Ontario Power Generation

SPECIAL COMMITTEE OF THE BOARD

OPG Confidential Exclusive

Minutes of a meeting of the Special Committee of the Board of Directors of Ontario Power Generation, held by teleconference call, on May 5, 2017, at 8:00 a.m.

Present	
George Lewis	Committee Chair – In Person
Bernard Lord	Member
Bill Coley	Member
Lisa DeMarco	Member
Yezdi Pavri	Member – In Person
Peggy Mulligan	Member

being a quorum of the Directors of the Committee, and

Jeffrey Lyash	President and Chief Executive Officer
Catriona King	Vice President, Corporate Secretary
Carlton Mathias	Assistant Corporate Secretary

The following individuals were in attendance:

Ken Hartwick	Chief Financial Officer and SVP - Finance
Chris Ginther	Chief Administrative Officer
Carlo Crozzoli	SVP Corporate Business Development & Strategy
Jennifer Rowe	SVP Corporate Affairs
John Mauti	Vice President, Chief Controller & Accounting Officer
John Lee	Vice President, Treasurer
Les Wong	Senior Counsel, OPG Law Division
William Orr	Fasken Martineau
Aaron Atkinson	Fasken Martineau
Tracy Brennan	Ernst & Young
Laney Doyle	Ernst & Young
Brittany Keenan	Ernst & Young
Donnie Persaud	CIBC
Andrew Maciel	CIBC
Katrina Niehaus	Goldman Sachs
Akila Raman	Goldman Sachs
David Dal Bello	RBC
Ian Benaiah	RBC

1. Constitution of Meeting/Approval of Agenda

Notice of the meeting having been given to all the members of the Special Committee and a quorum of the members being present, the Committee Chair declared the meeting regularly constituted for the transaction of business on May 5, 2017 at 2:00 pm.

a) Approval of Agenda

Mr. Lewis proposed a change to the agenda such that the order of item no. 4 (Financial Advisors Report on the Financing Program) precede item no. 5 (Legal and Operating Governance Framework for OPG's Paricipation in the Fair Hydro Financing Trust)

Upon a motion duly made, seconded and unanimously agreed to, it was RESOLVED THAT:

- The agenda for the May 5, 2017 meeting of the Special Committee was approved as amended.

b) Declaration of Conflicts of Interest

The Committee Chair asked if there were any real, potential, or perceived conflicts of interest to disclose and none were declared.

2. Minutes of Meeting/Actions Arising from the Minutes

Upon a motion duly made, seconded and unanimously agreed to, it was RESOLVED THAT:

- The minutes of the May 1, 2017 meeting of the Special Committee were approved.

There were no outsanding actions.

3. OPG Participation in Ontario's Fair Hydro Plan

Mr. Lyash gave a brief update to advise that the Province still plans to introduce the legislation in the Provincial Legislature on May 11, 2017.

Mr. Hartwick spoke to the written materials provided, summarizing the three core matters underpinning OPG's Business Case for participating in the Global Adjustment (GA) refinancing component of the Province's Fair Hydro Plan:

1. The Legislation – to be introduced on May 11, 2017th, that among other things establishes the GA as a regulatory asset, establishes OPG as the financing entity and establishes the financing processes. A number of matters important to OPG were "punted" to be ironed out in regulations;
2. A series of Regulations – these will not be completed and passed until closer to the end of June 2017. OPG has prepared a document to submit to the Ministry of Energy identifying the required content and language necessary to support the OPG Business Case, as well as the financing and accounting requirements;
3. A determination of the quantum of the Global Adjustment deferral that underpins the overall 25% reduction to consumer bills and the trajectory of subsequent increases to consumers over time. OPG has done its own analysis but it is the Province's responsibility for making this determination and providing OPG confirmation. The Ministry has retained Navigant consulting to conduct this validation.

The Committee asked a number of questions to which Mr. Hartwick responded. Included was a question on whether there are any anticipated Regulations that are so critical that if they are not issued in substance as OPG requires such would consititute a 'showstopper' for OPG's continued participation in the Fair Hydro Plan. Mr. Hartwick responded that in his view it is unlikely that such a circumstance would occur since the Province needs the debt to be financeable and the accounting to permit consolidation in OPG. These two issues should act as a natural check on the Province that the Regulations contain the provisions required by OPG and the Trust. However, he agreed that a risk still exits. Mr. Hartwick went on to advise that to mitigate this risk, OPG has prepared a list of requirements for the regulations, which reflects the input from OPG's respective legal, financing, and accounting advisors, and will be

submitting it to the Ministry subject to the Special Committee's recommendation and the Board's approval of OPG's participation.
The Committee asked whether the Province understands that OPG's participation in the Fair Hydro Plan will have a positive impact on OPG's earnings, and Mr. Hartwick confirmed that the Province does understand this.

With respect to the Material Contract Term Sheets at Appendix 2 to the Management Memo and the "Redemption Rights" term relating to the OPG Equity Subscription Agreement, the Committee Chair recommended that it's more appropriate to indicate OPG's right to redeem the Class A shares as a right that may exercised rather than one that is expected to be exercised. Mr. Hartwick agreed.

The Committee asked Ernst & Young a number of questions to which Ernst & Young responded. In response to a question, Ms. Brennan of Ernst & Young advised that based on everything she has seen to date in relation to the Fair Hydro Plan, the requirements have been laid out clearly for the Province, and if these carry through to the upcoming Regulations and other documents, she is comfortable that the financial position of the Financing Entity can be consolidated into OPG's financial statements.

The Committee asked a number of further questions about: the potential for future governments to reinstate the HST on electricity, changes to OPG's Articles of Amalgamation to permit OPG to issue public debt, and OPG's ability to participate in distributed generation as mitigation for future risk, to which Mr. Lyash, Mr. Hartwick and Mr. Crozzoli responded.

Redacted - Commercially Sensitive

Redacted - Commercially Sensitive

5. Legal and Operating Governance Framework for OPG's Patricipation in the Fair Hydro Financing Trust

   The materials were taken as read.

6. Special Committee Report to Board

   Mr. Lewis advised that there was a very recent development to bring to the Committee's attention. He asked Mr. Ginther to update the Committee.

   Mr. Ginther advised that on May 4th, the Deputy Minister of Energy advised OPG's CEO that the Province would not be furnishing any legal opinion from its legal advisors confirming the constitutionality of the Legislation. Pressing the Province to understand this change in position,Mr. Ginther advised that it is the Province's positionthat it would never seek to pass legislation that it knew in advance would be found unconstitutional.

   Mr. Ginther advised that in light of the Province's position, OPG Management had the following considerations for the Committee in respect of a Committee recommendation to the Board on OPG's participation in the Fair Hydro Plan:

   - In the absence of seeing a confirming legal opinion, a financial and reputational risk analysis is appropriate.
   - OPG has no evidence to believe that the Legislation is not constitutional
   - In respect of a financial risk assessment, given all the financeability protections in OPG's favour, the financial risk to OPG is low if, in the event, in turns out the Legislation is unconstitutional
   - In respect of reputational risk to OPG, the risk is moderate. The Province would likely bear the brunt of the reputational damage of having knowingly passed unconstitutional legislation, but OPG would be caught up in the situation
   - Even if OPG were to see a legal opinion to the Province confirming the constitutionality of the Legislation, this would have provided only incremental comfort to OPG in respect of a decision to participate in the Plan. The legal opinion would likely have a number of qualifications and would have been addressed to the Province, specifying it was not intended to be relied upon by any third party
   - OPG considered whether it should attempt to obtain its own legal opinion but this was ruled out because the Province controls all potentially relevant data
   - As the Legislation goes through the process to enactment, legislative debates will likely surface any constitutional issues that the Province may need to respond to publicly
   - In respect of the financing aspects of the Fair Hydro Plan, at some stage the Province will likely need to represent the lawfulness of the Legislation

   Mr. Lyash advised that Management is raising this issue with the Committee as the Province's position, as conveyed last night, is different from the information in the Board memorandum prepared by OPG Management. However, in his view, the mitigation to this concern is in the requirements for the regulations and other agreements.

Redacted - S/C Priv.

Substantial discussion followed and the Committee asked a number of questions and raised a number of concerns, including: risk to OPG proceeding without some form of written confirmation from the Province to address this risk, the basis for the Province's validation of the Fair Allocation Amount, and the "terms of the Provincial Guarantee and the protections for OPG if there is a change in government and/or change in legislation/ and whether OPG would choose to go down this path on its own.

Redacted - S/C Priv.

Mr. Lyash, Mr. Hartwick and Mr. Ginther responded to questions stating: OPG's own analysis supports the the valuation but it is the Province's accountability to determine and confirm and this has been made a condition of OPG Board approval; if there is a challenge down the road OPG is protected by the Provincial Guarantee.

The Committee requested OPG Management continue discussions with the Province regarding a representation letter to OPG confirming that the Province is undertaking legislation that is lawful. OPG Management agreed to do this. (*)

The Committee also asked Mr. Orr to further consider and advise the Committee on the sufficiency of OPG directors' indemnities in respect of any approvals for OPG to participate in the Fair Hydro Plan. Mr. Orr agreed. (*)

Mr. Lewis, Chair of the Special Committee said that a lot of solid work and progress has been undertaken to move the plan for OPG's participation forward. He also advised that in his view the Special Committee was not in a position to make a recommendation to the Board and proposed that this meeting of the Special Commitee be adjourned while OPG Management continue discussions with the Ministry, and reconvene the meeting on Tuesday, May 9, 2017 so that OPG Management can report on its efforts in obtaining a representation letter from the Province as to the lawfulness of the Legislation.

7. <u>In Camera Session with Independent Legal Counsel</u>

OPG Management left the meeting, and the Committee, and Ms. King met independently with Mr. Orr and Mr. Atkinson of Fasken Martineau, where the Committee continued its discussion regarding the conditions that the Special Commtitee would be satisfied with in making a recommendation to the OPG Board.

8. <u>Adjournment</u>

The meeting was adjourned at 10:00 a.m. following the conclusion of the in camera session until 7:00 a.m. on Tuesday May 9th.

9. Continuation of Meeting

Meeting reconvened at 7:00 a.m. on Tuesday May 9, 2017. Aaron Atkinson from Fasken Martineau LLP, independent legal advisor along with Bill Orr, joined the meeting.

Mr. Lewis referenced two new documents which had been circulated to the Committee in the evening of May 8th:

- A draft letter from the Ontario Minister of Energy to OPG regarding the legislation to be introduced on May 11, 2017 (see Appendix 1 to these minutes)
- A draft legal memorandum prepared jointly by Torys LLP and Fasken Martineau LLP, external legal counsel to OPG Management and the Committee, respectively, (see Appendix 2 to these minutes) regarding the extent to which directors can take comfort in the process of the Province's preparation of the legislation for purposes of satisfying their duty of care in determining whether to approve OPG's participation in the Fair Hydro Plan.

Redacted - S/C Priv.

Mr. Ginther spoke to developments and assessments undertaken since the meeting adjourned on May 5th and advised that:

- he had asked the Ministry of Energy's internal chief legal officer if she is aware of anything which may make the Legislation unconstitutional and she answered No
- in respect of the draft letter to be provided by the Minister of Energy to OPG's Board Chair, the Province will not provide any representation or warranty. However, the Province is prepared to provide a letter substantially in the form of the draft letter at Appendix 1 to these minutes
- having considered all of the circumstances, OPG Management is of the view that there is sufficient value in the debt to support the financing aspects of the Fair Hydro Plan
- the financing program will not spill over into the realm of being a general tax outside the taxing authority of the Province. OPG will confirm its views in this regard when it is

provided Navigant's report on the Fair Allocation Amount as previously discussed in recent Committee meetings

- OPG had again spoken with its three financial advisors and the absence of seeing a legal opinion of the Province's legal advisors respecting the constitutionality of the Legislation is not a concern to them around the financeability of the program.

The Committee asked a number of questions to which Mr. Hartwick and Mr. Ginther responded. In response to a question, Mr. Hartwick advised that OPG Management takes great comfort in that it will have the option, on a monthly basis, to determine whether it will buy the regulatory assest from the IESO. OPG will work with the rating agencies on a monthly basis to asssit in making the determination of buying/not buying the asset. OPG expects that before making each monthly purchase, it will also first obtain a rating agency confirmation with respect to the unchanged credit risks of the transaction.

Redacted - S/C Priv.

The Committee asked if OPG expects that it will have to give a representation to the financing dealers as to the constitutionality of the Legislation. Mr. Hartwick advised that OPG will not have to. Mr. Orr advised that typically what would be described are various types of risks and included in the list would be a risk around the lawfulness of the Legislation.

Redacted - S/C Priv.

(i) Motion regarding OPG's Participation in the Ontario Fair Hydro Plan

Upon a motion duly made and seconded, it was RESOLVED THAT:

- The Committee recommends that the Board of Directors approve:

a) OPG's Business Case for OPG's participation in the Fair Hydro Plan as set out in Appendix 8 of this memo;
b) The establishment of the Financing Entity and other organizational bodies in respect of the Financing Entity as well as the legal and operating governance framework for the Financing Entity;
c) The implementation of certain financings of the Financing Entity by OPG, as Financial Services Manager of the Financing Entity, consistent with the strategy articulated in Appendix 5 of this memo,
d) OPG Management concluding the contractual arrangements and structural documents to implement the Fair Hydro Plan, including the financings of the Financing Entity, as set out in this Board memo,
e) The resolution attached as Appendix 11,
f) all of the approvals above are subject to the following conditions:

(i) the Province of Ontario enacts the legislation provisionally titled, “the Ontario Fair Hydro Plan Act, 2017” and its attendant Regulations that are consistent with OPG’s requirements and objectives for participating in the Fair Hydro Plan, as outlined in this memo;
(ii) OPG’s Articles of Amalgamation are amended by the Shareholder to permit OPG to participate in the public debt markets without restrictions;
(iii) the Fair Allocation Amount eligible for refinancing is confirmed by the Province in writing, and
(iv) there is evidence in writing from the Province of Ontario that the Fair Hydro Plan, including the Fair Allocation Amount is determined by the Province’s legal advisors to be Constitutional,

g) That OPG Management provides regular updates to the Special Committee in respect of the foregoing in the form, manner, regularity and duration requested by the Special Committee.

As amended by removing f(iv) and adding the following:

“(iv) OPG receives a letter from the Minister of Energy, on behalf of the Province, following the introduction of the Proposed Legislation to the effect that, among other things, the Province has addressed legal imperatives of the Ontario Fair Hydro Plan by creating a mechanism to take into account the need to align the costs attributable to future rate payers with benefits to those same ratepayers, substantially in the form of the draft letter provided to OPG on May 8, 2017;

(v) evidence satisfactory to the Special Committee as to the enforceability of the Guarantee; and”

Ms. DeMarco abstained from voting on the motion.

(ii) Motion regarding Legal and Operating Governance Framework

Upon a motion duly made and seconded, it was RESOLVED THAT:

- The Committee recommends that the Board of Directors approve the legal and operating governance framework as outlined in the appendices to this memorandum.

Ms. DeMarco abstained from voting on the motion.

10. Termination of Meeting

The meeting was terminated at 7:45 a.m.

Special Committee Chair

Vice President, Corporate Secretary