

DRAFT November 9, 2017

FUNDING COMMITMENT-CONTINGENT FUNDING AGREEMENT

THIS ~~FUNDING COMMITMENT-CONTINGENT FUNDING~~ AGREEMENT effective as of this [] day of November, 2017.

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BETWEEN: The Independent Electricity System Operator

(hereinafter the "Corporation")

OF THE FIRST PART,

Her Majesty the Queen in ~~Right-right~~ of the Province of Ontario
as ~~Represented~~-represented by the Minister of Energy

(hereinafter called the "Province"),

OF THE SECOND PART

WHEREAS pursuant to (i) the *Ontario Fair Hydro Plan Act, 2017* (the "Act"), (ii) the regulations made pursuant to the Act; and/or (iii) any agreements relating to the implementation of the Act or regulations, including with any financing entity (as defined in the Act), (the Act, such regulations and agreements, collectively referred to as the "Fair Hydro Plan") the Corporation will determine the IESO deferral (as defined in the Act), which it will record in a variance account, and which forms part of ~~pursuant to the Act will be a regulatory asset established under the Act;~~

Commented [A1]: This defined term is not used elsewhere. Consider deleting to avoid confusion that the Act, regulations and agreements would form the entire Fair Hydro Plan

AND WHEREAS under the Act the Corporation may transfer a specified portion of the regulatory asset to a financing entity, however the financing entity is not required to accept a transfer of a specified portion of a regulatory asset;

AND WHEREAS the Corporation has a line of credit with the Ontario Financing Authority ("OFA") to enable the Corporation to fund the IESO deferral until such time as the Corporation is able to transfer the specified portion of the regulatory asset funded by the line of credit to a financing entity;

AND WHEREAS the Corporation and the Province wish to enter into this agreement to provide certainty that the Corporation will continue to be able to pay its liabilities as they become due in the event that (i) a financing entity does not accept and purchase one or more transfers of ~~the specified portions of~~ the regulatory asset, (ii) the balance in the Corporation's variance account established pursuant to section 24(1) of the Act is ~~[S1.5 billion or more]~~, and (iii) ~~IESO deferrals (as defined in the Act) continue to be created~~ and recorded in the Corporation's variance account in accordance with the Act and regulations made under the Act, and (iv) the Corporation is unable to recover the balance in the Corporation's

Commented [A2]: Any reason why this was included?

Also note that IESO deferral is only one component of the s.24 variance account. Funding costs in s.9.1 of O. Reg. 206/17 are also included in the variance account.

If there is no Part II rate adjustment or if the Part II rate adjustment fails to create an IESO deferral, even though it continues to pay for carrying costs, IESO would not be getting any funds under this agreement.

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variance account in accordance with section 25 of the Act (collectively referred to as a "Funding Triggering Commitment Event");

Commented [A3]: Suggested defined term to avoid indicating any "commitment" of Province.

NOW THEREFORE, in consideration of the sum of \$1.00 now paid by the Corporation to the Province and other good and valuable consideration (the receipt of which is hereby acknowledged), the parties hereby agree:

1. In the event that a Triggering Event has occurred, the Province agrees to [pay/loan] [NTD: to discuss whether this would be a non-recoverable payment by the Province, or a loan. If a loan, the IESO would need the ability to recover repayments from ratepayers. If it is not a loan, but is a non-recoverable payment, presumably it would reduce the balance in the IESO's variance account.] the Corporation all amounts required by the Corporation to pay all of its liabilities (the "Funded Liabilities") as they become due.
2. The Province shall advance the funds required by the Corporation within [] days of receipt of notice from the Corporation stating that a Funding Commitment Triggering Event has occurred, or is continuing, and certifying the amount required by the Corporation to pay all of its liabilities.
3. The Province represents and warrants to the Corporation as follows and acknowledges that the Corporation is relying on the following representations and warranties in connection with this agreement:
 - (a) the Province has all necessary power, authority and capacity to enter into this agreement and to perform its obligations hereunder;
 - (b) all necessary actions have been taken by the Province or on the Province's part to authorize its execution and delivery of this agreement, and without limiting the foregoing, the Province has received all necessary approvals under the *Financial Administration Act* (Ontario) required for it to enter into this agreement;
 - (c) this agreement has been duly executed and delivered by the Province and is a legal, valid and binding obligation of it enforceable against it in accordance with its terms, except as that enforcement may be limited by (i) the provisions of the *Proceedings Against the Crown Act* (Ontario), to the application of equitable principles and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction; (ii) section 11.3 of the *Financial Administration Act* (Ontario); and (iii) section 43 of the *Financial Administration Act* (Ontario).
4. This agreement shall be interpreted and governed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.
5. The provisions of this agreement and the benefit of all covenants and obligations herein contained shall enure to the benefit of the Corporation and the Corporation's administrators, executors and assigns as applicable.

Commented [A4]: Consider including a "sunset date" (e.g. if no Triggering Event arises prior to May 1, 2021, the agreement expires.)

Pursuant to s.25 of the Act, after May 1, 2021, IESO may recover the balance in the variance account from the rate-base if financing entities refuse to purchase specified portions of the regulatory asset.

Commented [A5]: Consider including clawback/setoff provisions (similar to those in the MAG TPA template) in the event that:

(i) specified portions of the regulatory asset are successfully transferred to a financing entity at a later date, or

(ii) IESO recovers all or part of the balance in its variance account from the rate-base in accordance with s.25 of the Act

Commented [A6]: O. Reg. 206/17 may need to be amended if such payment would reduce the balance in the IESO's variance account.

Unintended accounting consequences may arise if the amount is a non-recoverable payment from the Province.

Commented [A7]: Should this be subject to a "Maximum Funds" provision? (e.g. the Province's liability is capped at the balance of OFA's line of credit at time of Triggering Event)

Alternatively, insert a new provision similar to the one in MAG TPA template

Commented [A8]: What if the Province does not agree with the amount provided by IESO? Should a "Disputed Amounts" provision be expressly provided in this agreement?

Commented [A9]: Should we remove "has occurred" (i.e. require that the Triggering Event continue for a certain number of days before IESO can require funds be paid under this agreement)?

Commented [A10]: Should there be a limit on the types of liabilities paid by the Province?

If so, change highlighted term to "Funded Liabilities" and insert new provision governing Funded Liabilities.

Commented [A11]: This agreement would likely require a s. 28 approval before execution: the amount and timing of contingent liability cannot be determined until time of Triggering Event.

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6. No modification or amendment to this agreement will be binding unless executed in writing by the authorized representatives of the parties. No waiver of any provision of this agreement shall: i) be binding unless executed in writing and properly authorized by the party to be bound thereby; or ii) constitute a waiver of any other provision of this agreement or constitute a continuing waiver, unless otherwise expressly provided.

7. Upon the request of the Corporation of either party, the Province or other party shall execute and deliver such further instruments and do or cause to be done such further acts as may be reasonably necessary to carry out the provisions and purposes of this agreement.

8. Any notice to be given by either party hereto to the other pursuant to this Contract agreement will be in writing and delivered by regular mail, courier service, or electronic mail during the IESO's Corporation's normal business hours. Notices will be deemed to have been given: (a) in the case of delivery by postal service, five (5) business days after such notice is sent, or (b) in the case of delivery by courier service, or by email (or other electronic mail service), one (1) business day after such notice is sent/delivered, addressed in all cases as follows:

Commented [A12]: Should this be normal business hours of both parties? Or the Province's?

(a) In the case of the Corporation:
Independent Electricity System Operator
120 Adelaide Street West, Suite 1600
Toronto, Ontario M5H 1T1
Attention: Chief Financial Officer and General Counsel
Email: []

(b) In the case of the Province:

[]

9. This agreement may be executed by the parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument. Delivery of an executed signature page to this agreement by a party by electronic transmission will be as effective as delivery of a manually executed copy of this agreement by such party.

Commented [A13]: Should other boilerplate provisions be included? For example: entire agreement and severability.

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NOW THEREFORE, the parties have executed this agreement effective as of the day and year first above written.

THE INDEPENDENT ELECTRICITY
SYSTEM OPERATOR

DRAFT November 9, 2017

By: _____

**HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO, AS REPRESENTED
BY THE MINISTER OF ENERGY**

By: _____

Glenn Thibeault
Minister of Energy