DRAFT November 9, 2017

CONTINGENT FUNDING AGREEMENT

THIS 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 of the Province of Ontario as 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 record in a variance account ~~determine~~ the IESO deferral (as defined in the Act)~~, which it will record in a variance account~~ together with such adjustments contemplated by section 24(1) of the Act, and which amounts will forms part of a regulatory asset established under the Act;

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 **[$1.5 billion or more]**, and (iii) IESO deferrals continue to be ~~created and~~ recorded in the Corporation's variance account in accordance with the Act and regulations made under the Act or the IESO continues to be obligated to pay to the financing entity carrying costs pursuant to section 9.1 of O.

Commented [A1]: 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.

Commented [MB2]: Thank you , good comment. I have deleted "created" since being recorded is accurate and have also added payment of carrying costs.

Reg. 206/17 made under the Act, ~~and (iv) the Corporation is unable to recover the balance in the Corporation's variance account in accordance with section 25 of the Act~~ (collectively referred to as a "Triggering Event");

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 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.

Commented [MB3]: By operation of the Act the IESO has the ability to recover this amount from consumers. However, this recovery will likely be over a medium to long term. The purpose of this agreement is to ensure the IESO has the funds to pay its liabilities immediately as they come due.

The ability to recover from ratepayers under section 25 works if the money is loaned to the IESO. It would be the mechanism to enable the IESO to repay the funds.

Commented [A4]: Suggested defined term to avoid indicating any "commitment" of Province.

Commented [MB5]: Let's discuss concern with "commitment" so I understand the nuance. I assume it is the difference between seeking approval for an appropriation of funds, versus a section 28 approval for a contingent obligation but want to make sure.

Commented [A6]: 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 financ ...

Commented [MB7]: We could include a sunset date, but I'd recommend it be tied to there no longer being rate mitigation or an obligation on IESO to pay carrying costs. If either of those t ...

Commented [A8]: Consider including clawback/setoff provisions (similar to those in the MAG TPA template) in the event that: ...

Commented [MB9]: If gov't funds IESO because IESO is not able to borrow funds to pay its liabilities, I don't think IESO would record any amount in the variance account.

Commented [A10]: O. Reg. 206/17 may need to be amended if such payment would reduce the balance in the IESO's variance account. ...

Commented [MB11]: It shouldn't reduce the variance account because it will be funds we need to pay liabilities, not to pay down the OFA debt.

Commented [A12]: 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) ...

Commented [MB13]: Capping the amount to the OFA line of credit would defeat the purpose of this agreement. We are seek ...

Commented [A14]: 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 [MB15]: The IESO would be certifying the amount needed. This would be based on what is needed to settle contracts and markets so will be verifiable.

Commented [A16]: Should we remove "has occurred" (i.e. require that the Triggering Event continue for a certain number ...

Commented [A17]: Should there be a limit on the types of liabilities paid by the Province? ...

Commented [MB18]: Let's discuss what you have in mind. The intent is to enable the IESO to remain solvent so we drafted it to align with the standard solvency definition.

Commented [A19]: This agreement would likely require a s. 28 approval before execution: the amount and timing of ...

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.

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 either party, the 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 agreement will be in writing and delivered by regular mail, courier service, or electronic mail during the IESO's Corporation'sProvince'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 delivered, addressed in all cases as follows:

Commented [A20]: Should this be normal business hours of both parties? Or the Province's?

Commented [MB21]: I'm fine with it being 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) .I 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 [A22]: Should other boilerplate provisions be included? For example: entire agreement and severability.

Commented [MB23]: Yes, to severability. I will consider entire agreement. Perhaps also interpretation such that references to legislation or regs include amendments.

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

THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

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