a challenge that a sale took place and indicates that those events do not affect the validity of the sale.

Deemed Perfection and Priority of Dispositions
(3) This is reinforcing the automatic nature of the "sale" of the asset. It Provides for a clean sale to the OPG Financing Entity, free and clear of encumbrances (i.e., no specific need to "perfect" the sale.

Validity of Pledges,
(4) Statutory override permitting the OPG Financing Entity to give a security interest in the "regulatory asset" to investors.

This would give the investors (through an indenture) the right to enforce collection of the deferral repayments to pay off amounts owed by the OPG Financing Entity to the investors upon certain defaults by the OPG Financing Entity under an indenture.

Deemed Perfection and Priority of Pledges

(5) This is reinforcing that a commercial pledge given by OPG Financing Entity is valid and will have priority without specific "perfection". The result is that a pledge of the Regulatory Asset as security in accordance with the Treasury Plan will be given priority to other claims. The Pledge includes proceeds from the Regulatory Asset and is not affected by comingling or the ordinary requirement to file a financing statement under the PPSA.

Enforcement of Property Rights –

(6) The rights of any Regulatory Asset Owner to collect and enforce its rights and interests in, to or in respect of the Regulatory Asset shall be exercised in the manner set forth in Article 5. *[ntd-: NOT an annotation – pulled directly from Blakes' document.]*

Collective Action Required –

(7) This anticipates that the Regulatory Asset will be structured as a variable interest that can be divided between IESO (until it sells) and one or more OPG Financing Entitys. The likely format will be a co-ownership agreement, that will allow for different owners to have a fractional undivided ownership interest in the Regulatory Asset. Those will entitle the owners to a specified share of the cash flows, which will correspond to their finance payment obligations. This will allow for future financing flexibility.

MISCELLANEOUS

Fair Hydro Financing Plan, miscellaneous,

A.8 (1) Consideration will be given to whether any additional 'miscellaneous' provisions are needed (and expected by the market) to support the financing of this structure. Some of these provisions are not typical in legislation, and so will need further consideration (in consultation with leg counsel).

Regulations

114(1.5) The LGIC may make regulations to implement the Fair Hydro Financing Initiative

-(a) The power to implement the program (and to set out some of the details of the program) through regulations is important. Decisions remain to be made (once the drafting is a little further advanced) about what provisions/details need to appear in the proposed legislation, and what provisions/details can be set out in regulations.

ONTARIO ENERGY BOARD ACT, 1998

x. Subsection 1 (1) of the *Ontario Energy Board Act, 1998* would be amended by adding the following paragraph:

6. To facilitate the implementation of the [hydro financing initiative].

[Note: Would need to link with definition in the EA or else spell out the definition here - TBD.]

x. Section 27.1 of the Act would be amended by adding the following paragraph:

Hearings

(1.1) A directive may specify whether the Board is to hold a hearing, the circumstances under which a hearing may or may not be held and, if a hearing is to be held, the type of hearing to be held <u>and the time within which it must be held</u>.

The underlined is what makes this different from the other provisions in the Act that basically have the same wording. There are already a number of places in the Act where you have this type of hearings provision re directives (e.g., s. 27.2 (7)). If you basically want the same authority in each instance, then the wording should be consistent in each case. There are already some discrepancies between the current provisions (e.g., s. 27.2 (7) talks about types of hearings, whereas s. 28 (2) doesn't). Differences in wording will typically be presumed to be differences in meaning. So, the question is what you're intending to authorize in each case, and whether differences are intended. If you want the same thing everywhere, it should all be worded the same. Let me know.

[Note: Waiting for confirmation whether amendments to s. 78.7 are needed. Please advise.]

x. Section 78 of the Act would be amended by adding the following subsection after subsection (3.0.5):

Rates, fair hydro financing initiative activities -IESO, OPG, distributors, etc.
(3.0.6) The OEB would not be precluded from taking into account the performance of duties under this Part by any entity regulated by the OEB, including fees received by such entity in excess of the incremental costs of the provision of such services.

x. Section 79.16 (3) of the Act would be repealed and the following substituted:

Adjustment to eliminate variances

(3) In determining rates under clause (1) (b), the Board shall take into account balances in variance accounts established under section 25.33 of the *Electricity Act, 1998* and, subject to section X of that Act, make adjustments with a view to eliminating those balances within 12 months or such shorter time periods as the Minister may direct. [Note: Please let me know what section the highlighted portion is supposed to refer to… is it the provision that says the IESO has the 30 year period to pay off the amount in the variance account for the hydro financing initiative? I wonder if this is confusing and whether the amendment to subs. (3) above works… it almost seems unnecessary to say that the Board has to "take into account" this balance, given that we are setting up a bunch of very specific rules about what has to be done by various entities in order to eliminate this amount. What would the Board be expected to do with information about this variance account? For consideration.]

PART VII.3

COMPLIANCE – FAIR HYDRO FINANCING INITIATIVE

Right of the [OEB] to Inspect Books and Records,

113 (1) OEB may be given the power to investigate compliance with the legislation and the power to examine books and records, etc.

Power to Investigate Compliance and Impose Regulatory Sanctions

(2) This legislation will not limit the OEB's power to investigate compliance or prevent or preclude the OEB's power to impose sanctions. The OEB can investigate compliance with this part and to impose regulatory sanctions for non-compliance.

Limitation, Board,

(2.1) The OEB cannot, however, take any action to affect the irrevocability of the Transition Charges or the Undertaking of the Province.

Timing – this proposal for legislation would, if approved by the Legislature, come into force on a date to be established by Government.