



COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

April 25, 2018

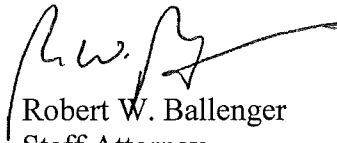
VIA EMAIL

Mr. Sonny Popowsky, Chairperson
Philadelphia Water, Sewer and Storm Water Rate Board
1515 Arch Street, 17th Floor
Philadelphia, PA 19102-1595

Dear Mr. Popowsky,

Enclosed please find the Public Advocate's Motion for Entry of Order and Certification of Appeal. Due to the urgency of this matter, the Public Advocate respectfully requests the Board's vote on this Motion at the next public meeting, scheduled for May 2, 2018.

Sincerely,



Robert W. Ballenger
Staff Attorney

cc. Rate Board Members and Counsel
Rate Proceeding Service List

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**Before the
Philadelphia Water, Sewer and Storm Water Rate Board**

In Re: Philadelphia Water Department :
Proposed FY2019-2021 : **Formal Notice Filed March 13, 2018**
Rate Increase :

**Public Advocate's
Motion for Entry of Order and Certification of Issues for Appeal**

In light of the April 18, 2018 determination by Ms. Rasheia Johnson to deny the Public Advocate's Motion for Recusal of Ms. Rasheia Johnson, the Public Advocate hereby moves the Philadelphia Water, Sewer and Storm Water Rate Board (Board) to enter an Order certifying the following legal issues for interlocutory appeal to the Court of Common Pleas of Philadelphia County, and staying further proceedings before the Board pending the outcome of such appeal:¹

I. Does the service of the City Treasurer, Ms. Rasheia Johnson, as a member of the Board violate the requirements of Section 5-801 of the Philadelphia Home Rule Charter and Section 13-101 of the Philadelphia Code requiring that the Board be established as an "independent rate-making body"?

II. Does the Board's determination regarding PWD's request for increased rates and charges (and related issues) constitute an adjudication for purposes of Pennsylvania's Local Agency Law (2 Pa. C.S. §§ 105, 551-588; 751-754)?

¹ In the context of Commonwealth Agencies, Pennsylvania regulations permit a party to a motion for an order certifying an issue for interlocutory appeal. See, e.g., 1 Pa. Code § 35.225(a) ("When the agency head has made an order which is not a final order, a participant may by motion request that the agency head find, and include the finding in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order under 42 Pa.C.S. § 702 (relating to interlocutory order) may materially advance the ultimate termination of the matter.")

Background

1. The Public Advocate filed its Motion for Recusal of Ms. Rasheia Johnson and supporting Memorandum of Law on April 6, 2018 (such motion and memorandum, hereinafter “Recusal Motion”). A copy of the Recusal Motion is incorporated by reference herein and available at: <https://beta.phila.gov/media/20180409105529/Verified-Motion-to-Recuse-R-Johnson-And-Memo-of-Law.pdf>.
2. The Public Advocate’s Recusal Motion alleged that Ms. Johnson should recuse herself based upon factual averments in support of the following claims:
 - a. Ms. Johnson’s service on the Board creates an appearance of bias due to her financial and fiduciary relationship with PWD and an actual conflict of interest due to the impact of the Board’s rate determination upon her functions as City Treasurer.
 - b. Ms. Johnson’s service presents an actual, impermissible conflict of interest due to her contractual authority, as City Treasurer, over certain PWD expert witnesses regarding the subject matter of PWD rates.
 - c. Ms. Johnson’s support, as City Treasurer, of a pending City ordinance that would have mandated an increase in customer water rates demonstrates actual bias in favor of rate increases.
3. The Recusal Motion set forth in detail the legal basis for the Public Advocate’s opinion that the Board’s final rate determination constitutes an appealable adjudication within the meaning of Pennsylvania’s Local Agency Law. See 2 Pa. C.S. §§ 101; 752.
4. PWD filed its Memorandum in Response to the Recusal Motion on April 12, 2018. A copy of PWD’s Memorandum is incorporated herein and available at:

https://beta.phila.gov/media/20180413104820/MemoinOppositiontoPARecusalMotion_4-12-18.pdf.

5. At the April 18, 2018 Public Meeting of the Board, Ms. Johnson addressed the Recusal Motion and stated that she would not recuse herself.
6. Ms. Johnson's statement constituted an oral Order, to be reflected in the minutes of the Board's April 18, 2018 Public Meeting.
7. In entering the oral Order, Ms. Johnson stated that she was relying on the written advice of the Board's counsel.
8. Ms. Johnson waived any privilege associated with such written advice, and directed that it be posted on the public record concerning PWD's request for increased rates and charges for FY 2019-2021. A copy of the Board's counsel's written advice, dated April 17, 2018, is incorporated herein and available on the record at:
<https://beta.phila.gov/media/20180419112630/DWCHtoJohnson20180417recusaladvice.pdf>.
9. In written advice, the Board's counsel advises that "it does not appear that City Council intended to bar any City employees other than Water Department officials from serving on the Rate Board" when it amended the Home Rule Charter and Philadelphia Code to establish an "independent rate-making body" to establish water rates and charges.
10. In written advice, the Board's counsel acknowledges that the Public Advocate's argument "rests on the premise that the Rate Board is adjudicating the rate case, rather than acting in a regulatory or legislative capacity."

11. In written advice, the Board’s counsel acknowledges that “[i]f the Rate Board’s decision were an adjudication of the rights of the parties, then some of the Public Advocate’s arguments might be well taken.”

12. The Board’s counsel and the Public Advocate have reached opposing conclusions regarding the independence required of Board members and the applicability of Pennsylvania’s Local Agency Law to the Board’s final rate determination to approve, modify, or reject proposed rates and charges.

a. The Public Advocate contends that the rate-setting process established by amendment to the Home Rule Charter and Philadelphia Code, creating an “independent” Board with specific prohibition on conflicts of interest and rendering decisions with the express right of appeal, indicates that the Board’s final determination is an adjudication. As such, due process protections attach, requiring the Board to lack even the appearance of bias.

b. The Board’s counsel relies on caselaw construing the rate-setting process that predates the establishment of the Board by amendment to the Home Rule Charter and Philadelphia Code. The Board’s counsel also relies upon City Council’s approval of the City Treasurer’s membership on the Board. According to the Board’s counsel, such case law and approval indicates that the Board’s final determination is not an appealable adjudication and so does not implicate due process protections requiring the Board to be impartial.

The Board May Enter an Appealable Interlocutory Order

13. Pursuant to Pennsylvania’s Judicial Code, 42 Pa. C.S. §702(b), an interlocutory appeal may be taken by permission:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

14. A “government unit” is defined to include any “government agency,” which, in turn, is defined to include any “officer or agency” of a political subdivision of the Commonwealth. 42 Pa. C.S. § 102.
15. The Board is a government unit and may enter an appealable interlocutory order pursuant to 42 Pa. C.S. §702(b).
16. The Court of Common Pleas is an appellate court for purposes of 42 Pa. C.S. §702(b) by virtue of 42 Pa. C.S. §701(a).
17. An interlocutory order by the Board may be reviewed by the Philadelphia Court of Common Pleas on appeal. See, e.g., Selig v. The Zoning Hearing Bd. of N. Whitehall Twp., No. 2171 C.D. 2015, 2016 WL 7030803, at *2 (Pa. Commw. Ct. Dec. 2, 2016), reconsideration denied (Jan. 4, 2017).
18. Failure to recuse can be the proper subject of an interlocutory appeal. See, e.g., Sullivan v. Bucks County, 499 A.2d 678, 691 n. 26 (Pa. Commw. 1985) (noting without discussion that a trial judge had certified the question of his own recusal); U.S. Steel Corp. v. Papadakos, 437 A.2.d 1044, 1046 (Pa. Commw. 1981) (holding that writ of mandamus was an improper avenue to pursue recusal of a trial court judge, because other remedies, including seeking 702(b) certification, were available); W.P. v. J.P., 2015 WL 6738835 (Pa. Sup. 2015) (non-precedential) (deciding a recusal question certified through 702(b)).

The Board Should Enter an Order Certifying Issues for Appeal

19. 42 Pa. C.S. 702(b) sets forth a three-part test for certification of a question for interlocutory appeal, each of which is satisfied:

- a. That the contemplated appeal involve controlling questions of law;
- b. That there are substantial grounds for difference of opinion; and
- c. That immediate appeal would materially advance the resolution of the case.

20. The contemplated appeal involves a controlling question of law.

- a. As set forth above, Ms. Johnson has refused to recuse herself on the basis of the Board’s counsel’s advice, which directly conflicts with the legal opinion of the Public Advocate, set forth in the Recusal Motion.
- b. With respect to the Recusal Motion, two controlling questions of law have arisen:
 - i. Does the service of the City Treasurer, Ms. Rasheia Johnson, as a member of the Board violate the requirements of the Philadelphia Home Rule Charter and the Philadelphia Code requiring that the Board be established as an “independent rate-making body”?
 - ii. Does the Board’s determination regarding PWD’s request for increased rates and charges (and related issues) constitute an adjudication such that the Board must lack actual bias or even the appearance of bias?
- c. The question of whether the Board’s final rate determination is an adjudication is also controlling for purposes of analyzing whether the basic tenets of due process are satisfied in this proceeding. See Kowenhoven v. County of Allegheny, 587 Pa. 545, 901 A.2d 1003 ([Pa.] 2006) (“Due process principles apply to quasi-judicial or administrative proceedings....”); see also 2 Pa. C.S. § 552-555

(guaranteeing rights of: representation; stenographic recordation of testimony; examination and cross-examination; written adjudication containing factual findings and reasons for the decision).

21. There are substantial grounds for difference of opinion.

- a. The Board’s counsel and the Public Advocate are in complete disagreement regarding the “independence” required of Board members and the application of the due process requirements of Local Agency Law (concerning administrative adjudications) to the Board’s rate determination.
- b. The Board’s counsel and the Public Advocate have substantial difference of opinion regarding:
 - i. The meaning and application of the requirement, set forth in the Philadelphia Home Rule Charter and Philadelphia Code, that the Board be established as “an independent rate-making body.”
 - ii. The proper analysis and application of the Pennsylvania Commonwealth Court’s holding in Public Advocate v. Brunwasser, 22 A.3d 261 (Pa. Commw. Ct. 2011).
 - iii. The meaning and statutory interpretation of City Council’s authorization of appeals of the Board’s rate determination to the Philadelphia Court of Common Pleas.
 - iv. The application of Pennsylvania law, including the provisions of the Local Agency Law applicable to adjudications, to the Board’s rate determination.

- c. Without commenting on the merits of the particular arguments advanced by the Public Advocate and the Board's counsel, it is clear that substantial grounds for difference of opinion have emerged.

22. Immediate appeal would materially advance resolution of the case.

- a. As the parties in this case prepare to commence technical hearings, significant differences of opinion concerning the requirement of the Board's independence and the application of the Local Agency Law's due process guarantees hang over the parties and the Board.
- b. Resolution of these issues will provide clarity to the parties and the Board, concerning, among other things,² the propriety of Ms. Johnson's membership on the "independent" Board under the standards of Philadelphia law and the extent to which such membership implicates due process issues under the standards of Pennsylvania law.
- c. When assessing whether an immediate appeal would materially advance resolution of the case, the consideration is whether such appeal may materially advance the ultimate (as opposed to instant) termination of the matter.
- d. The ultimate termination of the case may well turn on whether, in rendering a decision, the Board's composition failed to comply with Philadelphia or Pennsylvania law, including the provisions of the Home Rule Charter, Philadelphia Code, and the Local Agency Law.
- e. Failure to resolve the conflicting interpretations of the law between the Board's counsel and the Public Advocate will jeopardize the legal sufficiency of the

² The ramifications of such determination are significant and affect myriad issues, such as the importance of preserving issues for potential appeal, the appropriateness of voicing objections in technical hearings, applicable standards of professional responsibility, etc.

Board's rate determination in a likely future appeal. Should this rate proceeding be allowed to continue without first resolving the issue of the Board's independence and the issue regarding the adjudicatory or non-adjudicatory status of the Board's rate determination, there is the potential for remand and reconsideration of the merits of the underlying positions of the participants regarding PWD's requested rate increase.

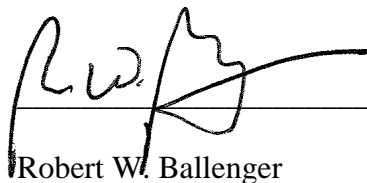
- f. The issues of the Board's independence and the adequacy of the due process protections afforded participants are at the core of this case and a proper resolution of the case itself requires an immediate and final resolution of the legal conflict concerning whether the Board is determined to be independent and whether its ultimate rate determination constitutes an appealable adjudication.

The Board Should Stay These Proceedings Pending Appeal

23. Because the issues of Board member independence and impartiality of administrative adjudications involve controlling questions of law, the Common Pleas Court is likely to exercise its discretion to permit the appeal to be taken.
24. Failing to stay these proceedings could result in irreparable harm in the form of waste and duplication of expense and effort by multiple parties.
25. Staying these proceedings would not materially harm other participants and would advance the public interest.

WHEREFORE, the Public Advocate respectfully requests that the Board certify for interlocutory appeal to the Commonwealth Court the issues of (1) whether Ms. Johnson’s service as a member of the Board violates the requirements of the Home Rule Charter and the Philadelphia Code requiring that the Board be established as an “independent rate-making body” and (2) whether the Board’s determination regarding PWD’s request for increased rates and charges (and related issues) constitutes an adjudication for purposes of Pennsylvania’s Local Agency Law. The Public Advocate further requests that the Board stay PWD’s 2018 rate proceeding pending the outcome of such appeal. An appropriate order reflecting the certification of these issues for immediate appeal is attached hereto.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R.W. Ballenger', is written over a horizontal line.

Robert W. Ballenger
Josie B.H. Pickens
Joline R. Price
Philip A. Bertocci

For the Public Advocate

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April 25, 2018

Philadelphia Water, Sewer and Storm Water Rate Board

In Re: Philadelphia Water Department :
Proposed FY2019-2021 : **Formal Notice Filed March 13, 2018**
Rate Increase :

ORDER

AND NOW, this _____ day of _____, 2018, in consideration of the Public Advocate’s Motion for Entry of Order and Certification of Issues for Appeal, and any responses thereto, it is hereby ordered:

1. On April 6, 2018, the Public Advocate filed its Motion for Recusal of Ms. Rasheia Johnson and accompanying Memorandum of Law (together, “Recusal Motion”)
2. The Public Advocate’s Recusal Motion alleged that Ms. Johnson should recuse herself based upon factual averments in support of the following claims:
 - a. Ms. Johnson’s service on the Board creates an appearance of bias due to her financial and fiduciary relationship with PWD and an actual conflict of interest due to the impact of the Board’s rate determination upon her functions as City Treasurer.
 - b. Ms. Johnson’s service presents an actual, impermissible conflict of interest due to her contractual authority, as City Treasurer, over certain PWD expert witnesses regarding the subject matter of PWD rates.
 - c. Ms. Johnson’s support, as City Treasurer, of a pending City ordinance that would have mandated an increase in customer water rates demonstrates actual bias in favor of rate increases.
3. On April 18, 2018, Ms. Rasheia Johnson entered an oral Order, verbally denying the Public Advocate’s Motion to Recuse.

4. Ms. Johnson's April 18, 2018 Order was entered on advice of counsel that:
 - a. Section 5-801 of the Philadelphia Home Rule Charter and Section 13-101 of the Philadelphia Code establishing an "independent rate-making body" to set water rates does not bar Ms. Johnson's service as a member of the Board.
 - b. The Board's final rate determination does not constitute an adjudication for purposes of Pennsylvania's Local Agency Law (2 Pa. C.S. §§ 105, 551-588; 751-754).
5. The following two issues involve controlling questions of law as to which there are substantial grounds for difference of opinion and immediate appeal from this Order relative to those issues may materially advance the ultimate termination of this matter:
 - a. Whether Ms. Johnson's service as a member of the Board violates the requirements of Section 5-801 of the Home Rule Charter and Section 13-101 of the Philadelphia Code requiring that the Board be established as an "independent rate-making body."
 - b. Whether the Board's determination regarding PWD's request for increased rates and charges (and related issues) constitutes an adjudication for purposes of Pennsylvania's Local Agency Law ((2 Pa. C.S. §§ 105, 551-588; 751-754).
6. Pending the outcome of the appeal of this Order to the Philadelphia Court of Common Pleas, further proceedings in the matter of PWD's Proposed FY 2019-2021 Rate Increase are hereby stayed.

PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD