

RE: Ontario Fair Hydro Plan

From: "Saulnier, Brett" <bsaulnier@torys.com>
To: "Feldman, Michael" <mfeldman@torys.com>, "Kacaba, Jennifer (ENERGY)" <jennifer.kacaba@ontario.ca>, "Rehob, James (ENERGY)" <james.rehob@ontario.ca>, "Shear, Dan (ENERGY)" <dan.shear@ontario.ca>, "Nelms, Scott (MOF)" <scott.nelms@ontario.ca>, "Hume, Steen (ENERGY)" <steen.hume@ontario.ca>, "Christie, Tim (ENERGY)" <tim.christie@ontario.ca>, leslie.wong@opg.com, "MCAULEY Tyler -LAWDIV" (tyler.mcauley@opg.com) <tyler.mcauley@opg.com>, john.s.lee@opg.com, judy.wilson@blakes.com, stephen.ashbourne@blakes.com, bryson.stokes@blakes.com, "Alan Hibben" (alan.hibben@rogers.com) <alan.hibben@rogers.com>, brad.purkis@tdsecurities.com, maharukh.hilloowala@tdsecurities.com, michael.wolff@tdsecurities.com, harold.holloway@tdsecurities.com, "Niehaus, Katrina" <katrina.niehaus@gs.com>, "Benaiah, Ian" <ian.benaiah@rbccm.com>, "Nevison, Gary (Gary.Nevison@tdsecurities.com)" <gary.nevison@tdsecurities.com>, "Thom, Trevor (Trevor.Thom@tdsecurities.com)" <trevor.thom@tdsecurities.com>, "Akman, Steven (Steven.Akman@tdsecurities.com)" <steven.akman@tdsecurities.com>, "Thompson, Susan (Susan.Thompson@tdsecurities.com)" <susan.thompson@tdsecurities.com>, "Manii, David (david.manii@tdsecurities.com)" <david.manii@tdsecurities.com>, "Persaud, Donnie - Debt Capital Markets" <dennie.persaud@cibc.com>, "Hill, Krista" <khill@torys.com>, "Turnbull, Vickie" <vickie.turnbull@rbccm.com>, "Dal Bello, David" <david.dalbello@rbccm.com>, "Mansoori, Nina" <nmansoori@torys.com>, "Sebastiano, Rocco" <rsebastiano@osler.com>, "Fitzpatrick, Michael F." <mfitzpatrick@hunton.com>, michael.boll@ieso.ca, Kim Marshall <kim.marshall@ieso.ca>, "Veinot, Cindy (TBS)" <cindy.veinot@ontario.ca>, Glenn Zacher <gzacher@stikeman.com>, "O'Brian, Adam" <aobrian@hunton.com>, "Emes, Aaron" <aemes@torys.com>, Peter Hamilton <phamilton@stikeman.com>, JORDA Jenny -FIN & C CTRL <jenny.jorda@opg.com>, marianne.aldred@ontarioenergyboard.ca, "Petsche, Nadine (TBS)" <nadine.petsche@ontario.ca>, "Ramchandani, Rima" <rramchandani@torys.com>
Cc: "Calwell, Carolyn (ENERGY/MEDEI/MRI)" <carolyn.calwell@ontario.ca>, "Myers, Jonathan" <jmyers@torys.com>, "Suzie Gignac (suzie.r.gignac@ca.ey.com)" <suzie.r.gignac@ca.ey.com>, "Blake Langill (blake.w.langill@ca.ey.com)" <blake.w.langill@ca.ey.com>, leanne.probert@ca.ey.com, "Kandeepan, Ken (OFA)" <ken.kandeepan@ofina.on.ca>, "Hosick, Sarah (TBS)" <sarah.hosick@ontario.ca>, "Johnson, Paul (ENERGY/MEDEI/MRI)" <paul.johnson3@ontario.ca>, mouche1961@gmail.com, "Martine Band (Martine.Band@oeb.ca)" <martine.band@oeb.ca>
Date: Wed, 26 Apr 2017 23:53:33 -0400
Attachments: Fair Hydro Plan Act (April 26 2017) Consultation v4 (Torys Comments).DOCX (96.93 kB); Blackline - Fair Hydro Plan Act (Torys comments).pdf (274.13 kB)

All,

Further to Michael's email, please find attached a mark-up of the draft Bill containing OPG and Torys' consolidated comments. Please note that this draft remains subject to the continuing review

of OPG.

Thanks,
Brett

Brett Saulnier

P. 416.865.8148 | F. 416.865.7380 | 1.800.505.8679
79 Wellington St. W., 30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada | www.torys.com



From: Feldman, Michael
Sent: April-26-17 5:58 PM
To: Kacaba, Jennifer (ENERGY) <Jennifer.Kacaba@ontario.ca>; Rehob, James (ENERGY) <James.Rehob@ontario.ca>; Shear, Dan (ENERGY) <Dan.Shear@ontario.ca>; Nelms, Scott (MOF) <Scott.Nelms@ontario.ca>; Hume, Steen (ENERGY) <Steen.Hume@ontario.ca>; Christie, Tim (ENERGY) <Tim.Christie@ontario.ca>; Leslie.Wong@opg.com; 'MCAULEY Tyler -LAWDIV' (tyler.mcauley@opg.com) <tyler.mcauley@opg.com>; John.S.Lee@opg.com; JUDY.WILSON@blakes.com; Stephen.Ashbourne@blakes.com; Bryson.Stokes@blakes.com; 'Alan Hibben' (alan.hibben@rogers.com) <alan.hibben@rogers.com>; Brad.Purkis@tdsecurities.com; Maharukh.Hilloowala@tdsecurities.com; Michael.Wolff@tdsecurities.com; Harold.Holloway@tdsecurities.com; 'Niehaus, Katrina' <Katrina.Niehaus@gs.com>; 'Benaiah, Ian' <ian.benaiah@rbccm.com>; Nevison, Gary (Gary.Nevison@tdsecurities.com) <Gary.Nevison@tdsecurities.com>; Thom, Trevor (Trevor.Thom@tdsecurities.com) <Trevor.Thom@tdsecurities.com>; Akman, Steven (Steven.Akman@tdsecurities.com) <Steven.Akman@tdsecurities.com>; Thompson, Susan (Susan.Thompson@tdsecurities.com) <Susan.Thompson@tdsecurities.com>; Manii, David (david.manii@tdsecurities.com) <david.manii@tdsecurities.com>; 'Persaud, Donnie - Debt Capital Markets' <Donnie.Persaud@cibc.com>; Hill, Krista <khill@torys.com>; 'Turnbull, Vickie' <vickie.turnbull@rbccm.com>; 'Dal Bello, David' <david.dalbello@rbccm.com>; Mansoori, Nina <nmansoori@torys.com>; 'Sebastiano, Rocco' <RSebastiano@osler.com>; 'Fitzpatrick, Michael F.' <MFitzpatrick@hunton.com>; michael.boll@ieso.ca; Kim Marshall <Kim.Marshall@ieso.ca>; Veinot, Cindy (TBS) <Cindy.Veinot@ontario.ca>; 'Glenn Zacher' <GZacher@stikeman.com>; 'O'Brian, Adam' <aobrian@hunton.com>; Emes, Aaron <aemes@torys.com>; 'Peter Hamilton' <PHamilton@stikeman.com>; 'JORDA Jenny -FIN & C CTRL' <jenny.jorda@opg.com>; maryanne.alred@ontarioenergyboard.ca; Petsche, Nadine (TBS) <Nadine.Petsche@ontario.ca>; Ramchandani, Rima <rramchandani@torys.com>
Cc: Calwell, Carolyn (ENERGY/MEDEI/MRI) <Carolyn.Calwell@ontario.ca>; Myers, Jonathan <jmyers@torys.com>; Suzie Gignac (suzie.r.gignac@ca.ey.com) <suzie.r.gignac@ca.ey.com>; Blake Langill (blake.w.langill@ca.ey.com) <blake.w.langill@ca.ey.com>; LeeAnne.Probert@ca.ey.com; Kandeepan, Ken (OFA) <Ken.Kandeepan@ofina.on.ca>; Hosick, Sarah (TBS) <Sarah.Hosick@ontario.ca>; Johnson, Paul (ENERGY/MEDEI/MRI) <Paul.Johnson3@ontario.ca>; mouche1961@gmail.com; Martine Band (Martine.Band@oeb.ca) <Martine.Band@oeb.ca>; Saulnier, Brett <bsaulnier@torys.com>; Feldman, Michael <mfeldman@torys.com>
Subject: RE: Ontario Fair Hydro Plan

All,

As requested, we set out below a list of major and minor issues compiled by Torys, Hunton and Williams and OPG. These are ordered as they arise in the Bill, not in the order of importance.

We plan to follow up later this evening with a markup of the draft Bill that reflects these comments as well as a few drafting points.

Major Issues

1. It is critically important to have a definition of “transfer” that is broad enough. We had a mark-up as did Stikemans. I prefer ours but the two are not really that far apart. I would suggest a call with Ashbourne, Hamilton and Feldman tonight or tomorrow to get consensus.

2. Section 6.1. The process for determining the rate for electricity under 6.1xx may not be workable or requires further clarification, as well as confirmation that the OEB is capable of making the necessary calculations. It appears that the rate under 6.1 is that which is required for a specified consumer to receive a monthly total bill that is 25% less than it would have been for them if the OEB determined RPP solely using the method under s. 79.16(1)(b). Though the determination of the comparison rate by OEB seems straightforward, it is not clear who determines the rates that are required for specified consumers to receive monthly total invoices that are 25% less than they would have been. It appears that these rates may have to be determined on an individual consumer basis, or at least separately for the consumers of each electricity vendor. This is because a total bill for one consumer will have a different proportion of commodity vs. delivery and other charges than a total bill for another consumer. As such, it does not appear to be a single rate that the OEB can determine for every specified consumer, as this will not result in the necessary 25% reductions. If not the OEB, who is it? If it is the electricity vendors, what authority do they have to determine these rates given prohibition under s. 78(2) of the OEB Act?

3. Section 8xx (2)(b) – delete “material” from last line of the paragraph – we probably don’t want to get into a dispute about whether a funding obligation was incurred in a manner that was in “material” conformity with the Financing Plan. In addition, as drafted, it would actually mean that if there were a material issue, the charge would be irrevocable, but if it was not material, then arguably the charge could be revocable.

[4. Section 10xx (1) – Will OPG, as Financial Services Manager, be able to determine the monthly clean energy adjustment?]

5. Prior Section 11xx (1), “The IESO shall, in accordance with the regulations, issue a remittance notice to each electricity vendor for the electricity vendor’s portion, as determined in accordance with the regulations, of the clean energy adjustment in respect of a reference period” should be reinserted.

6. Section 13(2) gives the Minister the ability to replace the Financial Services Manager. I think, because of section 17, this would mean that the Minister would have the ability to replace the FSM of an up and running financing entity. The Minister should not have that power. That power should only be exercisable by Debtholders. We had suggested bifurcating the role of the FSM for this purpose and limiting this replacement power to the purpose of preparing the Financing Plan. Perhaps another way of addressing this would be to have an explicit carve out to the effect that the Minister’s rights will not extend to OPG’s rights as FSM of a financing entity that has already issued funding obligations under section 17. This is also important in order to achieve the desired accounting treatment.

7. Section 15. The draft still has the FSM determining the fair allocation amount. This is OPG’s issue of greatest concern. We are attaching a proposal prepared by OPG to suggest a compromise between our last mark up, which had the Minister assume full responsibility, and the latest draft Bill which leaves the responsibility fully on OPG.

8. In s. 16(5) the draft Bill still proposes to treat the Financing Plan as a confidential document. We believe that unless the Minister allows for disclosure of the Financing Plan we will not be able to

satisfy disclosure obligations under securities laws.

9. s. 17(1) implies that the FSM may incur funding obligations itself. Is this a drafting error or is the intention to be building in flexibility so that OPG would be able to purchase the IESO funding shortfall itself in case OPG and the Dealers can't get a deal done quickly enough (impractical as that may be) ?

10. Section 22(2) still says that IESO does not retain any obligations in respect of the investment asset. This originally came from IESO and it should be dropped. It is incorrect. IESO does have obligations in respect of the investment asset. It has obligations in the Act and the regulations and it will have obligations in the master sale and servicing agreement.

11. Section 25xx (1) – delete references to “and recover amounts in respect of”. Definition of clean energy adjustment already reflects that it is an amount and the financing entity should be entitled to the full clean energy adjustment.

12. Section 38 of our previous markup had a provision for “Standing and Remedies” of a financing entity which was derived from the OBCA and we believe it would be a serious gap not to have that.

Minor Points

13. The definition of clean energy initiative now appears to be narrower than the intentions seemingly expressed by the revised preamble. It should be revised accordingly.

14. The definition of “refinancing” doesn't work because it no longer requires replacing old funding obligations with new funding obligations.

15. Section 6. For the purposes of the definition of “RPP rate” in 6xx, it should be recognized that this is not a single rate established by the OEB. Rather, OEB establishes a number of RPP prices under the relevant clause. There are time of use prices and tiered prices. Within each of these, there are several prices depending on time of day or volume consumed. If this has not been considered, it will be important to determine how this affects the rest of the drafting and the ability to calculate the necessary amounts that depend on the “RPP rate”.

16. s. 9(2) does not expressly address how these errors would be dealt with. It would be nice to specify that they would be corrected pursuant to the true up procedure in 10(3).

17. I don't think “fair adjustment” is defined anywhere anymore. In any event, I think sections 15(1)2 and 16(4)(b) are still adding dollar amounts to the fair adjustment, which I think is an adjustment to a rate (\$/Kwh). I am not sure what is meant by “value of an fair adjustment” – is this supposed to be the monetary impact that the adjustment had when aggregated over all specified consumers ? It is not clear.

18. Section 15(2)3 still refers to time value of money or rate of inflation instead of actual financing charges on the funding obligations, which is the real factor that would have to be taken into account.

19. Changes to section 53.1 of the Electricity Act are behind our mark-up.

Michael K. Feldman

From: Kacaba, Jennifer (ENERGY) [<mailto:Jennifer.Kacaba@ontario.ca>]
Sent: April-26-17 12:39 PM
To: Rehob, James (ENERGY) <James.Rehob@ontario.ca>; Shear, Dan (ENERGY) <Dan.Shear@ontario.ca>; Nelms, Scott (MOF) <Scott.Nelms@ontario.ca>; Hume, Steen (ENERGY) <Steen.Hume@ontario.ca>; Christie, Tim (ENERGY) <Tim.Christie@ontario.ca>; Leslie.Wong@opg.com; 'MCAULEY Tyler -LAWDIV' (tyler.mcauley@opg.com) <tyler.mcauley@opg.com>; John.S.Lee@opg.com; JUDY.WILSON@blakes.com; Stephen.Ashbourne@blakes.com; Bryson.Stokes@blakes.com; 'Alan Hibben' (alan.hibben@rogers.com) <alan.hibben@rogers.com>; Brad.Purkis@tdsecurities.com; Maharukh.Hilloowala@tdsecurities.com; Michael.Wolff@tdsecurities.com; Harold.Holloway@tdsecurities.com; 'Niehaus, Katrina' <Katrina.Niehaus@gs.com>; 'Benaiah, Ian' <ian.benaiah@rbccm.com>; Nevison, Gary (Gary.Nevison@tdsecurities.com) <Gary.Nevison@tdsecurities.com>; Thom, Trevor (Trevor.Thom@tdsecurities.com) <Trevor.Thom@tdsecurities.com>; Akman, Steven (Steven.Akman@tdsecurities.com) <Steven.Akman@tdsecurities.com>; Thompson, Susan (Susan.Thompson@tdsecurities.com) <Susan.Thompson@tdsecurities.com>; Manii, David (david.manii@tdsecurities.com) <david.manii@tdsecurities.com>; Feldman, Michael <mfeldman@torys.com>; 'Persaud, Donnie - Debt Capital Markets' <Donnie.Persaud@cibc.com>; Hill, Krista <khill@torys.com>; 'Turnbull, Vickie' <vickie.turnbull@rbccm.com>; 'Dal Bello, David' <david.dalbello@rbccm.com>; Mansoori, Nina <nmansoori@torys.com>; 'Sebastiano, Rocco' <RSebastiano@osler.com>; 'Fitzpatrick, Michael F.' <MFitzpatrick@hunton.com>; michael.boll@ieso.ca; Kim Marshall <Kim.Marshall@ieso.ca>; Veinot, Cindy (TBS) <Cindy.Veinot@ontario.ca>; 'Glenn Zacher' <GZacher@stikeman.com>; 'O'Brian, Adam' <aobrian@hunton.com>; Emes, Aaron <aemes@torys.com>; 'Peter Hamilton' <PHamilton@stikeman.com>; 'JORDA Jenny -FIN & C CTRL' <jenny.jorda@opg.com>; maryanne.aldred@ontarioenergyboard.ca; Petsche, Nadine (TBS) <Nadine.Petsche@ontario.ca>; Ramchandani, Rima <rramchandani@torys.com>
Cc: Calwell, Carolyn (ENERGY/MEDEI/MRI) <Carolyn.Calwell@ontario.ca>; Myers, Jonathan <jmyers@torys.com>; Suzie Gignac (suzie.r.gignac@ca.ey.com) <suzie.r.gignac@ca.ey.com>; Blake Langill (blake.w.langill@ca.ey.com) <blake.w.langill@ca.ey.com>; LeeAnne.Probert@ca.ey.com; Kandeepan, Ken (OFA) <Ken.Kandeepan@ofina.on.ca>; Hosick, Sarah (TBS) <Sarah.Hosick@ontario.ca>; Johnson, Paul (ENERGY/MEDEI/MRI) <Paul.Johnson3@ontario.ca>; mouche1961@gmail.com; Martine Band (Martine.Band@oeb.ca) <Martine.Band@oeb.ca>
Subject: RE: Ontario Fair Hydro Plan

All - Thank you for the detailed comments that you provided on Saturday and Sunday. Please find attached the next turn of the legislation. We have tried to balance the comments that we received to address the points that you have raised. This draft does not reflect the drafting points that were raised over Monday and Tuesday and we will reflect those points in our next instructions to legislative counsel. Please review and identify any significant substantive issues by 6 p.m. today. We continue to work toward pens down on Friday, meaning the draft that we have at that point in time will be proposed for introduction in the House. Thank you again for your contributions to this process.

Jennifer

Jennifer J. Kacaba
Counsel
MAG Civil Law Division
Ministries of Energy / Economic Development & Growth /
Research, Innovation & Science / Infrastructure / Accessibility
56 Wellesley Street West, 18th Floor.
Toronto

M7A 2E7
(416) 212-4867

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From: Kacaba, Jennifer (ENERGY)

Sent: April 20, 2017 5:59 PM

To: Rehob, James (ENERGY); Shear, Dan (ENERGY); Nelms, Scott (MOF); Hume, Steen (ENERGY); Christie, Tim (ENERGY); Leslie.Wong@opg.com; 'MCAULEY Tyler -LAWDIV' (tyler.mcauley@opg.com); John.S.Lee@opg.com; JUDY.WILSON@blakes.com; Stephen.Ashbourne@blakes.com; Bryson.Stokes@blakes.com; 'Alan Hibben' (alan.hibben@rogers.com); Brad.Purkis@tdsecurities.com; Maharukh.Hilloowala@tdsecurities.com; Michael.Wolff@tdsecurities.com; Harold.Holloway@tdsecurities.com; 'Niehaus, Katrina'; 'Benaiah, Ian'; 'Nevison, Gary' (Gary.Nevison@tdsecurities.com); 'Thom, Trevor' (Trevor.Thom@tdsecurities.com); 'Akman, Steven' (Steven.Akman@tdsecurities.com); 'Thompson, Susan' (Susan.Thompson@tdsecurities.com); 'Manii, David' (david.manii@tdsecurities.com); 'Feldman, Michael'; 'Persaud, Donnie - Debt Capital Markets'; 'Hill, Krista'; 'Turnbull, Vickie'; 'Dal Bello, David'; 'Mansoori, Nina'; 'Sebastiano, Rocco'; 'Fitzpatrick, Michael F.'; michael.boll@ieso.ca; 'Kim Marshall'; 'Veinot, Cindy (TBS)'; 'Glenn Zacher'; 'O'Brian, Adam'; 'Emes, Aaron'; 'Peter Hamilton'; 'JORDA Jenny -FIN & C CTRL'; maryanne.alred@ontarioenergyboard.ca; 'Petsche, Nadine (TBS)'; ramchandani@torys.com
Cc: Calwell, Carolyn (ENERGY/MEDEI/MRI); 'Myers, Jonathan'; 'Suzie Gignac' (suzie.r.gignac@ca.ey.com); 'Blake Langill' (blake.w.langill@ca.ey.com); LeeAnne.Probert@ca.ey.com; 'Kandeean, Ken (OFA)'; 'Hosick, Sarah (TBS)'; 'Johnson, Paul (ENERGY/MEDEI/MRI)'
Subject: RE: Ontario Fair Hydro Plan

All - Please find attached the next turn in the consultation draft (v.3) of the proposed legislation. We have been working to address the feedback that you provided earlier in the week. A number of points remain in progress. As with the earlier versions, by sharing this document, we hope to continue to advance our discussions.

Our timeline has been extended and we are now working to a pens down date of April 28th. We will not get another extension. Accordingly, we ask for your detailed, written comments on the draft, which we require no later than Sunday at noon.

We will continue to work on the bill in the interim, so earlier instructions are helpful to us. With your input on this timeline, we expect to be able to provide one more circulation around Tuesday or Wednesday next week.

We have not had the opportunity to add notes or to update our crosswalk to the Blakes summary document.

We look forward to receiving your written comments.

Jennifer

Jennifer J. Kacaba
Counsel
MAG Civil Law Division
Ministries of Energy / Economic Development & Growth /
Research, Innovation & Science / Infrastructure / Accessibility
56 Wellesley Street West, 18th Floor.
Toronto

M7A 2E7
(416) 212-4867

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From: Kacaba, Jennifer (ENERGY)
Sent: April 17, 2017 12:00 PM
To: Rehob, James (ENERGY); Shear, Dan (ENERGY); Nelms, Scott (MOF); Hume, Steen (ENERGY); Christie, Tim (ENERGY); Leslie.Wong@opg.com; 'MCAULEY Tyler -LAWDIV' (tyler.mcauley@opg.com); John.S.Lee@opg.com; JUDY.WILSON@blakes.com; Stephen.Ashbourne@blakes.com; Bryson.Stokes@blakes.com; 'Alan Hibben' (alan.hibben@rogers.com); Brad.Purkis@tdsecurities.com; Maharukh.Hilloowala@tdsecurities.com; Michael.Wolff@tdsecurities.com; Harold.Holloway@tdsecurities.com; 'Niehaus, Katrina'; 'Benaiah, Ian'; Nevison, Gary (Gary.Nevison@tdsecurities.com); Thom, Trevor (Trevor.Thom@tdsecurities.com); Akman, Steven (Steven.Akman@tdsecurities.com); Thompson, Susan (Susan.Thompson@tdsecurities.com); Manii, David (david.manii@tdsecurities.com); 'Feldman, Michael'; 'Persaud, Donnie - Debt Capital Markets'; 'Hill, Krista'; 'Turnbull, Vickie'; 'Dal Bello, David'; 'Mansoori, Nina'; 'Sebastiano, Rocco'; 'Fitzpatrick, Michael F.'; michael.boll@ieso.ca; Kim Marshall; Veinot, Cindy (TBS); 'Glenn Zacher'; 'O'Brian, Adam'; 'Emes, Aaron'; 'Peter Hamilton'; 'JORDA Jenny -FIN & C CTRL'; maryanne.alred@ontarioenergyboard.ca; Petsche, Nadine (TBS)
Cc: Calwell, Carolyn (ENERGY/MEDEI/MRI); 'Myers, Jonathan'; Suzie Gignac (suzie.r.gignac@ca.ey.com); Blake Langill (blake.w.langill@ca.ey.com); LeeAnne.Probert@ca.ey.com; Kandeepan, Ken (OFA); Hosick, Sarah (TBS)
Subject: RE: Ontario Fair Hydro Plan

Please find attached a further turn of the consultation draft. This document continues to be a work in progress. We have not had the opportunity to add notes or update our tracking table. We also have not yet considered the comments that we received this morning. We look forward to seeing you at 1.

Jennifer

Jennifer J. Kacaba
Counsel
MAG Civil Law Division
Ministries of Energy / Economic Development & Growth /
Research, Innovation & Science / Infrastructure / Accessibility
56 Wellesley Street West, 18th Floor.
Toronto
M7A 2E7
(416) 212-4867

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From: Calwell, Carolyn (ENERGY/MEDEI/MRI)
Sent: April 15, 2017 10:06 PM
To: Rehob, James (ENERGY); Shear, Dan (ENERGY); Kacaba, Jennifer (ENERGY); Nelms, Scott (MOF); Hume, Steen (ENERGY); Christie, Tim (ENERGY); Leslie.Wong@opg.com; 'MCAULEY Tyler -LAWDIV' (tyler.mcauley@opg.com); John.S.Lee@opg.com; JUDY.WILSON@blakes.com;

Stephen.Ashbourne@blakes.com; Bryson.Stokes@blakes.com; 'Alan Hibben' (alan.hibben@rogers.com); Brad.Purkis@tdsecurities.com; Maharukh.Hilloowala@tdsecurities.com; Michael.Wolff@tdsecurities.com; Harold.Holloway@tdsecurities.com; 'Niehaus, Katrina'; 'Benaiah, Ian'; Nevison, Gary (Gary.Nevison@tdsecurities.com); Thom, Trevor (Trevor.Thom@tdsecurities.com); Akman, Steven (Steven.Akman@tdsecurities.com); Thompson, Susan (Susan.Thompson@tdsecurities.com); Manii, David (david.manii@tdsecurities.com); 'Feldman, Michael'; 'Persaud, Donnie - Debt Capital Markets'; 'Hill, Krista'; 'Turnbull, Vickie'; 'Dal Bello, David'; 'Mansoori, Nina'; 'Sebastiano, Rocco'; 'Fitzpatrick, Michael F.'; michael.boll@ieso.ca; Kim Marshall; Veinot, Cindy (TBS); 'Glenn Zacher'; 'O'Brian, Adam'; 'Emes, Aaron'; 'Peter Hamilton'; 'JORDA Jenny -FIN & C CTRL'; maryanne.aldred@ontarioenergyboard.ca; Petsche, Nadine (TBS)
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Subject: Ontario Fair Hydro Plan

All - Please find attached the draft "Intergenerational Fairness in Hydro Rates Act, 2017". A tremendous amount of work has gone into getting to this draft and much more work is required to get this ready for the House. The goal of sharing this document now is to further the process we have engaged in over the last weeks. In the attached, we have included notes to try to address where the drafting is not yet consistent with our thinking. These notes are neither comprehensive nor complete. They are intended only as flags and as colour to the draft. We have not forgotten the comments that you have already provided and we are continuing to working through the translation of the commercial terms we have been discussing into legislative language.

For ease of reference, included with the draft bill are the partially updated Blakes' summary, a chart that attempts links the articles in that document to the sections of the bill (which is imperfectly numbered at best) and excerpts from the Electricity Act and the Ontario Energy Board Act, related to the consequential amendments.

In your review, please focus on the broad stroke concepts, rather than the minutia, and keep in mind the cascade of instruments that will be required – legislation first, then regulations and finally commercial agreements. We look forward to discussing the broader concepts on Monday

Carolyn Calwell
Legal Director
MAG Civil Law Division
Ministries of Energy / Economic Development & Growth /
Research, Innovation & Science / Infrastructure / Accessibility
416-212-8392

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