Message

From: Shear, Dan (ENERGY) [Dan.Shear@ontario.ca]
Sent: 2017-04-05 7:05:38 AM
To: Michael Boll [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4811917e15054407b665fe16d12ff415-Michael Bol]
Subject: Re: OPG Top issues list
Attachments: image001.jpg

Just FYI I understand from Carolyn that OEB has now been invited to this meeting. You might want to give some thought to the potential role of the OEB in connection with establishing the Fair Hydro Plan after year 4/5, which would drive the treasury plan from that point on.

Sent from my BlackBerry 10 smartphone on the Rogers network.
From: Michael Boll
Sent: Tuesday, April 4, 2017 4:39 PM
To: Rehob, James (ENERGY); Shear, Dan (ENERGY); Calwell, Carolyn (ENERGY/MEDEI/MRI)
Subject: FW: OPG Top issues list

FYI

From: Peter Hamilton [mailto:PHamilton@stikeman.com]
Sent: April 04, 2017 4:18 PM
To: Feldman, Michael; stephen.ashbourne@blakes.com
Cc: Michael Boll; Glenn Zacher
Subject: RE: OPG Top issues list

*** EXTERNAL email. Please be cautious and evaluate before you click on links, open attachments, or provide credentials. ***

I attach an issues list provided by IESO.

Peter Hamilton
Tel : (416) 869-5564
phamilton@stikeman.com<mailto:phamilton@stikeman.com>

STIKEMAN ELLIOTT LLP Barristers & Solicitors
5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L 1B9
https://na01.safelinks.protection.outlook.com/?url=www.stikeman.com&data=01%7C01%7CMichael.Boll%40ieso.ca%7C6b034b040aa0423b1fef08d47c13b756%7C7cd55abd63f243c58f4bd38ea458add8%7C0&sdata=y%2B4YOkPa6NK%2BQlhUOxqPcSouRSz8nUzvKrxzMpsULAI%3D&reserved=0<https://na01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.stikeman.com%2F&data=01%7C01%7CMichael.Boll%40ieso.ca%7C14583525a87b41f556f908d47b97e79d%7C7cd55abd63f243c58f4bd38ea458add8%7C0&sdata=vj04KuPxgUPgMe1zHtBElsnyRa%2BBb4QnLErbSgSByLs%3D&reserved=0>

TORONTO MONTREAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

From: Peter Hamilton
Sent: Tuesday, April 04, 2017 1:38 PM
To: 'Feldman, Michael'; stephen.ashbourne@blakes.com<mailto:stephen.ashbourne@blakes.com>
Subject: RE: OPG Top issues list

A few comments (in red) arising from the below:

Peter Hamilton
Tel : (416) 869-5564
phamilton@stikeman.com<mailto:phamilton@stikeman.com>

From: Feldman, Michael [mailto:mfeldman@torys.com]
Sent: Tuesday, April 04, 2017 12:34 PM
To: stephen.ashbourne@blakes.com<mailto:stephen.ashbourne@blakes.com>; Peter Hamilton
Cc: Feldman, Michael; WONG Leslie -LAWDIV; MCAULEY Tyler -LAWDIV; Hill, Krista; Ramchandani, Rima; Myers, Jonathan; Mansoori, Nina; Bomhof, Scott; Wortsman, Jerald

Subject: OPG Top issues list

Stephen and Peter,

In preparation for the lawyer's meeting tomorrow I am hopeful that we can at least leave the meeting with an agreed set of terms (what terms to use and what they mean). Understandably, there are various memos, emails, draft legislation and other documents floating around using different terms to mean more or less the same things and using more or less the same terms to mean different things. We need to start using the same lexicon. I am attaching a brief memo that sets out a few terms that we think we need to define; namely "consumer", "deferral amount", "qualified costs", "Fair Hydro deferral charges" and "Regulatory Asset". These terms may not be the ones that are finally agreed on as the terms to use, but I am most interested in getting agreement on what the concepts mean as that will hopefully lead us to agreement on the most important point from a legal perspective which is exactly what is the asset that is being purchased from IESO and that will service the debt issued by a Financing Entity.

I am also setting out below a list of the top items that OPG and Torys (with some input from Oslers on behalf of the investment banks) feel should be reflected in the legislation.

Please circulate among those of your colleagues who should be included.

1. A Financing Entity (FE) will not be required to purchase a Regulatory Asset from IESO unless it is able to finance the purchase.

Understand why this would be your position. However I do not believe that it is intended that the IESO' s obligation to finance and effectively warehouse the deferral would be so qualified. In the circumstances we need a thoughtful appraisal of the financibility risk and a discussion of what Plan B is if that that risk eventuates,

2. The legislation must require the Province to appoint a successor to carry out the duties of IESO in the event is IESO is restructured, dissolved or becomes insolvent.

3. The legislation must provide that if there is a change of Provincial law (including regulations, etc.) that adversely impacts the ability of a Financing Entity to fully recover a Regulatory Asset in order to fully repay all indebtedness incurred by a FE to purchase such Regulatory Asset, the Province will indemnify and hold the creditors of the FE harmless against all loss.

4. There can be no additional impairment on the ability to recover Regulatory Assets after the first five years of the program (that is, no limit on year over year increases).

5. There is a strong preference to have no oversight or other role for the OEB; however, to the extent required in order for the Regulatory Asset to be treated as an asset of the FE under GAAP, it would be possible for the OEB to have limited oversight over the FE's expenses so long as such oversight may not extend to the Qualified Costs necessary to recover all principal and interest and other financing charges on the debt incurred by the FE to purchase the Regulatory Asset.

6. The legislation must provide that any transfer, sale, conveyance or assignment of a regulatory asset to a FE is conclusively considered to be a sale for all purposes and may not be re-characterized or found by a court to be a loan or any other arrangement.

This raises the characterization, attachment and constitutional issues I have been discussing. The IESO' s interest in these issues relates to the nature and extent of any representations it may be asked to provided, the nature and extent of any representations IESO' s counsel may be asked to provided, the impact on disclosure (particularly if the IESO is required to be party to an offering document) and the impact upon financibility (particularly to the extent that all or some portion of that brisk is borne by the IESO).

7. The assignment and granting of a security interest over Regulatory Assets and all proceeds derived therefrom either (i) must be exclusively governed by the Fair Hydro legislation which should provide for the perfection and priority of such assignments and security interests in detail in such legislation, notwithstanding any provisions of the PPSA or any other provincial statute or, (ii) must deem the Regulatory Asset to be an "intangible" for purposes of the PPSA and provide that (a) no perfection is required under the PPSA to perfect the assignment of the Regulatory Asset to a FE, (b) the sale of a Regulatory Asset by IESO to a FE shall be free and clear of any security interest that IESO may have purported to grant over such asset, (c) only a FE may grant a security interest over the Regulatory Asset and (d) perfection and priority of a security interest granted by a FE in a Regulatory Asset is governed by the PPSA on the basis that the Regulatory Asset is an "intangible" thereunder.

We should consider what manner of presentation best addresses the artificial security interest concerns.

8. The legislation must provide sufficient flexibility for there to be more than one FE, each of which must be permitted to (i) purchase and aggregate Regulatory Assets, (ii) disaggregate and sell Regulatory Assets, (iii) grant security over its Regulatory Assets so as to enable the grantee of the security interest to realize on its security by selling the Regulatory Asset.

9. Either provide that (i) the Province will guarantee that the IESO will perform its duties as servicer under any sale and servicing agreement with a FE, or (ii) the FE (acting through OPG as manager or else at the direction of the indenture trustee) must have the right, pursuant to its Regulatory Asset, to

direct the LDCs to add additional true up amounts to hydro bills as required to ensure full timely recovery of Regulatory Assets to the extent that the amounts otherwise directed by the IESO are insufficient.

The IESO is concerned that its role be limited to taking reasonable actions to collect, and that it not provide a warranty of collection.

10. The legislation should put a time limit on the period during which IESO can continue to create deferrals under the program. This would provide investors with a necessary level of comfort that at some point ratepayers will be required to pay down the regulatory assets rather than IESO continuing to create deferrals in order to service the debt issued by the FEs.

I do not think that deferrals are being created in the discretion of the IESO. Will this not be mandated by legislation.

11. We need certainty around the category of ratepayers who will benefit from the Fair Hydro program and who will ultimately pay for the program (although it may be that this could be left to the Regulations). A corollary decision that needs to be made is what would happen if (for political or other reasons), the government wishes to expand the category of ratepayers benefitting from the program after the initial launch.

12. In order to ensure that only the category of ratepayers that benefits from the program is left paying for the program, there is likely a need for a retroactive true up by IESO so that the amount deferred by IESO in respect of the Fair Hydro program is the correct amount (in other words, amounts deferred in respect of other programs are not covered by Fair Hydro ratepayers and vice versa).

13. No FE may be voluntarily wound up, liquidated or dissolved until the earlier of (i) one year after all of its debt is repaid and (ii) the date designated by the Minister for the winding up, liquidation or dissolution of the FE (in which case the indemnity in paragraph 3 would apply).

Michael K. Feldman

P. 416.865.7513 | F. 416.865.7380 | 1.800.505.8679
79 Wellington St. W., 30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada |
https://na01.safelinks.protection.outlook.com/?url=www.torys.com&data=01%7C01%7CMichael.Boll%40ieso.ca%7C6b034b040aa0423b1fef08d47c13b756%7C7cd55abd63f243c58f4bd38ea458add8%7C0&sdata=C8BpjCBpWmOXGVYcED%2BfOBiPA8gL19lN6R4gS2YqLio%3D&reserved=0<https://na01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.torys.com&data=01%7C01%7CMichael.Boll%40ieso.ca%7C14583525a87b41f556f908d47b97e79d%7C7cd55abd63f243c58f4bd38ea458add8%7C0&sdata=biEi7LNZn2VYX5XTbcmYgOP5OCNPYmbZFEouK5h%2F8Yk%3D&reserved=0>

[Torys LLP]<https://na01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.torys.com%2F&data=01%7C01%7CMichael.Boll%40ieso.ca%7C14583525a87b41f556f908d47b97e79d%7C7cd55abd63f243c58f4bd38ea458add8%7C0&sdata=KZvbCLz0ohvtEnrC5YWWu7zhVoG16o9yY0NqDchDNxo%3D&reserved=0>