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Electricity Amendment Act, 2016 (Proceeds Recycling; GAM)

EXPLANATORY NOTE

[Insert explanatory note.]

ELECTRICITY ACT, 1998

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

(d.1) to continue, create or facilitate the continuance or creation of initiatives that are reasonably likely to reduce or to support the reduction of greenhouse gas,[1] including initiatives relating to electricity conservation and efficiency or to the use of cleaner energy sources and technologies, and to provide mechanisms for mitigating related costs to consumers;

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

(f) to protect the interests of consumers with respect to,

(i) the adequacy, reliability and quality of electricity service, and

(ii) prices of electricity services, which may include the establishment of one or more mechanisms as part of [*the Government of Ontario's initiative to defer the costs of global adjustment*];

[OLC Note: I have a few concerns about the proposed amendments to clause (f) (and some of these same concerns come up in a few other places throughout the draft where similar wording is used):

1. Because the substantive provisions were are creating will be very express about what is being established, I don't understand why the above amendment to the purpose provision is necessary. The existing clause (f) already notes that a purpose of the Act is to protect the interest of consumers with respect to "price". Why is this considered to be insufficient?

[1] FLS: See s. 71 (2) para. 2 of the Climate Change…Act.

2. I see that there is precedent within this Act to refer to government policies in broad terms, but this raises some concerns. A reference to a government "policy" or "initiative" 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.

3. If it's necessary to mention the initiative/policies in the purpose provision, consider whether or not you want to create a legislated link between these policies and "protecting the interests of consumers". Questions may be raised about *which consumers' interests* are meant to be protected (e.g. all consumers? a subset of consumers? Current consumers vs. future consumers?). Would it be better to refer to the implementation of the initiative without specifying that it must be done in the interests of consumer protection?

4. I have proposed some tentative wording to describe the initiative/policies. Once the language is settled, we may want to do something like what has been done with the definition of "smart metering initiative" to simplify repeated references throughout the draft.]

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

(q.1) to enter into agreements or arrangements with the Fair Hydro Financing Trust or designated entity under Part V.2;

(q.2) to engage in activities related the 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;

OLC 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 or disposition of regulatory assets referred to in section X;

x. (1) Subsections 25.33 (1) and (2) of the Act are repealed and the following substituted:

Electricity pricing adjustments

Adjustments by IESO

(1) Subject to subsection (2.1), the IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that <u>ensure that, over time, payments</u> by such classes of market participants in Ontario as are prescribed by regulation <u>reflect</u>,

[OLC Note: As per our discussion on March 16th, there is some concern about whether the above underlined wording (which is the current wording of subs. (1)) is sufficiently clear. The IESO is required to make adjustments to ensure that the payments "reflect" the various amounts listed below. Now that the list below is being expanded and will include a more diverse range of categories of amounts, we should consider whether revising the opening flush would be helpful to explain how, in a general way, the amounts are to be "reflected".]

(a) amounts paid 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) amounts paid to entities with whom the IESO has a procurement contract, as determined under the procurement contract;

(c) amounts received by the IESO, directly or indirectly, from the Greenhouse Gas Reduction Account established under section 71 of the *Climate Change Mitigation and Low-Carbon Economy Act, 2016* for the funding of greenhouse gas reduction initiatives under this Act or the *Ontario Energy Board Act, 1998* for which the costs would otherwise be borne in whole or in part by consumers;

(d) amounts received by the IESO from the Financing Entity under Part V.2; and

(e) amounts paid to the Financing Entity under section [repayment of principal/interest and operating cost],

Adjustments by distributors and retailers

(2) Subject to subsection (2.1), 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, [OLC Note: Same concerns as flagged under subs. (1).]

(a) amounts paid 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) amounts paid to entities with whom the IESO has a procurement contract, as determined under the procurement contract;

(c) amounts received by the IESO, directly or indirectly, from the Greenhouse Gas Reduction Account established under section 71 of the *Climate Change Mitigation and Low-Carbon Economy Act, 2016* for the funding of greenhouse gas reduction initiatives under this Act or the *Ontario Energy Board Act, 1998* for which the costs would otherwise be borne in whole or in part by consumers;

(d) amounts received by the IESO, directly or indirectly, from the Financing Entity under Part V.2; and

(e) amounts paid to the Financing Entity under [repayment of principal/interest and operating cost].

[OLC Note: Your instructions were slightly different for clauses (1) (d) & (e) and (2) (d) & (e) - for example see the underlined phrase in (d) above. Please review carefully to ensure that the differences are intentional. I don't understand the discrepancies so if they are intended, please explain.]

Application to certain market participants, consumers

(2.1) In making adjustments under subsection (1) or (2), the IESO shall, in accordance with the regulations, ensure that the amounts mentioned in clauses (1) (d) and (e) and (2) (d) and (e) are reflected only in payments by classes of market participants with respect to electricity consumed by a consumer who,

[OLC Note: This is an attempt to address the other issue we discussed on the phone, but I'm not sure it is quite right. The idea would be for the regulations to specify how the IESO would ensure that the short-term rate reductions that flow from the Trust borrowing 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 borrowed funds in the long-term.

An alternative to consider -- Perhaps this part of the calculations should not even be part of the GAM… it really depends on how this is supposed to work. I am wondering if perhaps this is a subsequent step that is entirely separate from the GAM. Tamara's previous draft had anticipated that the IESO would "apportion" amounts received from the Trust/entity for the purposes of covering the GAM to consumers. If that is the case, then perhaps subs. (2.1) doesn't need to be included in the GAM section at all. Instead, we would deal with "apportionment" by the IESO as a separate matter. I have included a proposed apportionment provision below in Part V.2.]

(a) is a member of a class of consumers prescribed for the purposes of subsection 79.16 (1) of the *Ontario Energy Board Act, 1998* who is required to pay the [global adjustment], regardless of whether or not the Board determines the rates for electricity payable by the consumer under that subsection;

(b) is [served by a sub-metering entity]; or

(c) is a member of a class of consumers prescribed by the regulations.

x. Clause 25.33 (4) (a) of the Act is amended by striking out "(2) and (3)" and substituting "(2), (2.1) and (3)".

x. Section 25.33 of the Act is amended by adding the following subsections:

Separate accounting by IESO

(4.1) If required by the regulations, the IESO shall separately track and account for any amounts referred to in clauses (1) (c) for which it makes adjustments under this section.

[OLC Note: Please confirm the underlined. Or is this requirement intended to be broader?]
[OLC Note: Instructions included "and to direct such amounts to the contracts and generators or classes of contracts and generators as may be prescribed". You noted that for constitutional reasons, you may want to direct GGRA money only to renewables-related contracts so that you could show that the money was used for GHG reduction activities. Please advise.]

Same

(4.2) The IESO shall separately track and account for each of the following amounts:

1. Amounts referred to in clause (1) (d) for which it makes adjustments under that subsection.

2. Amounts referred to in clause (1) (e) [principal/interest amounts] for which it makes adjustments under that subsection.

3. Amounts referred to in clause (1) (e) [management and operating costs] for which it makes adjustments under that subsection.

4. Amounts paid to the Fair Hydro Financing Trust or designated entity under [authority requiring payment back to TBD of operating costs].

5. The following variances, if any:

   i. Variances between the amounts set out in paragraphs 1 and 2.

   ii. Variances between the amounts set out in paragraphs 3 and 4.

   iii. Any other variances related to the amounts set out in paragraphs 1 to 4 that the IESO considers appropriate.

Separate accounting by distributors and retailers

(4.3) If required by the regulations, distributors and retailers shall separately track and account for any amounts referred to in clauses (2) (d) and (e) for which they make adjustments under this section.

x. Subsection 25.33 (5) of the Act is repealed and the following substituted:

Variance, deferral accounts[2]

(5) The IESO shall establish and maintain such variance or deferral accounts as may be required,

(a) for the purposes of subsections (3) and (4.2); and

(b) to otherwise record all amounts payable or receivable by it under this section.

[OLC Note: Subs. 25.33 (7) refers to adjustments made under subs. (1) or (2) -- this should perhaps also refer to subs. (2.1)?]

(3) Section 25.33 of the Act is amended by adding the following subsection:

Additional requirements

(9) The Lieutenant Governor in Council may, by regulation, require the IESO, a distributor, retailer, generator or any other licence holder to take the steps prescribed by the regulations in the manner and time prescribed by the regulations, in order to implement or facilitate the implementation of the adjustments for the amounts referred to in clauses (1) (c), (d) and (e) and (2) (c), (d) and (e) [and subsection (2.1)?].

[OLC Notes:
1. Can you give me any examples of how ENE might use this reg making authority?
2. Please confirm the citations to the borrowing piece against those provisions in this draft and let me know if you need to narrow them at all.]

Note: Regulation-making authority drafting to be done later, once the actual substantive elements of the scheme have been landed (or at least more landed). For now, I've left it exactly as it was in draft 2, when only GGRA was in play.

x. (1) Subclause 114 (1.3) (f) (ii) of the Act is amended by adding "under subsection 25.33 (2)" after "that must or may be made".

TBD whether s. 114 (1.3) (f) (i) and (ii) need further amendment, given the inclusion of the new clause (c) in s. 25.33 (1) and (2). I don't see anything at this point that would need changes.

[2] FLS: see the current s. 25.33 (5), as well as s. 88 (1) (i.7) of the Ontario Energy Board Act.

(2) Subsection 114 (1.3) of the Act is amended by adding the following clause:

(g.0.1) requiring the IESO, a distributor, retailer or generator or any other licence holder to take specified steps, including […], in order to implement or facilitate the implementation of the adjustment of the amounts referred to in clauses 25.33 (1) (c) and (2) (c), and prescribing the manner in which and the timing by which the steps must be taken,

Please provide examples, if possible, so that we can consider, (a) whether this reg authority is sufficient, and (b) whether to refer to the examples expressly.

TBD whether s. 114 (1.3) (f) (xii) – (xv) are to be amended in any way. They provide authority to require that various actors provide information to various other actors "for the purposes of section 25.33 or a regulation made under this clause". If your clients are interested in a reporting requirement relating to the actual GHG reduction initiatives, then I think that if that authority doesn't already exist elsewhere, it could be added, but not here. As I read it, this is really reporting in respect of the adjustments, set-offs, credits, payments, etc.

- Just a flag, in case it matters, that a couple of these information-sharing subclauses are subject to s. 114 (6) of the Act, which deals with agreements to the contrary.

x. Subsection 53.1 (1) of the Act is amended by adding "and establishing and operating the Fair Hydro Financing Trust provided for under Part IV.1.1" at the end.

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

Rights of the Minister[3]

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).

x. The Act is amended by adding the following Part:

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

PART V.2
[FAIR HYDRO INITIATIVE/COST DEFERRAL INITIATIVE]

Definition

53.6.0.1 In this Part,

"Financing Entity" means,

(a) the Fair Hydro Financing Trust mentioned in clause 53.6.1 (1) (a), or

(b) an entity designated by regulation as mentioned in clause 53.6.1 (1) (b).
[NTD - could move this definition to the beginning of the Act since we use this term in 25.33 but let's wait for the drafting to settle first. The idea is to have a single term that captures the Trust/designated entity.]

[OLC Note: As discussed on the phone, you are still working on identifying the "spark plug" that would set the financing activities in motion and establish limits on borrowing, etc. The possibility of a Minister/LGIC "financing directive" is not preferred because of the level of control this would give the government. You mentioned that you are considering whether LGIC regulations might be more appropriate or else whether a non-legislative process (e.g. SH declaration) might work best. Please advise.]

COST DEFERRAL INITIATIVE

IESO borrowing to reduce electricity prices

x. (1) The IESO may borrow funds from the Financing Entity for the purpose of accomplishing the *[the Government of Ontario's initiative to defer the costs of global adjustment].*

Apportionment

(2) The IESO shall apportion amounts received under subsection (1) to consumers referred to in subsection 25.33 (2.1), in accordance with […].
[OLC Note: How are the requirements that would determine apportionment for this subsection meant to interact with the GAM reg? I know this is under active consideration.]

Consumer liable for apportioned amounts

x. Consumers referred to in [above] are liable to the IESO and their distributor for their proportionate share, to be determined by the regulations, of the [amounts listed in paras. 1-4 below?].
[OLC Note: The above is essentially a placeholder for the moment. 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".]

Right of recovery, Financing Entity

x. (1) The Financing Entity shall have the right to recover the following amounts in full from the IESO, distributors and prescribed consumers:

1. The amounts received by the IESO under subsection (1).

2. The amounts of any interest costs or charges incurred by the Financing Entity in relation the amounts mentioned in paragraph 1.

3. The amounts of costs relating to the operation or management of the Financing Entity, <u>as are approved by the Board.</u>

[OLC Note: How will the Board be approving these costs? Is this related to the expenditure report submitted to the Board? That provision (below) doesn't refer to any approval taking place.]
[OLC Note: Need to mention expenditures?]

4. Other amounts as may be prescribed <u>or as may be approved by the Board</u>.

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

[OLC Note:
I don't understand how the following provisions dealing with "regulatory assets" fit with the "right of recovery" provision above.
1. Are the "regulatory assets" something different from the amounts listed in paras. 1 to 4 above? Or are these meant to be the same amounts?

2. Are the rules relating to the "sale of regulatory assets" essentially rules about how the FE will actualize its right of recovery? I don't understand how the IESO would "sell" these things… don't they just make a payment, and haven't we already stated this below in the section that requires the IESO to make payments to the FE?

I've set out the substance of your instructions on the regulatory assets here for reference:

Sale of regulatory assets

x. *(1) The IESO shall, in accordance with the regulations, sell and convey to the Financing Entity all title and right to the following regulatory assets on such terms and conditions as are provided for by the Financing Entity:*

1. *Any and all amounts referred to in clause (1.1) (a) which are borrowed by the Financing Entity during the deferral period and payable for the month for the purposes of providing near-term relief to prescribed electricity consumers;*

2. *Any and all amounts referred to in clause (1.1) (b) of any interest costs or charges incurred by the trust or entity during the deferral period, payable in the month, in relation to amounts referred to in clause (a);*

3. *Any and all amounts of any costs or charges referred to in clause (1.1) (c) relating to the operation or management of the trust, as approved by the Board.*

4. *The full amount of any and all other costs or true-ups which may be prescribed by the regulations.*

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

Debts
(2) For greater certainty, the amounts mentioned in subsection (1) are debts owing to the Financial Entity by the IESO, distributors and prescribed consumers until such amounts have been fully paid and fully discharged.
[OLC Note: I haven't checked to see how other similar provisions 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.]

Recovery by IESO
x. The IESO shall recover the amounts set out in [previous section] from consumers referred to in subsection 25.33 (2.1), in accordance with […]:
OLC Note: how are the requirements that would determine recovery for this subsection meant to interact with the GAM reg?

Payments to Financing Entity
x. (1) On or before January 1, 2047, the IESO shall, through its billing and settlement systems, make full payment to the Financing Entity of the following:

1. The amounts received by the IESO under subsection (1).

2. The amounts of any interest costs or charges incurred by the Financing Entity in relation the amounts mentioned in paragraph 1.

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

[OLC Note: How will the Board be approving these costs? Is this related to the expenditure report submitted to the Board? That provision (below) doesn't refer to any approval taking place.]

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

[OLC Note: How would the IESO know if other costs have been approved by the Board?]

FINANCING ENTITY

Direction of Minister, Financing Entity

53.6.1 (1) For the purpose of accomplishing [*the Government of Ontario's initiative to defer the costs of global adjustment*], the Minister may,

(a) direct Ontario Power Generation Inc. to establish and operate the Fair Hydro Financing Trust; or

(b) direct Ontario Power Generation Inc. to [oversee? Administer?] an entity designated by regulation.

[OLC 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.

Object of Financing Entity

53.6.2 (1) The object of the Financing Entity is to finance the amounts required to accomplish [*the Government of Ontario's initiative to defer the costs of global adjustment*].

[OLC 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. is there an automatic hierarchy of individuals that are appointed and who take responsibility when a Trust is established?). 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:

[OLC 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].

[OLC 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.]

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

[OLC Note: Is it necessary to state that the payments are received to recover the amounts borrowed? We have already made it clear in the opening of this subsection that this is all being done to achieve the object of the Trust.]

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

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

Board approval of expenditures, etc.

53.6.4 (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.

[OLC Note: As mentioned above, who will actually be responsible for carrying out this duty? OPG? IESO? Should we be more clear about who is submitting the expenditures?]

[OLC 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 above.]

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.

[OLC 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, trust or entity,

53.6.5 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.

ONTARIO ENERGY BOARD ACT, 1998

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

6. To facilitate the implementation of the policies of the Government of Ontario respecting climate change mitigation and greenhouse gas reduction.

7. To facilitate the implementation of the [*the Government of Ontario's initiative to defer the costs of global adjustment*].

[OLC Note: As noted above in the EA purpose provision, need to consider this further.]

x. Section 2 of the Act is amended by adding the following paragraph:

7. To facilitate the implementation of the policies of the Government of Ontario respecting climate change mitigation and greenhouse gas reduction.

x. Section 27.1 of the Act is 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 and the time within which it must be held.

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.

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

x. Section 79.16 (3) of the Act is 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. [OLC Note: I didn't spend any time on the above amendment -- will revisit it in the next draft. This is a placeholder.]

Commencement

xx. This Act comes into force on [insert commencement rule]