



## CITY OF PHILADELPHIA

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April 17, 2018

### **PRIVILEGED AND CONFIDENTIAL**

#### Via Email and Regular Mail

Rasheia R. Johnson, City Treasurer  
Member – Water, Sewer and Storm Water Rate Board  
640 Municipal Services Bldg.  
1401 JFK Boulevard  
Philadelphia PA 19102

#### **Re: Public Advocate's Request for Your Recusal from Water Rate Board**

Dear Ms. Johnson:

Pursuant to Sections 4-400(a) and 8-410 of the Philadelphia Home Rule Charter ("Charter"), I write to advise you concerning the motion submitted by the Public Advocate on April 6, 2018, asking that you recuse yourself from participation as a member of the Philadelphia Water, Sewer and Storm Water Rate Board in the ongoing rate proceeding in which the Water Department filed a Formal Notice on March 14, 2018. In brief, there is no legal reason why you must recuse yourself generally from the Rate Board's proceedings.

This legal advice is privileged and confidential. However, you are free to waive the privilege and to release its contents to the Public Advocate, the Water Department, and the other participants in the pending rate case. The interests of transparency and public confidence in the Rate Board's actions appear to weigh in favor of release in this instance.

The core of the Public Advocate's argument is its contention that you have a conflict of interest and an appearance of bias in participating in deciding the rate case because you have a "financial and fiduciary relationship" with the Water Department and because the outcome of the rate case will impact your functions as City Treasurer. In turn, this argument rests on the premise that the Rate Board is adjudicating the rate case, rather than acting in a regulatory or legislative capacity. If the Rate Board's decision were an adjudication of the rights of parties, then some of the Public Advocate's arguments might be well taken. But the Rate Board is actually acting for and as the City in setting rates, just as the Water Commissioner used to do before the City created the Rate Board. The City is not depriving the participants of any rights, and thus the constitutional requirement of due process is not implicated.

Both before and after the establishment of the Rate Board, a City agency was charged with setting rates under the general standards set by Council. Until 2014, that agency was the Water Department. Since then, it has been the Rate Board. In both cases, the proceedings are

“for the purpose of gathering information to be considered . . . in determining whether a rate case [is] necessary,” and the hearings are “by definition investigatory rather than adjudicatory in nature.” *Public Advocate v. Brunwasser*, 22 A.3d 261, 270 (Pa. Commw. 2011), quoting *Consumer Educ. & Protective Ass’n International, Inc. v. Marrasso*, 133 Pa. Commw. 148, 155, 575 A.2d 160, 163 (1990), *aff’d mem.*, 528 Pa. 600, 600 A.2d 189 (1992) (*per curiam*).

The actors have changed – notably, the Rate Board is independent of the Water Department – and some of the Rate Board’s procedural regulations are somewhat different. However, the fundamental structure, in which the City delegates to a City agency the power and responsibility to set rates under standards defined by the Charter and City Council, remains essentially the same. Assisted as before by the Hearing Officer, the Rate Board will determine the rates; it will not adjudicate the rights of parties. As the Commonwealth Court has held, such a ratemaking process “is quasi-legislative and not quasi-judicial”; moreover, any Rate Board actions that any participants may choose to challenge “are not particular to the parties that chose to participate in the ratemaking process,” and the Rate Board’s rate determinations “are not adjudications and thus are not appealable under the Local Agency Law within the trial court’s appellate jurisdiction.” *Brunwasser*, 22 A.3d at 270.

On November 6, 2012, the voters of Philadelphia changed Section 5-801 of the Charter to read as follows:

§5-801. Rates and Charges. In accordance with such standards as the Council may from time to time ordain, the Water Department shall fix and regulate rates and charges for supplying water, including charges to be made in connection with water meters, and for supplying sewage disposal services; **provided however, that City Council may by ordinance, establish an independent rate-making body to be responsible for fixing and regulating rates and charges for water and sewer services; and provided further that City Council may by ordinance, establish open and transparent processes and procedures for fixing and regulating said rates and charges.** The standards pursuant to which rates and charges shall be fixed by the Department shall be such as to yield to the City at least an amount equal to operating expenses and interest and sinking fund charges on any debt incurred or about to be incurred for water supply, sewage and sewage disposal purposes. In computing operating expenses, there shall be included proportionate charges for all services performed for the Department by all officers, departments, boards or commissions of the City.

Council Resolution No. 120188 (May 10, 2012). Following adoption of that amendment by the voters, Council exercised its new authority under Section 5-801 by enacting Bill No. 130251-A (approved by Mayor Nutter Jan. 20, 2014), providing that (1) “an independent rate-making body [the Rate Board] shall fix and regulate rates and charges . . ., in accordance with the standards established in this Section 13-101 without further authorization of Council,” Philadelphia Code (“Code”) § 13-101(3); and (2) the Rate Board “shall establish open and transparent processes and procedures for public input and comment on proposed water rates and charges,” with the Water Department to adopt regulations incorporating the Board’s processes and procedures and the Rate Board to adopt regulations for rate hearings and determining rates and charges, § 13-101(3)(d).

As previously, Council provided that rates and charges must “yield to the City at least an amount equal to operating expenses and debt service, on all obligations of the City” relating to the systems maintained by the Water Department, and as to Water-related revenue obligations, “such additional amounts as shall be required to comply with any rate covenant and sinking fund reserve requirements approved by ordinance of Council in connection with the authorization or issuance of water, sewer and storm water revenue bonds, and proportionate charges for all services performed for the Water Department by all [City officers and agencies].” Code § 13-101(4)(a).

Also as before, Council mandated that the rates and charges yield *not* more than “the total appropriation from the Water Fund to the Water Department and to all other departments, boards or commissions, plus a reasonable sum to cover unforeseeable or unusual expenses, reasonably anticipated cost increases or diminutions in expected revenue, less the cost of supplying water to City facilities and fire systems and, in addition, such amounts as, together with additional amounts charged in respect of the City’s sewer system, shall be required to comply with any rate covenant and sinking fund reserve requirements approved by ordinance of Council in connection with the authorization or issuance of water and sewer revenue bonds”; but that “rates and charges may provide for sufficient revenue to stabilize them over a reasonable number of years.” Code § 13-101(4)(b).

Council also added new substantive requirements. The Board must “recognize the importance of financial stability to customers and fully consider the Water Department’s Financial Stability Plan”; must “determine the extent to which current revenues should fund capital expenditures and minimum levels of reserves to be maintained during the rate period,” considering “all relevant information” such as “peer utility practices, best management practices and projected impacts on customer rates”; and must develop rates and charges “developed in accordance with sound utility rate making practices and consistent with the current industry standards for water, wastewater and storm water rates,” including two specific industry manuals. Code § 13-101(4)(b)(i)-(ii). The Financial Stability Plan must “forecast capital and operating costs and expenses and corresponding revenue requirements,” identifying “the strengths and challenges to the Water Department’s overall financial status including the Water Fund’s credit ratings, planned and actual debt service coverage, capital and operating reserves and utility service benchmarks,” comparing the Department to “similar agencies in peer cities in the United States.” Code § 13-101(2). Council must receive a Financial Stability Plan every four years, and Water must update it before each rate case. *Id.*

Procedurally, Council codified the prior practice of holding public hearings and requiring a written report of the Board’s determinations of relevant facts. Code §§ 13-101(3)(f), 101(4)(b)(i). Council set a 120-day deadline for the Rate Board to make its determination before the Water Department may institute temporary emergency rates and charges; and provided for appeals to the Court of Common Pleas within 30 days after the Board files its report. Code §§ 13-101(8)-(9).

It does not appear that Council intended a formal meaning of “appeal” in Section 13-101(9), rather than a general reference to court review. The *Brunwasser* court held that the Court of Common Pleas could review the Water Department’s rate decision through a declaratory judgment action, rejecting the City’s contention that the Public Advocate must file a formal

appeal. *Brunwasser*, 22 A.3d at 267-270. The Commonwealth Court specifically held that the Local Agency Law, 2 Pa. C.S. §§ 751-754, did *not* apply, agreeing with the Public Advocate that City water rate decisions were not “adjudications.” *Id.*, 22 A.3d at 269. The Court held:

the dispute is over the Commissioner’s Rate Determination and subsequent promulgation of the Final Regulations, amending the PWD’s Regulations establishing water rates in the City of Philadelphia for all PWD customers. The challenged actions of the Commissioner and PWD are not particular to the parties that chose to participate in the ratemaking process. The resulting Rate Determination and Final Regulations, therefore, are not adjudications and thus are not appealable under the Local Agency Law within the trial court’s appellate jurisdiction under Section 933(a)(2) of the Judicial Code.

*Id.* at 270.<sup>1</sup>

The Rate Board, like the Water Commissioner under the old procedure, must “fix and regulate rates and charges”<sup>2</sup> after public advertising as required for all City regulations<sup>3</sup> and public hearings<sup>4</sup> and based on similar standards. While Council has also provided that a “party to the proceedings of the Board affected by the Rate Report may appeal to the Court of Common Pleas . . . within thirty (30) days of the filing of the Board’s Rate Report with the Department of Records,” Code § 13-101(9), there is no indication that Council intended to make Rate Board decisions into “adjudications,” as opposed to recognizing the opportunity for judicial review and limiting the time period to 30 days, commensurate with the Rate Board’s own 120-day deadline. Any actions that a party may wish to challenge in a case before the Rate Board are almost certainly “not particular to the parties that chose to participate in the ratemaking process.” *Brunwasser*, 22 A.3d at 270.

Again, the Rate Board’s decisions are the means that the City has chosen to set rates *for itself*. Contrary to the Public Advocate’s argument, the Rate Board is unlike the Gas Commission. The Gas Commission’s elaborate procedures – whether or not required under existing law – are a vestige from when, like the Public Utility Commission, the Gas Commission was the regulator of a private entity.<sup>5</sup> Thus the Gas Commission cases cited by the Public

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<sup>1</sup> In relevant part, state law defines “adjudication” as “Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 Pa. C.S. § 101.

<sup>2</sup> Code § 13-101(3).

<sup>3</sup> Rate Board Regulation 2(d), referring to Charter § 8-407 (Regulations) and Code § 21-1703 (Notice of Regulations Proposed by Departments, Boards and Commissions).

<sup>4</sup> Code § 13-101(3)(f); Rate Board Regulation 6.

<sup>5</sup> As a five-member body, the Gas Commission dates from clause 6 of an agreement with The Philadelphia Gas Works Company (a subsidiary of the for-profit United Gas Improvement Company) effective Jan. 1, 1938. *See, e.g., 1939 Ordinances of the City of Philadelphia* 263, 266-267 (July 20) (City Controller, two members elected by Council, one appointed by Mayor, one appointed by UGI). UGI lost its seat on the Gas Commission to a Mayoral appointee in the 1962 agreement, *see 1961 Ordinances of the City of Philadelphia* 1587, 1603 (Dec. 29), on which the current agreement with Philadelphia Facilities Management Corporation – still nominally a private entity – is most directly based.

Advocate<sup>6</sup> are inapposite as to due-process requirements in the legislative and regulatory mechanism established for the Rate Board. So are the cases that deal with boards and commissions that adjudicate disputes of individuals, such as the firing or other discipline of police officers or superintendents,<sup>7</sup> zoning or environmental decisions affecting rights of specific individuals,<sup>8</sup> and pension board benefits decisions.<sup>9</sup>

Council and the voters clearly intended for the Rate Board to be “independent.” But the independence was legislative in nature – “to give the level of transparency that I think should be required any time you’re making any adjustments in rates, taxes or any other aspect of requiring that individuals pay more for *be it public utilities or real estate taxes.*”<sup>10</sup> Council wanted “some level of independent process, *be it a commission or be it a City Council,*” like more than a dozen other large cities.<sup>11</sup> The crucial independence is from the Water Department itself.<sup>12</sup>

In proposing the amendment to Charter Section 5-801 and then in enacting Code Section 13-101, it does not appear that City Council intended to bar any City employees other than Water Department officials from serving on the Rate Board.<sup>13</sup> Then-Councilmember Kenney responded to then-City Treasurer Nancy Winkler’s testimony on the Charter change as follows:

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<sup>6</sup> *Action Alliance of Senior Citizens v. Phila. Gas Comm’n*, 6 Pa. D.&C. 3d 144 (C.C.P. Phila. 1977); *Public Advocate v. Phila. Gas Comm’n*, 161 Pa. Commw. 428, 637 A.2d 676 (1994), *rev’d*, 544 Pa. 129, 674 A.2d 1056 (1996).

<sup>7</sup> *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969); *In re Blystone*, 144 Pa. Commw. 27, 600 A.2d 672 (1991); *Purcell v. Reading School District*, 167 A.3d 216 (Pa. Commw. 2017).

<sup>8</sup> *Horn v. Hilltown Tp.*, 461 Pa. 745, 337 A.2d 858 (1975); *Christman v. Zoning Hearing Bd. of Tp. of Windsor*, 854 A.2d 629 (Pa. Commw. 2004); *Kuszyk v. Zoning Hearing Bd. of Amity Tp.*, 834 A.2d 661 (Pa. Commw. 2003); *FR & S, Inc. v. Com., Dept. of Environmental Resources*, 113 Pa. Commw. 576, 537 A.2d 957 (1988); *Borough of Youngsville v Zoning Hearing Bd. of Borough of Youngsville*, 69 Pa. Commw. 282, 450 A.2d 1086 (1982).

<sup>9</sup> *Bell v. City of Philadelphia, Bd. of Pensions and Retirement*, 84 Pa. Commw. 47, 478 A.2d 537 (1984).

<sup>10</sup> Remarks of Council President Clarke, Hearing of Committee on Law and Government (April 12, 2012) at 4:15-21 (emphasis supplied).

<sup>11</sup> *Id.* at 76:2-10 (emphasis supplied).

<sup>12</sup> Other cities do not restrict city officials with some authority affecting the water department or authority from participating in rate-setting. For example, the chair of the rate-setting board of directors of the DC Water Authority – one of the agencies cited by Council – is Tommy Wells, <https://www.dewater.com/board-of-directors>, who is Director of the Department of Energy & Environment, <https://www.dewater.com/person/tommy-wells>, which promulgates water quality regulations that affect Water Authority costs and therefore rates. See [https://doee.dc.gov/sites/default/files/dc/sites/d DOE/release\\_content/attachments/DC%20Water%20Comments.pdf](https://doee.dc.gov/sites/default/files/dc/sites/d DOE/release_content/attachments/DC%20Water%20Comments.pdf).

<sup>13</sup> Council knows how to disqualify City officials from membership on City boards and commission when it wants to do so. Section 5-801 of the Charter and Section 13-101(3) of the Code do not contain language utilized where Council has determined that City officials should be ineligible for service. See, for example, Charter Section 3-806(e) (“No person while serving as a member of the Board of Ethics shall: seek or hold a position as an elected or appointed public official or employee within the Commonwealth . . .”); and former Charter Section 3-800 (“Of the appointed members [of the City Planning Commission], at least five shall be persons who hold no other public office . . .”). Nor did Council choose to place the Rate Board within Article III, Chapter 8 (Independent Boards and Commissions) of the Charter. Pursuant to Section 8-403 of the Charter, the Rate Board

. . . I don't know where I'm at on these two pieces of legislation yet. I'm a little conflicted in your testimony in that I don't understand why the process you have in place now is inherently fair and transparent, that the process is being recommended at least or will be negotiated or talked about as this moves forward will be a similarly vetted group of people that are engineers, that are financial analysts, that are people who are capable of doing this. If they have the same knowledge and same background and understand the federal requirements and the market's requirements and the customer, ratepayers' requirements, why would they make a decision any different than our wonderful Water Commissioner would make and his qualifications?

I don't -- Ms. Winkler, your testimony came a little off guard, the politics, politics, politics. Well, I don't expect to be sitting on this rate-making agency. I suspect that *some similarly situated engineer person who has a strong financial background like yourself would sit on that rate-making board and make a decision based on all the facts that you consider yourselves*. Why would they come to a different conclusion?<sup>14</sup>

The same Council that proposed the Charter change and created the Rate Board confirmed Ms. Winkler – *who was still City Treasurer* – as a member of the first Rate Board.<sup>15</sup> It did so despite the on-the-record objection of the attorney currently serving as lead representative of the Public Advocate, who argued that the City Treasurer's presence on the Rate Board would violate due process and would inherently conflict with her responsibility for the Water Department's finances and bonds.<sup>16</sup> Council rejected this position and voted to confirm Ms. Winkler. Knowing that you were City Treasurer, Council similarly voted to confirm your nomination by Mayor Kenney to the Rate Board.<sup>17</sup>

I conclude that there is no legal basis for the contention that your position as City Treasurer requires your recusal generally from Rate Board proceedings.

You may still consider whether to recuse yourself from individual motions, or decisions concerning individual recommendations of the Hearing Officer. *Every* Rate Board member must make decisions based on the hearing record and the standards that the Charter<sup>18</sup> and Code<sup>19</sup> have

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is a "departmental board" that must "exercise its powers and perform its duties independently of the departmental head and officers" (here, those of the Water Department); but there is no legal reason why one or two Rate Board members may not be members of the Administration. Even independent boards and commissions that may make decisions adverse to the City itself may include Mayoral appointees and other City officials. *See, e.g.*, Charter §§ 3-801, 4-700, 4-701 (Commission on Human Relations); Charter §§ 3-804, 7-200, 7-201 (Civil Service Commission).

<sup>14</sup> Remarks of J. Kenney, Hearing of Council Committee on Law & Gov't on Bill 120177 and Res. 120188 (4/19/12) at 35:20-37:3 (emphasis supplied).

<sup>15</sup> Council Res. 140984 (adopted Feb. 5, 2015).

<sup>16</sup> *See* Testimony of Robert Ballenger, Hearing of Council Committee of the Whole on Resolutions 140984, 140985, 140986, 140987, 140988, and 150016 (Jan. 29, 2015) at 23:5-28:25.

<sup>17</sup> Council Res. 170746 (Sept. 21, 2017).

<sup>18</sup> *See* text of Charter Section 5-801 quoted above on page 2.

<sup>19</sup> *See* the first three paragraphs on page 3.


set forth. Any of you should recuse yourselves if and when you cannot follow those standards fairly.

Even short of that, if your personal involvement in a particular scenario, or influence or attempted influence from outside the Rate Board – whether from City officials or outside interests – makes it unclear to you whether you can decide a matter fairly on the merits, or makes it likely that the decision of the Rate Board could lack credibility due to a serious appearance of impropriety, then you should consider recusing yourself or resigning.

However, your training and your experience as City Treasurer constitute professional experience in the fields of public administration and finance, which Council has said it wants from one or more Rate Board members. Code § 13-101(c). If you can be fair, your knowledge and experience can be every bit as beneficial to the Rate Board's collective decisions as is the Chair's experience as a consumer advocate in utility rate cases. Council has determined that Board members' diverse experiences and perspectives can be a net positive in reaching results that will be, and may be seen to be, fair and beneficial to all classes of Water Department customers, to holders of City water revenue bonds and notes, to City residents, businesses, and taxpayers, and to the City itself.

I would be happy to discuss any of this further. You may also want to consult the City's Chief Integrity Officer, Ellen Mattleman Kaplan, concerning ethical choices and any potential appearance of impropriety.<sup>20</sup>

Sincerely,



Daniel W. Cantú-Hertzler

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<sup>20</sup> The Public Advocate has not alleged any potential personal financial conflict of interest or other violation of Chapter 20-600 of the Code or Article X of the Charter. If any such issues were to arise, Section 4-1100 of the Charter indicates that you should consult the City's Board of Ethics. The Board of Ethics or this office could assist with issues under the Public Official and Employee Ethics Law, 65 Pa. C.S. §§ 1101-1113.