RE: Fair Hydro -- Change of Law Assumption Agreement

From: "Mansoori, Nina" <nmansoori@torys.com>
To: "Whitfield, Tobias P. (MOF)" <tobias.whitfield@ontario.ca>
Cc: LEE John -TREASURY <john.s.lee@opg.com>, RYFA Ken -TREASURY <ken.ryfa@opg.com>, WONG Leslie -LAWDIV <leslie.wong@opg.com>, "Ramchandani, Rima" <rramchandani@torys.com>, "Feldman, Michael" <mfeldman@torys.com>, "Olusoga, Yinka" <yolusoga@torys.com>, "Donaldson, Mark (TBS)" <mark.donaldson@ontario.ca>, "Manning, Mike (OFA)" <mike.manning@ofina.on.ca>, "Mayman, Gadi (OFA)" <gadi.mayman@ofina.on.ca>, "Kwan, Ronald (OFA)" <ronald.kwan@ofina.on.ca>, "Kandeepan, Ken (OFA)" <ken.kandeepan@ofina.on.ca>, "Nelms, Scott (MOF)" <scott.nelms@ontario.ca>, "Devine, James (OFA)" <james.devine@ofina.on.ca>, "Yep, Carlos (OFA)" <carlos.yep@ofina.on.ca>, "Strathy, Anna (OFA)" <anna.strathy@ofina.on.ca>, "Cengarle, John (MOF)" <john.cengarle@ontario.ca>, "Kwan, Ronald (OFA)" <ronald.kwan@ofina.on.ca>, "Katona, Keley (MOF)" <keley.katona@ontario.ca>, "He, Gavin (OFA)" <gavin.he@ofina.on.ca>, "Hirani, Anis (OFA)" <anis.hirani@ofina.on.ca>, "Kim, John (OFA)" <john.kim@ofina.on.ca>, "Veinot, Cindy (TBS)" <cindy.veinot@ontario.ca>, "Hanslep, Malle (MOF)" <malle.hanslep@ontario.ca>, "Thouin, Alena (ENERGY)" <alena.thouin@ontario.ca>, "McKinlay, Tom (MAG)" <tom.mckinlay@ontario.ca>, stephen.ashbourne@blakes.com, LADAK Lubna -TREASURY <lubna.ladak@opg.com>
Date: Fri, 06 Oct 2017 17:58:12 -0400
Attachments: Fair Hydro -- Change of Law Assumption Agreement.msg (59.39 kB)

Toby,

Thank you for your draft proposal; we have set out below our conceptual comments and concerns on it. Please note that the points below remain subject to the continuing review of OPG. Please also note that we have not yet sought the dealers' views on the proposal. We think it is premature to do so until we settle these points amongst ourselves and a revised draft of the proposal is circulated reflecting our agreement.

As further discussed below, your proposal deviates in some key ways from what we proposed in our email of September 19 (attached) and raises the accounting and operational issues we tried to avoid in the September 19th proposal. Given the need to settle the Protection Agreement as soon as possible, we'd appreciate if we could discuss these points early next week.

Best Regards,
Nina

Accounting Issues:
E&Y has concerns from an accounting perspective with the level of Provincial oversight and input on certain parts of the process, namely:

-that OPG will likely have to go back to the Province on each incurrence of debt and they will have to do so prior to that incurrence
-that OPG must certify and provide a lot of detailed reporting with respect to each incurrence of debt

-the level of frequency of reporting in general (not just the certifications/information noted above but also the contemplated annual forecasts and quarterly updates of those forecasts)
-the negative pledge with respect to the exercise of certain options on the debt
-the fact that OPG must give notice to the Province when incurring funding obligations that are expressly excluded from the Protection Agreement

Taken as a whole, we understand that E&Y sees all of this as the Province exerting a level of control on the debt that no typical guarantor would have. Please also advise if the Province's accountants have reviewed the proposal.

Practical Issues:

- * The procedural steps to bind the Province are lengthy and complicated. From our perspective, as drafted, OPG will likely have to seek Provincial approval on each debt issuance (which weakens the accounting as discussed above). The dealers and their counsel will have a reaction to the proposed adherence conditions but query whether there is value in setting out the adherence conditions in the Protection Agreement itself. Setting aside the mechanics of how we get there, the dealers want comfort that the incurrence of obligations by the financing entity will be covered by the Protection Agreement. We would propose that the mechanics of any approval process (once we settle the terms of that process) be the subject of a separate procedures agreement or memo from the Province to OPG, whereby the Province delegates to OPG the ability to bind the Province under the Protection Agreement with respect to an incurrence of obligations so long as the adherence conditions in the procedures agreement or memo have been met. The Protection Agreement would then simply state that, upon OPG certifying to the indenture trustee that the adherence conditions have been satisfied under the procedures agreement/memo, the Province will be deemed to be bound under the Protection Agreement with respect to the specific obligations incurred at the time of the certification.
- * In addition to the accounting concerns, the level of detail and frequency of reporting required present timing and operational issues. For example, as part of the adherence conditions, you are asking for details on the interest rate. However, pricing will in part be driven off whether that specific incurrence will have the benefits of the Protection Agreement.

Drafting Issues:

- * Please refer to the existing terminology of the Act to ensure there is certainty on the obligations covered under the Protection Agreement. We think the best way for you to approach this would be to refer to all finance amounts and then expressly carve out what you are proposing not be covered.
- * We'd like to understand the reason OPG's management fees have been excluded. We assume you do not intend for OPG's reimbursement costs (costs incurred by OPG on behalf of the Financing Entity) to be excluded? Please advise why taxes are being excluded?
- * There are a few references to "exceed the maximum amount specified therefor in the applicable governing document". Please advise what is being contemplated here.
- * We have a number of other drafting comments which we'll revisit once we've settled on the conceptual points above and have reviewed a revised draft of the document.

Nina Mansoori

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From: Whitfield, Tobias P. (MOF) [mailto:Tobias.Whitfield@ontario.ca]
Sent: September-27-17 4:21 PM

To: Ramchandani, Rima <rramchandani@torys.com>; Feldman, Michael <mfeldman@torys.com>; Mansoori, Nina <nmansoori@torys.com>; 'WONG Leslie -LAWDIV' <leslie.wong@opg.com>; LEE John - TREASURY <john.s.lee@opg.com>; RYFA Ken -TREASURY <ken.ryfa@opg.com>
Cc: Donaldson, Mark (TBS) <Mark.Donaldson@ontario.ca>; Manning, Mike (OFA) <Mike.Manning@ofina.on.ca>; Mayman, Gadi (OFA) <Gadi.Mayman@ofina.on.ca>; Kwan, Ronald (OFA) <Ronald.Kwan@ofina.on.ca>; Kandeepan, Ken (OFA) <Ken.Kandeepan@ofina.on.ca>; Nelms, Scott (MOF) <Scott.Nelms@ontario.ca>; Devine, James (OFA) <James.Devine@ofina.on.ca>; Yep, Carlos (OFA) <Carlos.Yep@ofina.on.ca>; Strathy, Anna (OFA) <Anna.Strathy@ofina.on.ca>; Cengarle, John (MOF) <John.Cengarle@ontario.ca>; Kwan, Ronald (OFA) <Ronald.Kwan@ofina.on.ca>; Katona, Keley (MOF) <Keley.Katona@ontario.ca>; He, Gavin (OFA) <Gavin.He@ofina.on.ca>; Hirani, Anis (OFA) <Anis.Hirani@ofina.on.ca>; Kim, John (OFA) <John.Kim@ofina.on.ca>; Veinot, Cindy (TBS) <Cindy.Veinot@ontario.ca>; Hanslep, Malle (MOF) <Malle.Hanslep@ontario.ca>; Thouin, Alena (ENERGY) <Alena.Thouin@ontario.ca>; McKinlay, Tom (MAG) <Tom.McKinlay@ontario.ca>; 'STEPHEN.ASHBOURNE@blakes.com' <STEPHEN.ASHBOURNE@blakes.com>
Subject: RE: Fair Hydro -- Change of Law Assumption Agreement

Rima,

Further to our earlier conversations, please find attached our proposed process for confirmation of application of the Protection Agreement.

We would be happy to discuss further when you have had a chance to review.

Best
Toby

Tobias Whitfield
Counsel, Legal Services Branch
Ministry of Finance
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From: Ramchandani, Rima [mailto:rramchandani@torys.com]
Sent: September 25, 2017 12:21 PM
To: 'STEPHEN.ASHBOURNE@blakes.com'; Hanslep, Malle (MOF); Whitfield, Tobias P. (MOF); Thouin, Alena (ENERGY)
Cc: LEE John -TREASURY; RYFA Ken -TREASURY; 'WONG Leslie -LAWDIV'; Feldman, Michael; Mansoori, Nina
Subject: RE: Fair Hydro -- Change of Law Assumption Agreement

Good morning all, just following up on our email below. Please let us know when we should expect your feedback.

Many thanks,
Rima

Rima Ramchandani

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TORYS LLP

From: Ramchandani, Rima

Sent: September-19-17 9:55 PM
To: 'STEPHEN.ASHBOURNE@blakes.com' <STEPHEN.ASHBOURNE@blakes.com>; Hanslep, Malle (MOF) <Malle.Hanslep@ontario.ca>; 'Whitfield, Tobias P. (MOF)' <Tobias.Whitfield@ontario.ca>
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Subject: Fair Hydro -- Change of Law Assumption Agreement

Steve, Malle and Toby, further to our meeting the other day, set out below for your review is a proposal on the Provincial approval process under the Change of Law Assumption Agreement. Once we have your feedback on this, we will need to share it with Osler and the accountants and as John mentioned, we are under some time pressure to bring this to a resolution prior to the upcoming June 29 OPG Board meeting. We look forward to your comments, and feel free to reach out if you have any questions. -- Rima

Obligor Approval

The Change of Law Assumption Agreement will apply to all Specified Claims relating to Funding Obligations that are incurred by an Eligible Financing Entity in accordance with the Obligor's approval process. The definition of Specified Claims to be mutually agreed by all parties.

In order for a Financing Entity to become designated as an Eligible Financing Entity by the Obligor, prior to the initial issuance of Funding Obligations by such Financing Entity, the Obligor will be provided with copies of the following documents (collectively the "Program Documents") for review:

(i) the constating documents of such Financing Entity;
(ii) the management agreement between the Financing Entity and OPG;
(iii) the master transfer and servicing agreement between the Financing Entity and the IESO;
(iv) the master trust indenture governing the issuance of Funding Obligations by the Financing Entity;
(v) a form of supplemental indenture governing the issuance of bonds, issuable in series, by the Financing Entity;
(vi) a form of note purchase agreement or credit agreement governing the issuance of short term Funding Obligations by the Financing Entity;
(vii) a form of schedule to an ISDA Master Agreement governing derivative transactions that may be entered into the Financing Entity from time to time; and
(viii) such other documents as may be requested by the Obligor.

Once a Financing Entity is designated by the Obligor as an Eligible Financing Entity, it will not be necessary for the Obligor to approve the documentation related to specific issuances of Funding Obligations; however, OPG will be expected to notify the Obligor of any new material program documentation or any material amendments to existing program documentation before such new documentation or amendments become effective. The failure of OPG to provide any such notice will not invalidate the application of the Change of Law Assumption Agreement to any Specified Claims.

It will not be necessary for the Obligor to approve each new issuance of Funding Obligations provided that such Funding Obligations are issued in accordance with following:

(1) The Funding Obligations are issued in accordance with agreements that contain: (a) covenants of the Eligible Financing Entity that are no more onerous in any material respect and (b) events of default that are consistent in all material respects, respectively, with the covenants of the Eligible Financing Entity and events of default contained in the draft Program Documents.

(2) At least [30 days] prior to the initial issuance of Funding Obligations by an Eligible Financing Entity, OPG will provide the Obligor with a forecast of the principal amount and expected term of the Funding Obligations that OPG expects such Eligible Financing Entity to issue in accordance with the Financing Plan in the next two years (a "Two Year Forecast"). The execution of the Change of Law Assumption Agreement in respect of such Eligible Financing Entity shall constitute the Obligor's approval of the issuance of Funding Obligations by such Eligible Financing Entity in accordance with the Two Year Forecast.

(3) OPG shall provide the Obligor with an updated Two Year Forecast between 9 and 12 months prior to the expiry of each current Two Year Forecast.

(4) Unless the Obligor provides OPG with a written notice no later than 3 months prior to the date following receipt of the current Two Year Forecast that the Change of Law Assumption Agreement will be inapplicable with respect to new Funding Obligations incurred following the expiry of the current Two Year Forecast, the Obligor will be deemed to approve the application of the Change of Law Assumption Agreement to all Funding Obligations incurred up to the expiry of the new Two Year Forecast.

At the time of issuance of Funding Obligations by an Eligible Financing Entity, the Financing Entity will provide (i) any required certifications to the underwriters/agents that such Funding Obligations are covered by the Change of Law Assumption Agreement; and (ii) notice to the Obligor of the material terms of the Funding Obligations issued, together with electronic copies of the final executed Program Documents.

P. 416.865.7666

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