Intergenerational Fairness in Hydro Rates Act, 2017 (draft)

IESO Issues

1. We have received advice from KPMG that it is critical to the ability of IESO to book a regulatory asset (which in turn is critical to the overall transaction) that the statutory language ensures that IESO has an effective right of recovery in respect of any IESO Funding Shortfall not transferred to the SPV. In our view, recovery by the IESO should be determined by OEB in accordance with the regulations and/or the Fair Allocation Plan. To this end, the IESO proposes that s 25.33 of the EA/O Reg 430/04 be amended, as necessary, to provide for the IESO to record the IESO Funding Shortfall amount in a variance account and to provide for the OEB to eliminate and dispose of the variance account balance as part of the RPP adjustment process under the OEB Act, with such necessary OEB accounting order.

22. (1) The IESO has property rights and interests, which together constitute a regulatory asset, in the recovery of the IESO funding shortfall. (1.1) The right to recover the IESO funding shortfall under subsection (1) is subject to the following limits: 1. The amount recovered in respect of a reference period may not exceed the amount by which the [fair allocation] in respect of a reference period exceeds the amount of the clean energy adjustment for the reference period. 2. No part of the funding shortfall shall be recovered before May 1, 2022. (2) The establishment of the regulatory asset is not affected by any failure to impose, attribute, invoice, accrue or collect the clean energy adjustment. 22.1 (1) Subject to the approval by order of the Ontario Energy Board, the IESO shall record the IESO funding shortfall from time to time in its books. (2) The Ontario Energy Board may, in accordance with the regulations, by	22. (1) The IESO has the right, exercisable in accordance with this Act and the regulations to recover the IESO funding shortfall. [This right constitutes a regulatory asset and a property right.] NTD: to the extent qualification as a regulatory asset is an accounting judgment there may be little value in attempting to dictate that result by statute. However, the use of a defined term "regulatory asset" for other purposes is fine. Is the intent that Sections (1.1)(1) and (1.1)(2) would limit the recovery rights of the Investment Asset Owner or just the IESO in respect of the regulatory asset. Any material express limitation or condition attached to the IESO right of recovery based on the fair allocation plan is likely to be problematic as impairing the effective right of recovery. If this is the result then IESO may be treated as an equity holder and may not be able to recognize the regulatory asset. In addition, Section (1.1) 1 appears to reintroduce the concept that IESO's

order specify how the IESO funding shortfall must be recorded.	funding shortfall amount ranks subsequent to the clean energy adjustment amount such that the recovery of the IESO's funding shortfall in a reference period is limited to whatever space is left under the fair allocation curve. . If the right to record the shortfall is subject to an OEB order, that order may need to be obtained in advance This language and structure may not be definitive enough to provide for a real right of recovery of any regulatory asset amount held by the IESO. The statute should provide that the IESO be required to record the funding shortfall in a variance account (without having to obtain OEB approval) and that the OEB be required, as prescribed by regulation, to provide for recovery of the variance amounts recorded - presumably the regulation could provide when, after 2022, and in what manner (i.e., over what period of time) the IESO can recover any regulatory asset amount. OEB, by accounting order, would establish an IESO [fair hydro] variance account and indicate what IESO shortfalls may be included in it. The OEB is not approving each funding shortfall. The OEB's role in recovery would be to include the funding shortfall variance in future prices so IESO may recover it. In Section 6, OEB also needs to continue to determine what RPP price would have been payable but for the price set by Section 6. This is needed so LDCs know what amount would have been invoiced, so IESO in turn, based on information provided by LDCs, can determine the funding shortfall.

8.2 The IESO and the Financial Services Manager shall not, at any time, exceed the limits set out in the applicable Fair Allocation Plan.	Note that Section 7 restricts prices increases to inflation forever. We suggest redrafting this to delete "for inflation" in paragraph 2. Section 8.2 is unclear with respect to what limits cannot be exceeded. It introduces uncertainty with respect to the IESO right to record a shortfall and the IESO right of recovery. It may therefore prejudice the accounting treatment.

2. In our view, the IESO should become and remain the owner of a distinct asset, defined as the Regulatory Asset. Upon a "transfer" of all or a portion of this Regulatory Asset, the Investment Asset owner acquires an Investment Asset. On this construct the IESO is not a co-owner with the Investment Asset owner of an asset, the IESO's portion of which is the Regulatory Asset and the Investment Asset's owners potion of which is the Investment Asset. The IESO, based on conversations with KPMG, believes that it obtains a better result from an accounting perspective if it owns a distinct asset, as opposed to a co-ownership interest which is likely to be treated as a residual or subordinated interest.

23. (1) The IESO may transfer the regulatory asset in accordance with the Financing Plan. 23.1 Upon transfer of the regulatory asset or a portion of the regulatory asset, the regulatory asset or portion is deemed to be an investment asset and is vested in the investment asset owner.	NTD: The IESO right to transfer should not be subject to compliance with the Financing Plan. Consider corresponding amendment to Section 8.1 (1.1) so that the Fair Allocation Plan and the Financing Plan do not limit the ability of the IESO to transfer, or collect in respect of, a Regulatory Asset which has already arisen.

"regulatory asset" means the regulatory asset established under section X or, if any part of that regulatory asset has been transferred under this Act, **the portion of the regulatory asset that is not deemed to be an investment asset**; "investment asset" means all or part of the regulatory asset that is deemed to be an investment asset under section x;	23. The IESO may, from time to time, transfer all or any portion of the regulatory asset. Upon a transfer of all or a portion of the regulatory asset, the investment asset owner acquires an investment asset to which this Act applies. Any such transfer shall be without recourse to the IESO and upon any such transfer the IESO (or any person claiming through the IESO) shall have no further right, title or interest in (except as express provided herein) or any obligations in respect of, the portion of the regulatory asset transferred, or the corresponding investment asset. "regulatory asset" means the regulatory asset established under section X or, if any part of that regulatory asset has been transferred under this Act, **the portion of the regulatory asset that has not been transferred**; "investment asset" the investment asset established under section x;

3. We think that further particulars will be required in relation to the definition of the Funding Shortfall. Therefore we would add reference to "as prescribed by regulations" to address the need to provide for any variance/true up. We also need regulations to address recovery of IESO funding costs (which at moment legislation does not address).

22.2 (1) The IESO shall determine the IESO funding shortfall for each month in a reference period by calculating the difference between the following amounts: 1. The sum of all invoice amounts issued to specified consumers for the month. 2. The sum of all invoice amounts that would have been issued to	22.2 (1) The IESO shall determine the IESO funding shortfall for each month in a reference period in accordance with the regulations. NTD: We think that the reference to a "reference period "is unnecessary. Alternatively make provision for the addition or subtraction of additional amounts as further prescribed by

specified consumers for the month if paragraphs 1 and 2 of section 7.2 did not apply. (2) The determination under subsection (1) shall be made based on the amount of electricity actually used by specified consumers during the reference period.	regulations.

4. For a number of reasons it is difficult to treat the transaction between the IESO and the Financing Trust as a transaction which is in law a transfer, sale or assignment. That terminology implies the transfer of property from one person to another. First, there remains uncertainty at law (even with the revised "fishing licence language") with respect to the whether the Investment Asset acquired by the Investment Asset Owner is property. Second, there is a higher level of uncertainty with respect to whether the Regulatory Asset is property, given that the Regulatory Asset does not have the same level of certainty of recovery as does the Investment Asset, and lacks some of the ancillary rights attached to the Investment Asset. Third, even if both the Regulatory Asset and the Investment Interest constitute property, there is a continuity gap between them since the rights acquired by the Investment Owner are different from the rights disposed of by the IESO.

We think that the best way of proceeding is for the Act to state specifically that upon any "transfer", the IESO has no further rights in the Regulatory Asset, or portion thereof transferred and the Investment Asset Owner acquires the corresponding Investment Interest free of any adverse claim. Since, in both cases, these rights are a creature of statute, it is hard to see how such a stipulation could realistically be challenged. However, in order to avoid circularity, the term "transfer" needs to be defined more broadly so that it is not dependent upon there being a transfer at common law.

"transfer" means an assignment, conveyance, disposition or sale.	"transfer" means (i) in relation to the regulatory asset, or any portion thereof, any act of IESO which states that is a "transfer" of all or any portion of the regulatory asset for purposes of this Act or any other act of the IESO by which the IESO purports to dispose of its interest in all or any portion of the regulatory asset and, as a result, constitute a named person the owner of an investment asset under this Act and (ii) in relation to an investment

	asset or any portion thereof …., and, in each case, transferred shall have a corresponding meaning.
25. (1) A transfer of a regulatory asset or an investment asset under this Act that is expressed to be a sale or an absolute assignment is a valid and enforceable sale and absolute assignment of the regulatory asset or investment asset, as the case may be, and confers upon the owner of the investment asset acquired a valid property right and interest in, to and under the applicable investment asset in accordance with the terms of the transfer.	Probably unnecessary, at least in relation to the Regulatory Asset, because of the effect given to a transfer of the Regulatory Asset in Section 23. In any event, because of the differences in the definition of "transfer" and because discontinuity is an issue for the Regulatory Asset but not for the Investment Interest, we would suggest that there be separate provisions dealing with the transfer of the Regulatory Asset and the Investment Interest.
(2) Without limiting subsection (1), any transfer that by its terms is intended to constitute a sale or absolute transfer shall be treated for all purposes as an absolute transfer of IESO's right to recover the IESO funding shortfall or an investment asset owner's right, title and interest in, to and under an investment asset, as applicable (or relevant portion thereof), and not merely as a pledge thereof, and upon such absolute transfer the transferor shall retain no right, title or interest in regulatory asset or the investment asset (or relevant portion thereof) subject to the transfer, including all rights to recover the IESO funding shortfall or the investment asset arising after such transfer.	NTD: not sure that there is any value in deeming a transfer to be absolute.
(3) At the time a transfer of a regulatory asset or an investment asset is made, the transfer shall be deemed to have been and shall be perfected, vested, valid and binding as against the transferor and all other persons who have claims of any kind against the transferor.	

(4) Subsection (3) applies regardless of whether the persons who have claims have received notice of the transfer and the property rights and interests acquired by the owner of the investment asset shall have priority over any liens in favour of such other persons.	NTD: Perfection not likely relevant. Transfer should be free of any adverse claim.

5. While the electricity distributors can be sub-servicers of IESO as servicer, IESO can assume no responsibility for their performance obligations. Again, we are advised that this is critical from an accounting perspective.

13x. (1) Each electricity vendor shall [in accordance with the regulations?] determine the proportionate share of clean energy adjustments payable on a monthly basis by each of its specified consumers. (2) The electricity vendor shall issue an invoice to each specified consumer for the applicable amount of clean energy adjustments in accordance with the regulations. (3) Each electricity vendor shall, as an agent of the IESO, make reasonably diligent efforts to collect clean energy adjustments from specified consumers.	(4) The IESO shall not be liable to the Investment Asset Owner, any pledgee, or any person claiming through the Investment Asset Owner or any pledgee, for any failure to collect or remit, or any other breach or failure to perform, by any electricity vendor. Do we need to address the very limited circumstance of the IESO as an electricity vendor? Section 13x(1) does not appear to contemplate a volumetric rate, but rather the LDC determining a fixed amount payable by each of its consumers.

6. For constitutional reasons related to the federal bankruptcy power, limit the unnecessary use of "deeming provisions".

Section 15x (2) The amounts required to be deposited or received into the account are deemed to be held in trust for the investment asset owner.	(2) The amounts deposited into the account, until paid in accordance with this Act and the regulations, shall be held in trust by the applicable electricity vendor for the investment asset owner.
Section 12 (2) The amounts collected are deemed to be held in trust for the investment asset owner.	(2) The amounts received by the IESO from electricity vendors pursuant to Section x until paid in accordance with this Act and the regulations shall be held in trust by the IESO for the investment asset owner.
23.1 Upon transfer of the regulatory asset or a portion of the regulatory asset, the regulatory asset or portion is deemed to be an investment asset and is vested in the investment asset owner.	…Upon a transfer of all or a portion of the regulatory asset, the investment asset owner acquires an investment asset to which this Act applies and the IESO (or any person claiming through the IESO) has no further right, title or interest in the portion of the regulatory asset transferred, or in the corresponding investment asset.
Section 25 (3) At the time a transfer of a regulatory	Delete, see new Section 23.

asset or an investment asset is made, the transfer shall be deemed to have been and shall be perfected, vested, valid and binding as against the transferor and all other persons who have claims of any kind against the transferor.	
"investment asset" means all or part of the regulatory asset that is deemed to be an investment asset under section x; ("French")	"investment asset" the investment asset established under section x;
"regulatory asset" means the regulatory asset established under section X or, if any part of that regulatory asset has been transferred under this Act, the portion of the regulatory asset that is not deemed to be an investment asset;	"regulatory asset" means the regulatory asset established under section X or, if any part of that regulatory asset has been transferred under this Act, the portion of the regulatory asset that has not been transferred;

7. Does the clean energy adjustment determine the amount payable in respect of both the Regulatory Asset and the Investment Asset? If so, any subordination or other arrangement that results in the IESO receiving a residual interest may impact de-recognition. In our view, this calculation should exclude the IESO, and the IESO should have a separate right of recovery assessed by the OEB.

"clean energy adjustment" means… 11x. (1) The Ontario Energy Board shall apply the method set out in Schedule 1 to determine the amount of the clean energy adjustment payable on a monthly basis by each electricity vendor on behalf of the electricity vendor's specified	Should specify that this is the amount required by the Investment Asset Owner and does not relate to IESO's right of recovery. Consistent with this, Schedule 1 is defined in relation to the funding and other costs of the owner of the investment asset. Regarding section 11x(2), IESO recommends adding variance tracking so that the financing entity can communicate any variance (positive or negative) to the OEB. This should also be included in Schedule 1 as an input to determining the amount of clean energy

consumers. (2) The Ontario Energy Board may adjust the amount determined under Schedule 1 from time to time to address the any difference between the amount of the clean energy adjustment payable in respect of the reference period and the amount of the clean energy adjustment collected as of the date of the determination. (3) The Lieutenant Governor in Council may make regulations governing the calculation under subsection (2) and how the amount is to be applied to the clean energy adjustment. (4) The Ontario Energy Board shall communicate to each electricity vendor information relating to the clean energy adjustment to be allocated by the electricity vendor to each specified consumer in respect of a reference period.	adjustment for a reference period.

8. In order to ensure that the Disposition results in the de-recognition of the "regulatory asset" on IESO's books (and that the Disposition not be treated as a financing transaction) it is important the Disposition) by IESO to the financing trust be without recourse to IESO and that all collection obligations on the part of IESO be on a reasonable efforts, or consistent efforts, basis only. Therefore, clarify that the IESO's trust and remittance obligations are limited to amounts actually received by it. IESO's obligation to segregate and remit should be conditional upon receipt of the corresponding amounts from the electricity vendors.

Section 12 (4) The IESO shall promptly deposit all amounts received in respect of clean energy adjustments into the account established under subsection (3.1). (2) The amounts collected are deemed to be held in trust for the investment asset owner.	Section 12 (4) The IESO shall promptly deposit all amounts received by it from electricity vendors pursuant to Section x into the account established under subsection (3.1). (2) The amounts received by the IESO from electricity vendors pursuant to Section x until paid in accordance with

(5) The IESO shall remit amounts received in respect of clean energy adjustments to or for the benefit of the regulatory asset owner in accordance with the regulations.	this Act and the regulations shall be held in trust by the IESO for the investment asset owner. (5) The IESO shall remit amounts received in respect of clean energy adjustments to or for the benefit of the regulatory asset owner in accordance with the regulations. Regarding section 11x(2), IESO recommends adding variance tracking so that the financing entity can communicate any variance (positive or negative) to the OEB. This should also be included in Schedule 1 as an input to determining the amount of clean energy adjustment for a reference period.

9. Daily remittances are not consistent with the operation of the system and may not be practical. At the very least, this should be left open to be addressed in the commercial documents.

Section 12x (4) The IESO shall promptly deposit all amounts received in respect of clean energy adjustments into the account established under subsection (3.1).	Define "promptly", or provide that it is to be specified in the Regulations. The invoicing contemplated by section 12(2) regulations should be done based on IESO's monthly settlement process. It would appear that this is the case; section 13(1) references LDCs determining clean energy adjustment on a monthly basis. (4) contains a Note about considering daily segregation or remittances. IESO does not believe daily remittances are necessary. Daily remittances would add additional complexity and cost to the settlement process. It is not clear that LDCs would be able to move to daily remittances without substantial cost and effort.

	The risk of a particular LDC going bankrupt is small. If an LDC does go bankrupt, daily remittances merely minimizes risk of a month of remittances for that one LDC, which the Financing Entity can recover in a future period in any event through the True Up.

10. Consider the extent to which deeming provision are required in connection n with the operation of the PPSA. The number of deeming provisions raises the issue of whether the security interest provided for is one provided for by statute or one provided for by the PPSA. For the most part, once the application of the PPSA is provided for, the perception, priority and proceeds rules in the PPSA ought to be allowed to operate (and should not prejudice the transaction).

27. (1) The owner of an investment asset may grant a pledge to or in favour of a person in, to and over all or a specified portion of its right, title and interest in, to and under the investment asset in connection with any funding obligation.	Use PPSA term "security interest"
(2) A pledge may be a lien, mortgage, charge, right of set-off or security interest.	Redundant. In any event, the reference to set-off is not relevant or appropriate. Why not use PPSA terminology.
(3) The pledge may be made to secure a funding obligation **and when granted shall be valid and enforceable in accordance with its terms and shall be effective to confer upon the person to whom the pledge is granted a valid security interest in, to and in respect of the investment asset in accordance with the terms of the pledge.**	Redundant and may prejudice the conclusion that a conventional PPSA security interest is intended,
(x) All proceeds of a related [Investment Interest?] that are subject to the pledge that are received by the owner of the investment asset shall immediately be subject to the pledge, and the security interest in the proceeds shall be perfected pursuant to the Personal Property Security Act.	Redundant, except to the extent it is contemplated to expand the PPSA concept of "proceeds". Consider

(x) A pledge perfected under the Personal Property Security Act shall be a continuously perfected security interest and shall have priority over any other lien or security interest, created by operation of law or otherwise, that may attach to the property rights and interests in the [Investment Interest?] subject to the pledge unless the pledgee has otherwise agreed in writing. (x) A pledgee shall have a perfected security interest in a related investment interest, including the owner of the investment asset's rights and interests in and to [the clean energy adjustment?] or other related proceeds in respect of the investment interest and that are deposited in any [which account?] or other account of any [Electricity Distributor, IESO, Alternative Servicer or other person who may have commingled such Transition Charge Collections or such other proceeds with other funds]. (8) All proceeds of the investment asset that are subject to the pledge and that are received by the investment asset owner shall immediately be subject to the pledge and shall be perfected without any physical delivery of the proceeds, registration of any financing statement or any further act. (9) The pledge shall be a continuously perfected security interest and shall have priority over any other lien, created by operation of law or otherwise, that may subsequently attach to the property rights and interests in the investment asset subject to the Pledge, subject to the written consent of the person to whom the pledge has been granted. (10) The person to whom the pledge has been granted shall have a perfected	whether that can or should be done. Redundant, the priority rules in the PPSA should be sufficient, Redundant, except to the extent it is contemplated to expand the PPSA concept of "proceeds". Consider whether that can or should be done. Redundant, except to the extent it is contemplated to expand the PPSA concept of "proceeds". Consider whether that can or should be done.

security interest in revenues or other proceeds that are deposited in any [investment asset account] or other account of any electricity vendor, the IESO, an agent of an electricity vendor or the IESO or other person who may have commingled such revenues or other proceeds with other funds.	

11. Partial payments by retail customers to electricity distributors should be allocated to Transition Charges on a ratable basis, and once allocated shall be segregated.

14x. (1) This section applies if, (a) an electricity vendor receives a payment made by or on behalf of a specified consumer in respect of amounts payable under one or more invoices; and (b) the amount paid is less than the total amount payable. (2) The electricity vendor shall allocate the payment on a pro rata basis to the clean energy adjustment and other amounts payable under the relevant invoices. (3) The electricity vendor shall deposit the portion of the payment allocated to clean energy adjustments into the account established under X.	Correct.

12. In order not to impair the ability of the IESO to dispose of its interest in the Regulatory Asset and in order not to impair the financibility of the Investment Interest by the Trust, subsequent actions and compliance with allocation plan and

the financing plan should not be a condition of the effectiveness of any aspects of the transaction.

(6) The fact that any provision of this Act is held to be invalid or ceases to be in effect for any reason does not affect a funding obligation that was incurred under this Act before the day that the provision was held to be invalid or ceased to be in effect.	(6) The fact that any provision of this Act is held to be invalid or ceases to be in effect for any reason does not affect a **transfer, funding obligation or grant of a security interest** that was effected or incurred under this Act before the day that the provision was held to be invalid or ceased to be in effect.

13. Provide legislative basis for provision of commercial undertakings of the sort which may be required for purposes of h financial close.

200x. (1) Subsection 6 (1) of the Electricity Act, 1998 would be amended by adding the following clauses: (q.1) to enter into agreements or arrangements with [any special purpose financing entities established under (name of new Fair Hydro Act?)]; (q.2) to engage in activities related to making payments to and receiving payments from [any special purpose financing entities established under (name of new Fair Hydro Act?)], as required under that Act, and to engage in related settlement activities; (q.3) to engage in activities related to the transfer of the regulatory asset created under [(name of new Fair Hydro Act?)], which activities may include, (i) incurring liabilities in relation to the regulatory asset (ii) transferring the regulatory asset to [any special purpose financing	Retain specific objects but add a general object "to engage in activities to facilitate the implementation of the Fair Hydro Act, including:…" NTD: incorporate the expanded

entities established under (name of new Fair Hydro Act?)];	definition of "transfer"
(iii) transferring the regulatory asset to third parties;	NTD: "and the "transfer thereof"
(q.4) acting as a recovery agent under the [(name of new Fair Hydro Act?)];	NTD: consider need a for authority to enter into, if required, underwriting agreements and sign offering documents NTD: Consider need for exemption under *Collections Agencies Act*.