Message

From: Peter Hamilton [PHamilton@stikeman.com]
Sent: 2017-11-23 11:24:04 AM
To: Saulnier, Brett [bsaulnier@torys.com]; Glenn Zacher [GZacher@stikeman.com]; Michael Boll [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4811917e15054407b665fe16d12ff415-Michael Bol]; Anthony Martinello [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3fb7d76317b34780b15d96309b995c31-Anthony Mar]; Jeannette Briggs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=148095610f7242f48a5a9da24b1a8a87-Jeannette B]; Kim Marshall [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b63a22b42bf14587870d93119a054d88-Kim Marshal]
CC: Feldman, Michael [mfeldman@torys.com]; Ramchandani, Rima [rramchandani@torys.com]; 'leslie.wong@opg.com' [leslie.wong@opg.com]; dup-john.s.lee@opg.com [john.s.lee@opg.com]; 'ken.ryfa@opg.com' [ken.ryfa@opg.com]; Sebastiano, Rocco [RSebastiano@osler.com]; Milligan, Peter [PMilligan@osler.com]; Fullerton, Rick [RFullerton@osler.com]; Mansoori, Nina [nmansoori@torys.com]; LAURETA LAPIRA May -TREASURY [may.lapira@opg.com]; LADAK Lubna -TREASURY [lubna.ladak@opg.com]; 'matthew.go@opg.com' [matthew.go@opg.com]
Subject: RE: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity
Attachments: SETOR1-#6779775-v12-Master_Transfer_and_Servicing_Agreement.docx; WSComparison__6779775_10-_6779775_12.pdf

Please see attached a revised draft of the MTSA. This draft incorporates with only minor changes the Torys comments sent on Friday, the Oslers comments and the DBRS comments communicated last night by Torys.

The DBRS comments on the draft security agreement are all fine.

On the indemnity, we made a number of comments none of which were accepted in the Oslers mark-up.

In our mark-up were had tried to reflect the following principles:

1. The IESO contract is with the Issuer, and in the event of breach the IESO's primary liability ought to be to the issuer.
2. Recognizing the institutional relationship between the IESO and the Issuer, it is not unreasonable that the Indenture Trustee have the right to enforce the contract directly in circumstances where the Issuer fails to do so (even though such a direct right is often not a feature of a securitization).
3. Conferring a direct cause of action on the indenture trustee, in its capacity as such, is sufficient to address the procedural issues of the finance parties and it is not necessary or appropriate to create multiple causes of action in favour of an open ended class of potential claimants, none of whom are party to the contract.
4. No double recovery. Indemnification of the Issuer in full against all of its losses resulting from an IESO breach should satisfy in full any other claim
5. Providing for a direct cause of action in favour of a person or persons not party to the MTSA should not expand the IESO's contractual liability under the MTSA. This is consistent with the position of the Indenture Trustee as an assignee of the Issuer's rights under the MTSA. Generally an assignee acquires no better or higher rights than the assignor. However, again in recognition of the institutional relationship between the IESO and the OPG, the IESO would agree not to assert against the indenture trustee personal defences which the IESO might have asserted as against the Indenture trustee.

Rather than us sending out a dueling draft, which would merely repeat the comments which Oslers did not accept, perhaps we might hear from the dealers which of these principles is unacceptable to them (and why).

If we cannot engage on that basis, I am open to suggestions as to how to proceed.

Peter Hamilton

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From: Saulnier, Brett [mailto:bsaulnier@torys.com]
Sent: Wednesday, November 22, 2017 8:39 PM
To: Glenn Zacher; Michael Boll; Anthony Martinello (Anthony.Martinello@ieso.ca); Jeannette Briggs (jeannette.briggs@ieso.ca); kim.marshall@ieso.ca; Peter Hamilton
Cc: Feldman, Michael; Ramchandani, Rima; 'leslie.wong@opg.com'; dup-john.s.lee@opg.com; 'ken.ryfa@opg.com'; Sebastiano, Rocco; Milligan, Peter; Fullerton, Rick; Mansoori, Nina; LAURETA LAPIRA May -TREASURY; LADAK Lubna -TREASURY; 'matthew.go@opg.com'
Subject: RE: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity

All,

Please find attached a revised MTSA and IESO Security Agreement reflecting comments provided by DBRS. I note that we are still awaiting comments from Moody's. The attached are being circulated to all parties concurrently and therefore remain subject to review by Osler and OPG.

Please also let us know when we should expect comments on the changes to the MTSA and Acknowledgement & Indemnity circulated on Friday (below). On the implementation plan, Osler provided the same comment on the management agreement and we think it would make the most sense for OPG/IESO to compare notes and come up with a joint implementation plan that both parties are comfortable with. Let us know if we can help facilitate that at all.

Thanks,
Brett

Brett Saulnier

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TORYS LLP

From: Saulnier, Brett
Sent: November-17-17 5:43 PM
To: Glenn Zacher <GZacher@stikeman.com>; Michael Boll <Michael.Boll@ieso.ca>; Anthony Martinello (Anthony.Martinello@ieso.ca) <Anthony.Martinello@ieso.ca>; Jeannette Briggs (jeannette.briggs@ieso.ca) <jeannette.briggs@ieso.ca>; kim.marshall@ieso.ca; Peter Hamilton <PHamilton@stikeman.com>
Cc: Feldman, Michael <mfeldman@torys.com>; Ramchandani, Rima <rramchandani@torys.com>; Saulnier, Brett <bsaulnier@torys.com>; 'leslie.wong@opg.com' <leslie.wong@opg.com>; 'dup-john.s.lee@opg.com' <john.s.lee@opg.com>; 'ken.ryfa@opg.com' <ken.ryfa@opg.com>; Sebastiano, Rocco <RSebastiano@osler.com>; 'Milligan, Peter' <PMilligan@osler.com>; Fullerton, Rick <RFullerton@osler.com>
Subject: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity

All,

Attached are revised drafts of the MTSA and indemnity to the indenture trustee, in clean and blackline reflecting comments from Osler. For background on the MTSA changes, Osler advised that the provisions added regarding implementation under the servicer duties were drafted based on the IESO presentation made to the rating agencies. The changes to the carrying costs provisions are to ensure that the financing entity has sufficient cash on hand in advance of the payments it's required to make with a mechanism to true up for over or under payment from time to time.

Please also note that we were advised that the rating agencies will be providing some feedback on the MTSA. As soon as we are in a position to share this we will let you know.

Thanks,
Brett

Brett Saulnier