Message

From: Michael Lyle [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=704AFE32C06A42C78CF357CE53A5B319-MICHAEL LYL]
Sent: 2017-04-10 11:41:00 AM
To: Michael Boll [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4811917e15054407b665fe16d12ff415-Michael Bol]
Subject: RE: Further Thoughts about the Regulatory Asset
Attachments: Generator Expected Service V2 feb 24.docx

FYI

From: Michael Boll
Sent: April 10, 2017 10:46 AM
To: Michael Lyle
Subject: Re: Further Thoughts about the Regulatory Asset

Yes, probably will be lunch.

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Michael Lyle
Sent: Monday, April 10, 2017 10:32 AM
To: Michael Boll
Subject: RE: Further Thoughts about the Regulatory Asset

Can we talk about this when you are on a break?

From: Michael Boll
Sent: April 10, 2017 6:58 AM
To: Kim Marshall; Anthony Martinello; Jeannette Briggs; Michael Lyle
Subject: Fw: Further Thoughts about the Regulatory Asset

Fyi

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Feldman, Michael <mfeldman@torys.com>
Sent: Sunday, April 9, 2017 10:19 PM
To: 'Peter Hamilton'
Cc: Ramchandani, Rima; Mansoori, Nina; Glenn Zacher; Jim Harbell; Michael Boll; Feldman, Michael
Subject: RE: Further Thoughts about the Regulatory Asset

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

Peter,

I am attaching a clean and blacklined version of our mark-up to the draft legislation last circulated by Blakes.

P. 416.865.7513 | F. 416.865.7380 | 1.800.505.8679

From: Peter Hamilton [mailto:PHamilton@stikeman.com]
Sent: April-09-17 1:38 PM
To: Feldman, Michael <mfeldman@torys.com>; ASHBOURNE, STEPHEN <STEPHEN.ASHBOURNE@blakes.com>
Cc: JACKSON, ADAM <ADAM.JACKSON@blakes.com>; Fitzpatrick, Michael F. <MFitzpatrick@hunton.com>; O'Brian,

Adam <aobrian@hunton.com>; Ramchandani, Rima <rramchandani@torys.com>; Hill, Krista <khill@torys.com>; Emes, Aaron <aemes@torys.com>; Myers, Jonathan <jmyers@torys.com>; Mansoori, Nina <nmansoori@torys.com>; WONG Leslie -LAWDIV <leslie.wong@opg.com>; MCAULEY Tyler -LAWDIV <tyler.mcauley@opg.com>; Glenn Zacher <GZacher@stikeman.com>; Jim Harbell <JHarbell@stikeman.com>; Michael Boll <Michael.Boll@ieso.ca> (Michael.Boll@ieso.ca) <Michael.Boll@ieso.ca>
Subject: RE: Further Thoughts about the Regulatory Asset

See below a couple responses in red.

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

From: Feldman, Michael [mailto:mfeldman@torys.com]
Sent: Saturday, April 08, 2017 11:44 AM
To: Peter Hamilton; ASHBOURNE, STEPHEN
Cc: JACKSON, ADAM; Fitzpatrick, Michael F.; O'Brian, Adam; Ramchandani, Rima; Hill, Krista; Emes, Aaron; Myers, Jonathan; Mansoori, Nina; WONG Leslie -LAWDIV; MCAULEY Tyler -LAWDIV; Glenn Zacher; Jim Harbell; Michael Boll <Michael.Boll@ieso.ca> (Michael.Boll@ieso.ca); Feldman, Michael
Subject: RE: Further Thoughts about the Regulatory Asset

Stephen,

I think Peter and I are zeroing in on the same target. Please see my comments on Peter's specific comments below.

P. 416.865.7513 | F. 416.865.7380 | 1.800.505.8679

From: Peter Hamilton [mailto:PHamilton@stikeman.com]
Sent: April-07-17 5:58 PM
To: Feldman, Michael <mfeldman@torys.com>; ASHBOURNE, STEPHEN <STEPHEN.ASHBOURNE@blakes.com>
Cc: JACKSON, ADAM <ADAM.JACKSON@blakes.com>; Fitzpatrick, Michael F. <MFitzpatrick@hunton.com>; O'Brian, Adam <aobrian@hunton.com>; Ramchandani, Rima <rramchandani@torys.com>; Hill, Krista <khill@torys.com>; Emes, Aaron <aemes@torys.com>; Myers, Jonathan <jmyers@torys.com>; Mansoori, Nina <nmansoori@torys.com>; WONG Leslie -LAWDIV <leslie.wong@opg.com>; MCAULEY Tyler -LAWDIV <tyler.mcauley@opg.com>; Glenn Zacher <GZacher@stikeman.com>; Jim Harbell <JHarbell@stikeman.com>; Michael Boll <Michael.Boll@ieso.ca> (Michael.Boll@ieso.ca) <Michael.Boll@ieso.ca>
Subject: RE: Further Thoughts about the Regulatory Asset

I very largely agree with Michael's comments below. In addition, IESO's very strong preference is not to hold or retain a co-ownership interest in the securitization asset, however described.

I would also think that the retention by IESO of any such interest would be problematic from a financing perspective, and might also complicate our objective of not being party to any prospectus.

I did, however, want to add a few thoughts.

First, while the distinction between a fully formed Securitization Asset and a partially inchoate Regulatory Asset is very likely inevitable, we cannot wholly orphan the Regulatory Asset. I would expect that the auditors would need to see some substance in the Regulatory Asset. The IESO will also want to attribute value to the Regulatory Asset in the event that it cannot be sold. That means, I think, that some of the terms of payment or recovery in favour of the IESO will need to be set out at the time the asset comes into existence, even if they are then altered upon the "transfer" to the SPV.

MKF: I agree. There must be a statutory right to recover the Regulatory Asset. My thought is that recovery on behalf of IESO could be determined by OEB in accordance with the regulations and/or the Fair Allocation Plan, but I think the accountants need to weigh in on how the details of this recovery right of the Regulatory Asset in the hands of IESO should be determined to achieve their objectives.

Second, the construct of a Regulatory Asset being sold and then simultaneously reborn as an undifferentiated part of a larger Securitization Asset, which Securitization Asset provides for different terms than the Regulatory Asset, puts further pressure on any sale or transfer analysis. In effect, the rights acquired by the SPV will be different than the rights disposed of by the IESO. Combining that issue with the previous issue around the property characterization, it is hard to describe what is happening as a transfer. The Lenders to the SPV will want the IESO and their counsel to say that the IESO retains no interest in the relevant bundle of rights. It would be difficult to make that statement if it is required to be made on the back of the transfer as described. I think that the best way of providing the required comfort is for the statute to state specifically that upon an "act of transfer" or, better, an "election to transfer", the IESO has no further rights in the bundle of rights transferred. Since these rights are a creature of statute, it is hard to see how such a stipulation could realistically be challenged..

MKF: I still think the path of least resistance is to continue to describe this as a Disposition and for the statute to deem this to be a sale. I agree that the only point that investors and rating agencies should be concerned about is that after such a Disposition, neither IESO nor its creditors will have any right, title or interest in the Regulatory Asset subject to the Disposition or the Financing Asset held by the Financing Asset Owner. That concept should be built into the section dealing with the "true sale". I will provide some language in my next markup but it will be straightforward. I do not see the need for an "election to transfer". By IESO entering into a Disposition Agreement, it is electing to transfer.

As an example, let's say that a US based licensed air carrier has certain landing rights and slots at various airports in Canada. These are intangible rights, analogous to the Regulatory Asset. They are generally not assignable. However if this US carrier (the Seller) enters into an agreement to sell its business as a going concern to another US licensed air carrier (the Purchaser), the purchase and sale agreement will likely describe the transfer of these landing rights and slots as a "sale" of these assets as part of the overall asset sale. In fact, this "sale" will really be a surrender of these intangible rights by the Seller to enable the Purchaser to apply for and hopefully obtain the same landing rights and slots (let's assume as a condition to closing). The important thing from the Purchaser's financing perspective is that (i) upon closing the Purchaser has the necessary rights, and (ii) upon closing the Seller does not. Once the Purchaser has its landing rights and slots, it may actually be able to put through more passengers and generate more revenue under these rights than the Seller could, for various reasons (size of aircraft, load factors, etc). I would still be fine with describing this in the legislation as a sale of the Regulatory Asset which, upon assignment, gives the Purchaser a right to recover more than the Seller could. I acknowledge that the form of the true sale opinion (which would be premised on the statute deeming this to be a sale) may have some additional language in it describing what is actually meant by the "sale" as deemed to happen in the statute, but the important part of that opinion will be relating to the clean opinion that neither IESO nor, in the event of the insolvency of IESO, IESO's creditors could have access to this property.

I think that we are close but not quite aligned. What I am trying to avoid is a discussion, be it in our opinion or in the IESO's rep of the constitutional limits on the power of the Province to deem something to be a property right. In some of the US opinions and documents I have read, the opinion and rep are given solely on the basis of the terms of the statute and any constitutional issue is assumed away. That might well work, subject to the level of paranoia and attentiveness of the credit rating agencies and underwriter's counsel. Rather than rely upon their inattention, the alternative, in my view, is to rely upon the fact that this is a right conferred by statute and therefore it can be taken away by statute. This "taking away" could operate independently of the characterization of the bundle of rights as property. However, we need to avoid backing into the property issue by saying that the "taking away" operates upon a valid disposition. I think that a subtle drafting point only.

Third, limiting the class of Financing Asset holders to Financing Entities is at least partially circular since the Financing Asset comes into existence only upon the "transfer" to a Financing Entity. If the intent was to prevent further transfers by the Financing Entity, that issue does not concern us. If what you intended to say is that a Regulatory Asset can only be sold to a Financing Entity then that is I think problematic since the Financing Entity has no corresponding obligation to accept and pay for a "transfer". In any event, even if that turns out to be the desired commercial result, I would suggest that it be left for the financial transaction and not provided for in the statute.

MKF: My intention was to suggest that IESO could only sell to a Financing Entity. I understand that theoretically this might seem at first blush to be problematic to IESO, but in reality nobody has an obligation to accept and pay for a transfer. If a Financing Entity can't get the necessary financing then it is not obligated (nor would it have the financial resources) to purchase. However, if there is another party willing to purchase a Regulatory Asset, then that person should be willing to do so through a Financing Entity. Remember, that a Financing Entity will have the benefit of 49% subordinated funding from OPG (most of which will be funded by the Province). Other potential purchasers will not have this benefit. I think there is some conceptual benefits to be gained by limiting Financing Asset Owners to Financing Entities and defining Financing Entities as entities established and managed by OPG as Administrative Agent. It would make it more logical for OPG to assume a larger role in establishing the Financing Plan (as I think its accountants require) and would probably facilitate the establishment of a global capital markets platform, without having to be concerned with unrelated co-owners in the same Financing Asset. I think the offsetting benefits of keeping the flexibility of having other Financing Asset Owners is more illusory than real. But that is something that should be tested with the investment bankers.

I think that this is a theoretical and a practical issue. The theoretical issue is do we have a series of assets (in which case it makes sense that an asset could be dealt with outside this structure) in which case I certainly see the point in restricting who the owner or owners can be. The practical issue is what is the plan, and what is the protection for the IESO if this issue turns out now or later not to be financeable (acknowledging that if we cannot sell it to the financing entity it is very unlikely that we could sell it to anyone else irrespective of what the statute says).

Fourth, on the assumption that credit enhancement will require that there be a delta between the amount of financing available and the value over time of the regulatory asset, and that the IESO will not retain an interest in that asset , how will that value be captured in a way that does not generate a windfall at the expense of ratepayers.

MKF: I think this is the role of the True Up. It could go up or down depending on the variance between collections and estimates. I admit that my understanding of how this would work in practice is still only at a conceptual level, but I am told that this issue does get worked out in US deals.

Fifth, unfortunately there is still likely a need for cooperation and coordination between the IESO and the SPV, in that, for so long as a Regulatory Asset exists in the IESO, both the IESO and the SPV will have an interest in the cash flow associated with the deferral. However, I agree that the required cooperation f does not likely rise to the level of a co-ownership agreement and that this does not need to be provided for in the statute.

MKF: My understanding is that the SPV will have no interest whatsoever in IESO's Regulatory Asset until it pays for it.

Agree, subject to where we get to on Stephen's co-ownership proposal. But even if we are not co-owners, we may both own assets that represent a claim on the same cash flows. This would be the case during the interim periods prior to a financing and in the event of a financing fail. Therefore co-ordination as regards allocation of collected cash will be necessary.

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

STIKEMAN ELLIOTT LLP Barristers & Solicitors
5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L1B9
www.stikeman.com

From: Feldman, Michael [mailto:mfeldman@torys.com]
Sent: Friday, April 07, 2017 4:14 PM
To: ASHBOURNE, STEPHEN
Cc: JACKSON, ADAM; Peter Hamilton; Fitzpatrick, Michael F.; O'Brian, Adam; Ramchandani, Rima; Hill, Krista; Emes, Aaron; Myers, Jonathan; Mansoori, Nina; Feldman, Michael; WONG Leslie -LAWDIV; MCAULEY Tyler -LAWDIV
Subject: Further Thoughts about the Regulatory Asset

Stephen,

After our meeting today we had a call with Mike and Adam at Hunton & Williams that helps me to crisp up my thinking on the nature of the Regulatory Asset in the hands of IESO and the Regulatory Asset in the hands of a Financing Entity as well as the co-ownership aspect of what each Regulatory Asset Owner has.

Mike and Adam indicated that in the US there are a couple of Master Trust deals which would, in effect, be analogous to different Financing Entities owning different co-ownership interests in what we are calling the Regulatory Asset. But in none of those deals would the Seller (IESO) also retain a co-ownership interest. That might be a tough one for the rating agencies to swallow. Although in many cases the Seller holds what is referred to as a "regulatory asset" under US GAAP (based on the likelihood of recovering an amount in a regulated environment), once the Seller sells the right to impose, bill and collect this amount from Ratepayers it is termed a "Securitization Asset" (or some similar term) and in the hands of the Issuer the Securitization Asset includes the right not only to recover the principal amount of the debt incurred but also interest, and all other charges and operating expenses. In other words, as per your understanding this morning, the nature of the Securitization Asset depends on there being a corresponding securitization funding, whereas the nature of the regulatory asset in the hands of the Seller does not.

I think we need two different defined terms. What we are currently calling a "Regulatory Asset" I would call a "Financing Asset" (as an example) and we can keep that concept based on the underlying Funding Obligations. The Regulatory Asset Owner (now Financing Asset Owner) would always incur indebtedness in order to acquire the related Financing Asset and the entitlement of the Financing Asset would depend upon the terms of that indebtedness.

IESO, by recording a deficit or deferral in a given month, would be given a statutory right to recover that amount [perhaps subject to the Financing Plan] and hence would record the asset, when recorded, as a regulatory asset. This regulatory asset would be an entitlement to recover the recorded deficit and would not be dependent on IESO's financing (as there may be no need to finance this deficit if IESO can get it sold in time). The result is that IESO has no share in the Financing Asset but it has its own statutory regulatory asset so long as it holds it.

We also think that while it may be acceptable to have a co-ownership structure for a Financing Asset that is owned entirely by Financing Entities (managed by OPG), the introduction of the possibility of other types of Financing Asset Owners (like a commercial bank) will give rise to challenges in structuring a capital markets platform and this would be novel for the rating agencies to deal with. I believe that the purpose of the structure is to develop a funding plan that would result in the Financing Assets and related Funding Obligations being consolidated with OPG. The possibility of any other Financing Asset Owner other than a Financing Entity managed by OPG is very slim and I think introduces unnecessary complications for virtually no realistic benefit. As a result, I suggest limiting Financing Asset Owners to Financing Entities. This would then allow the rating agencies to treat all Financing Entities (if there are more than one) as a single Master Trust with security over co-ownership interests in the same Financing Asset. This would also make it more logical for OPG to be given the role in the legislation it thinks it may have to assume in developing the Financing Plan so as to achieve on balance sheet treatment for it.

Let me know if you would like to discuss.

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 | www.torys.com

TORYS LLP

This email and any attachments are for the sole use of the intended recipients and may be privileged or confidential. Any distribution, printing or other use by anyone else is prohibited. If you are not an intended recipient, please contact the sender immediately, and permanently delete this email and attachments.

Le présent courriel et les documents qui y sont joints sont exclusivement réservés à l'utilisation des destinataires concernés et peuvent être de nature privilégiée ou confidentielle. Toute distribution, impression ou autre utilisation est interdite aux autres personnes. Si vous ne faites pas partie des destinataires concernés, veuillez en informer immédiatement l'expéditeur, ainsi que supprimer ce courriel et les documents joints de manière permanente.

This email and any attachments are for the sole use of the intended recipients and may be privileged or confidential. Any distribution, printing or other use by anyone else is prohibited. If you are not an intended recipient, please contact the sender immediately, and permanently delete this email and attachments.

Le présent courriel et les documents qui y sont joints sont exclusivement réservés à l'utilisation des destinataires concernés et peuvent être de nature privilégiée ou confidentielle. Toute distribution, impression ou autre utilisation est interdite aux autres personnes. Si vous ne faites pas partie des destinataires concernés, veuillez en informer immédiatement l'expéditeur, ainsi que supprimer ce courriel et les documents joints de manière permanente.