

Chris G. Paliare  
Ian J. Roland  
Ken Rosenberg  
Linda R. Rothstein  
Richard P. Stephenson  
Nick Coleman  
Donald K. Eady  
Gordon D. Capern  
Lily I. Harmer  
Andrew Lokan  
John Monger  
Odette Soriano  
Andrew C. Lewis  
Megan E. Shortreed  
Massimo Starnino  
Karen Jones  
Robert A. Centa  
Nini Jones  
Jeffrey Larry  
Kristian Borg-Olivier  
Emily Lawrence  
Tina H. Lie  
Jean-Claude Killey  
Jodi Martin  
Michael Fenrick  
Ren Bucholz  
Jessica Latimer  
Lindsay Scott  
Alysha Shore  
Denise Cooney  
Paul J. Davis  
Danielle Glatt  
Lauren Pearce  
Elizabeth Rathbone  
Daniel Rosenbluth  
Glynnis Hawe  
Hailey Bruckner  
Charlott e Calon  
Catherine Fan  
Douglas Montgomery  
Shawna Leclair  
Jesse Wright  
Chloe Hendrie

COUNSEL  
Stephen Goudge, Q.C.

HONORARY COUNSEL  
Ian G. Scott, Q.C., O.C.  
(1934 -2006)

Richard P. Stephenson  
T 416.646.4325 Asst 416.646.7419  
F 416.646.4301  
E richard.stephenson@paliareroland.com  
[www.paliareroland.com](http://www.paliareroland.com)

File 98198

March 10, 2021

**VIA RESS FILING and EMAIL**

Ms. Christine E. Long  
Registrar  
Ontario Energy Board  
2300 Yonge Street, 27th Floor,  
P.O. Box 2319  
Toronto, ON M4P 1E4

Dear Ms. Long,

**Re: Re: EB-2020-0290 – OPG 2022-2026 Payment Amounts**

I am writing on behalf of the PWU in response to OPG's correspondence to Board dated March 5, 2021, seeking an order regarding the terms of access of PWU and SUP representatives to the Aon Report (Exhibit F3 Tab 3 Schedule 2 Attachment 1).

The PWU submits that the order sought by OPG is inappropriate, for two main reasons.

First, it is not apparent that the information contained in the Aon Report is confidential at all, for labour relations reasons, or otherwise. This treatment has not been sought in relation to similar documents filed in past proceedings. In support of its position, OPG states the following:

This report includes cost estimates and underpinning assumptions that are labour-sensitive because they consider pension, other post-employment benefits and associated headcount assumptions relating to certain Pickering downsizing processes expected to take place during the period.

Obviously, we have not seen the information that OPG is referring to in this passage. However, it is difficult to understand how this information could be materially different than the information that OPG has already put on the public record (or information that can easily be mathematically derived from that information). Specifically, OPG has already publicly filed the standard 2K Table document, which contains detailed forecasts regarding FTEs, wages, overtime, pension and OPEB costs on an annual basis by representation and employee category. A copy of the 2K Table as filed by OPG is attached hereto. The PWU

submits that, in order for OPG seek confidential treatment for this document, it is incumbent upon them to demonstrate to the Board that it is in fact confidential in the sense that it is materially different information that is publicly available. Moreover, the Board should scrutinize that information to satisfy itself that the information is materially different.

Secondly, the PWU submits that the treatment sought by OPG with respect to the PWU and its counsel is punitive to the PWU, undermines its right to its counsel of choice, and undermines the effectiveness of its representation in this matter. The PWU is aware of the Board's disposition of this issue in the last OPG Payment Amounts case (EB-2016-0152). The PWU respectfully disagrees with that decision. Obviously, the Board is not bound by that decision.

In fact, when the Board most recently considered this type of issue, it reached the opposite conclusion. Specifically, the issue arose in the most recent Toronto Hydro rates case (EB-2018-0165). The issue in that case was slightly different, in the sense that Toronto Hydro opposed the production of the documentation in question to PWU representatives, even if they executed the standard Board Undertaking. Nevertheless, the Board's decision is instructive.

In arguing against Toronto Hydro's request, the PWU filed submissions by letter dated November 8, 2018, a copy of which is attached. In that letter the PWU submitted that the execution of the Undertaking should suffice. In addition, the PWU observed that it is common for solicitors to be required to "compartmentalize" information, with strict restrictions precluding use or disclosure beyond a prescribed purpose (including the deemed undertaking rule in the Rules of Civil Procedure). Finally, the PWU noted that, in the case of lawyers, the breach of an undertaking is an act of professional misconduct pursuant to the rules governing the legal profession. The PWU adopts and repeats the submissions set out in the November 8, 2018 letter here.

The Board agreed with the PWU, and ruled that its counsel should be given access, upon the execution of the Undertaking. No obligation to provide an undertaking that counsel would not be involved in future collective bargaining was required. A copy of the Board decision dated December 14, 2018 is attached.

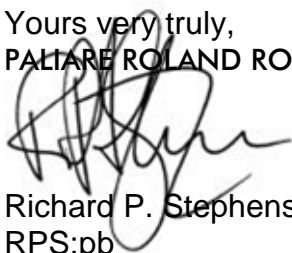
The PWU's analysts from Ecoanalysis are known to the Board, and do not participate in collective bargaining activities between the PWU and OPG. As a consequence, they are prepared to execute the affidavit (although in the PWU's submission it should not be required).

On the other hand, as PWU counsel, I am not prepared to execute the affidavit because I am not prepared to limit the PWU's counsel of choice in respect of its

future activities.<sup>1</sup> Moreover, it is neither appropriate nor necessary that they be put to that election.

Yours very truly,

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

A handwritten signature in black ink, appearing to read 'R. Stephenson', is written over the printed name and firm name.

Richard P. Stephenson  
RPS:pb

Doc 3699740 v1

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<sup>1</sup> As previously noted, I have not typically been engaged by the PWU in respect of collective bargaining matters. However, neither I, nor the PWU should be required to predict, and limit the scope of future engagements.

Numbers may not add due to rounding

12/30/2020

Line No.	NUCLEAR FACILITIES	2016 Actual	2017 Actual	2018 Actual	2019 Actual	2020 Plan	2021 Plan	2022 Plan	2023 Plan	2024 Plan	2025 Plan	2026 Plan
1	<b>Staff</b> (Regular and Non-Regular)	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>	<b>FTEs</b>
2												
3	<b>Nuclear - Direct</b>											
4	Management	577.8	643.7	683.8	691.1	693.8	608.3	609.0	594.1	571.3	503.8	386.3
5	Society	2,165.6	2,327.9	2,358.5	2,313.6	2,256.9	2,205.6	2,071.1	2,037.4	1,998.4	1,698.6	1,377.3
6	PWU	4,142.9	4,086.2	3,877.1	3,675.6	3,792.6	3,635.7	3,340.2	3,254.9	3,075.5	2,695.8	2,507.7
7	Term/ETE	11.6	87.0	211.7	353.8	617.5	807.5	908.3	898.7	903.5	620.8	92.0
8	EPSCA	144.6	289.4	364.4	314.7	279.4	359.2	377.8	408.2	320.8	229.9	128.1
9	Subtotal	7,042.4	7,434.2	7,495.5	7,348.8	7,640.3	7,616.2	7,306.4	7,193.3	6,869.6	5,748.9	4,491.4
10												
11	<b>Nuclear - Allocated</b>											
12	Management	305.6	298.4	283.7	261.2	279.2	261.3	252.2	250.9	234.4	213.7	173.3
13	Society	415.9	466.8	466.2	444.1	459.7	455.7	432.5	424.6	406.1	368.7	292.9
14	PWU	578.0	554.4	485.6	484.6	475.8	473.6	429.1	385.4	364.3	300.9	244.1
15	Term/ETE	0.0	5.2	28.3	41.0	75.6	103.5	114.6	115.8	107.7	75.1	0.0
16	EPSCA	29.8	32.3	31.5	48.4	34.8	45.2	43.2	34.2	34.1	31.1	19.4
17	Subtotal	1,329.3	1,357.1	1,295.3	1,279.3	1,325.0	1,339.3	1,271.6	1,210.8	1,146.7	989.6	729.7
18												
19	<b>NUCLEAR FACILITIES</b>											
20	Management	883.4	942.1	967.5	952.3	973.0	869.6	861.1	845.0	805.6	717.5	559.6
21	Society	2,581.5	2,794.7	2,824.7	2,757.7	2,716.6	2,661.3	2,503.6	2,462.0	2,404.6	2,067.4	1,670.2
22	PWU	4,720.8	4,640.6	4,362.6	4,160.2	4,268.4	4,109.3	3,769.2	3,640.3	3,439.8	2,996.8	2,751.8
23	Term/ETE	11.6	92.2	240.0	394.8	693.2	910.9	1,023.0	1,014.4	1,011.2	695.9	92.0
24	EPSCA	174.4	321.7	395.9	363.1	314.1	404.4	421.0	442.4	354.9	260.9	147.5
25	Total	8,371.7	8,791.3	8,790.8	8,628.0	8,965.3	8,955.5	8,577.9	8,404.1	8,016.2	6,738.5	5,221.1
26												
27	<b>Salary &amp; Incentive Pay</b> (including Fiscal Adjustment)	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>
28	Management	151.3	173.6	181.3	188.6	169.4	156.4	157.9	157.1	154.2	138.6	112.5
29	Society	333.3	378.9	369.5	350.5	353.1	353.2	342.5	340.3	339.9	298.5	246.9
30	PWU	483.0	485.2	461.6	442.6	483.6	476.2	451.9	442.3	432.6	389.4	362.7
31	Term/ETE	1.3	7.9	18.2	32.0	58.0	78.5	89.9	90.6	93.2	64.5	7.8
32	EPSCA	14.6	27.6	43.2	45.5	38.5	46.1	48.0	51.0	42.2	31.0	17.8
33	Total	983.5	1,073.2	1,073.8	1,059.2	1,102.6	1,110.4	1,090.2	1,081.3	1,062.2	922.0	747.8
34	<b>Overtime</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>
35	Management											
36	Society	40.7	42.3	43.9	45.3	37.2	41.0	35.0	39.0	33.5	30.0	17.0
37	PWU	86.7	89.0	84.0	82.2	79.7	92.9	78.7	87.3	74.8	64.8	37.3
38	Term/ETE	0.1	1.3	2.9	5.3	2.7	5.0	4.9	6.1	4.4	0.0	0.0
39	EPSCA	8.9	12.8	14.3	12.5	6.0	1.6	1.9	1.3	1.4	1.2	1.2
40	Total	136.4	145.4	145.1	145.3	125.6	140.4	120.6	133.7	114.1	96.0	55.6
41	<b>Benefits</b> (Current Benefits and Pension & OPEB)	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>
42	Management	51.7	63.3	66.7	66.5	71.1	67.0	70.2	69.2	68.6	62.0	49.5
43	Society	128.6	132.9	156.6	147.0	167.1	175.2	176.0	173.2	175.6	154.1	127.1
44	PWU	213.9	204.8	220.0	204.3	211.8	214.6	211.7	206.3	206.5	186.5	171.1
45	Term/ETE	0.2	2.7	6.6	11.4	17.2	20.6	22.8	22.9	23.9	16.7	2.2
46	EPSCA	9.9	18.1	17.1	15.5	13.6	16.4	17.1	18.2	15.1	11.0	6.3
47	Total	404.3	421.7	467.0	444.7	480.7	493.8	497.7	489.9	489.6	430.3	356.2
48												
49	Current Benefits (Statutory)	61.4	63.6	64.2	63.1	60.8	62.1	60.3	59.9	58.9	49.4	38.6
50	Current Benefits (Non-Statutory)	66.8	80.1	73.8	75.6	80.9	84.2	81.6	81.3	78.4	62.2	42.5
51	Pension & OPEB (Current Service)*	276.2	278.1	329.1	305.9	339.0	347.5	355.8	348.8	352.3	318.8	275.1
52	<b>TOTAL COMPENSATION</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>	<b>\$M</b>
53	Management	203.0	236.8	248.0	255.1	240.4	223.4	228.1	226.4	222.7	200.6	162.0
54	Society	502.6	554.0	570.1	542.8	557.4	569.3	553.5	552.5	549.0	482.6	391.1
55	PWU	783.6	779.1	765.6	729.1	775.1	783.7	742.3	735.9	713.9	640.7	571.2
56	Term/ETE	1.6	11.9	27.7	48.7	77.9	104.1	117.6	119.6	121.5	81.2	10.0
57	EPSCA	33.4	58.5	74.6	73.5	58.1	64.1	67.0	70.5	58.7	43.2	25.3
58	Total	1,524.1	1,640.3	1,685.8	1,649.2	1,709.0	1,744.6	1,708.5	1,705.0	1,665.8	1,448.3	1,159.6
59												
60	*presented on an accrual basis											

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Charlotté Calon

COUNSEL  
Stephen Goudge, Q.C.

COUNSEL  
Ian G. Scott, Q.C., O.C.  
(1934 - 2006)

**Richard P. Stephenson**

T 416.646.4325 Asst 416.646.7419  
F 416.646.4301  
E [richard.stephenson@paliareroland.com](mailto:richard.stephenson@paliareroland.com)  
[www.paliareroland.com](http://www.paliareroland.com)

File 95498

November 8, 2018

**VIA EMAIL: BoardSec@oeb.ca**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor, P.O. Box 2319  
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: EB-2018-0165 - Application by Toronto Hydro-Electric System Limited ("Toronto Hydro") for an Order or Orders approving or fixing just and reasonable distribution rates and other charges, effective January 1, 2020 to December 31, 2024**

This is the PWU's response to Toronto Hydro's correspondence to the Board dated November 5, 2018 which raises the issue of the access of PWU representatives who have executed the Board's Declaration and Undertaking to certain "confidential" information filed by it with the Board.

The PWU submits that the Toronto Hydro's position regarding the PWU's access to confidential information pursuant to an undertaking should be rejected. There are two main reasons for doing so.

First, assuming the Board accepts that the information in question is truly confidential, the proposed restriction on access for union counsel should not be imposed because it is unnecessary. The Board mandated Confidentiality Declaration and Undertaking (the "Undertaking") provides the Applicant with complete protection of all its legitimate interests. Note that amongst the requirements of the Undertaking are the following:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.
2. I will not divulge Confidential Information except to a person granted access to such Confidential Information or to the Board.

So long as these obligations (together with the other obligations contained in the Undertaking) are fulfilled, there is no risk to the Applicant of misuse of this information. For the Board to deny access to information to PWU counsel, notwithstanding the fact that the Undertaking has been executed, can only

suggest one thing – the Board is satisfied that there is a real risk that PWU counsel will not fulfill its undertaking.

Such a conclusion is harmful, and unwarranted. It is a conclusion made in the complete absence of any evidence that PWU counsel's undertaking is unworthy of credit. Moreover, it ignores the fact that (in addition to Board ordered sanctions) it is an act of professional misconduct for a solicitor to breach his or her undertaking.

What is even more problematic is the fact that the Board has singled out union counsel for this unique treatment. We understand that the rationale for the Board's position is not that union counsel are unworthy of its trust, but rather that union counsel may have an ongoing role in representing his or her client in other matters, including labour relations. The potential existence of that future role may (or may not) be true, but it does not justify this unique treatment.

It assumes that this future role could not be performed without breaching the Undertaking. Again, an assumption that anyone, and particularly a solicitor, would breach his or her undertaking is an unwarranted and unjustified assumption. Second, it ignores the fact that solicitors regularly "compartmentalize" information. One simple example of this is the "deemed undertaking" rule contained in Ontario's *Rules of Civil Procedure*. The Rule provides as follows:

***Deemed Undertaking***

**30.1.01 (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.**

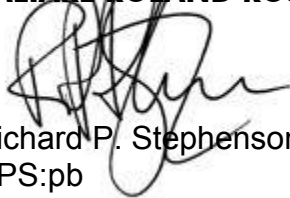
Critically, the Rule (a) does not preclude counsel of access to the information in the first instance; and (b) does not preclude that counsel from acting in subsequent matter where the same information may be relevant. Rather, the Rule imposes an obligation on the solicitor not to use that information in the subsequent proceeding. That restriction is precisely what the Board's undertaking requires. The difference between the *Rules of Civil Procedure* and Board's proposed action is that the Rules recognize and accept that a solicitor is able to fulfill those obligations. The Board should do likewise.

In certain prior cases, the Board has determined that the appropriate resolution is to permit the union's representatives to have access, but only if they execute an affidavit, confirming that he or she will not participate in any manner in future collective bargaining on behalf of the union. The PWU submits this requirement is inappropriate, for three reasons. First, for the reasons outlined above, it is unnecessary. Secondly, it acts as a material restriction on a client's ability to retain its counsel of choice. Thirdly, it is also inappropriate because it seeks to single out the union and its representatives for unique treatment.

Logically, if there was any legitimate basis for Toronto Hydro to have a concern that persons would violate the undertakings that they execute, that concern should extend equally to all persons who do so. The information in question concerns Toronto Hydro's costs for contracting certain services. Presumably, Toronto Hydro should be concerned that information should not fall into the hands of prospective bidders for that work. Notwithstanding this risk, Toronto Hydro is not seeking any order that representatives of other parties having access to this information provide affidavits attesting that they will not accept any future engagement to act on behalf of a prospective bidder for Toronto Hydro construction services. If Toronto Hydro were serious about this issue, it would be consistent. The absence of that consistency reveals that Toronto Hydro must be motivated by something other than a genuine concern for the protection of its confidential information.

Yours very truly,

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**



Richard P. Stephenson  
RPS:pb

cc. Charles Keizer/Crawford Smith – Counsel to Toronto Hydro

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EB-2018-0165

**Toronto Hydro-Electric System Limited**

**Application for electricity distribution rates beginning  
January 1, 2020 until December 31, 2024**

**DECISION ON CONFIDENTIALITY  
December 14, 2018**

Toronto Hydro-Electric System Limited (Toronto Hydro) filed a 5-year Custom Incentive Rate-setting (IR) application with the Ontario Energy Board (OEB) on August 15, 2018 (updated September 14, 2018) under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its distribution rates, to be effective January 1, 2020 to December 31, 2024.

Procedural Order No. 1, dated October 25, 2018, accepted a number of parties as intervenors in the proceeding and granted cost award eligibility to all parties that requested it. Procedural Order No. 1 also established deadlines for the filing of submissions on Toronto Hydro's confidentiality requests and for Toronto Hydro to reply to the submissions of parties.

In its Decision on Confidentiality and Procedural Order No. 2, the OEB approved confidential status for four of the six categories of information requested by Toronto Hydro.<sup>1</sup> For the cost difference between internal and external construction projects<sup>2</sup>, the OEB considered the redacted information sufficiently aggregated such that negotiations with construction contractors or unions should not be impacted. The OEB also noted that public disclosure of this information could make it less complicated to test Toronto Hydro's application.

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<sup>1</sup> In its reply submission on confidentiality, dated November 13, 2018, Toronto Hydro withdrew its confidentiality request related to commercially sensitive and proprietary information in its corporate tax returns. An un-redacted copy of this information is filed on the public record for this proceeding.

<sup>2</sup> Exhibit 1B, Tab 2, Schedule 2, p. 22.



The OEB previously treated this information as confidential.<sup>3</sup> The OEB provided Toronto Hydro with the opportunity to augment its submission before the OEB made a final determination.

Toronto Hydro's supplemental submission largely reiterated the same point previously made; that disclosure of the information would affect both its contracting and collective bargaining, and therefore would result in increased costs for its customers. Toronto Hydro submitted that the fact that the data is aggregated does not remedy this concern as long as it reveals any difference between contractor and internal labour costs, which the external contractors or the labour unions could use to benefit their position in future bargaining with the utility.

Toronto Hydro also argued that it would not be more complex to test its application if the information is confidential, and that complexity is not one of the OEB's criteria for determining whether information will be kept confidential.

The OEB did not say that complexity was a criteria it considered for determining whether information should be granted confidential status. The OEB's *Practice Direction on Confidential Filings* (Practice Direction) states that "[t]he Board and parties to a proceeding are required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings."<sup>4</sup> This is reiterated in the OEB's Chapter 1 Filing Requirements for Distribution Rate Applications.<sup>5</sup> The Practice Direction also states that "[t]he Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law."<sup>6</sup> The onus is on Toronto Hydro to demonstrate that confidential treatment is warranted.

The OEB is not satisfied that Toronto Hydro has provided sufficient rationale for granting confidential treatment for the cost difference between internal and external construction projects. However, the OEB has further questions for Toronto Hydro on this matter. Rather than continue this process through written questions and submissions, the OEB will reserve its judgement at this time.

The OEB intends to hold an oral hearing for this Toronto Hydro proceeding. This will afford an opportunity for the OEB to ensure it has all of the relevant information on this

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<sup>3</sup> EB-2014-0116, Decision on Confidentiality and Procedural Order No. 4, January 7, 2015.

<sup>4</sup> Ontario Energy Board, *Practice Direction on Confidential Filings*, p. 2.

<sup>5</sup> Ontario Energy Board, Filing Requirements for Electricity Distribution Rate Applications, Chapter 1, p. 3.

<sup>6</sup> Ontario Energy Board, *Practice Direction on Confidential Filings*, p. 2.

matter. All parties shall continue to treat this information confidential until the OEB makes a final determination.

Toronto Hydro submitted that the PWU should not have access to the un-redacted version of its evidence on the cost difference between internal and external construction projects.

Counsel for the PWU argued that the OEB's mandated Confidentiality Declaration and Undertaking (Undertaking) requires a person to commit that the confidential information will be used exclusively for duties performed in respect of this proceeding, and that the confidential information not be disclosed except to a person granted access to such confidential information, or to the OEB.

The OEB will permit the disclosure specifically to Richard Stevenson, counsel for PWU. No staff or other representatives from PWU are granted access. As all parties are aware, there are significant consequences for breaches of the OEB's Undertaking. In addition to sanctions that the OEB can take, Mr. Stevenson as a lawyer has additional obligations to the Law Society of Ontario (LSO), and in particular to the LSO's *Rules of Professional Conduct*, to which he is bound. The OEB is satisfied that the significant consequences of a breach of the Undertaking are such that the risk of disclosure is minimized.

**DATED** at Toronto, December 14, 2018

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary