

**BEFORE THE  
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

In the Matter of the Philadelphia Water Department's Proposed Change in Water, Wastewater and Stormwater Rates and Related Charges	Fiscal Years 2019-2021
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**PHILADELPHIA WATER DEPARTMENT'S MOTION IN LIMINE TO  
LIMIT OR EXCLUDE CERTAIN PORTIONS OF TESTIMONY  
SUBMITTED BY THE PUBLIC ADVOCATE**

TO HEARING OFFICER BOCKWAY:

The Philadelphia Water Department ("PWD" or "Water Department") submits this Motion *in Limine* ("Motion") to request that the scope of the technical hearing be limited to (i) exclude certain issues and proposals presented by the Public Advocate regarding the Structure and Operation of the Tiered Assistance Program ("TAP") and Barring Unfair and Deceptive Shutoff Notices; and (ii) strike Part 1 (Structure and Operation of TAP) and Part 4 (Barring Unfair and Deceptive Shutoff Notices of the Direct Testimony of Roger D. Colton (Public Advocate Statement 3) relating to the above topics.

By this Motion, the Department contends that the issues raised by Mr. Colton concerning both the structure and operation (e.g., availability) of TAP and shut-off notices are beyond the scope of a rate proceeding before the Philadelphia Water, Sewer and Storm Water Rate Board ("Board" or "Rate Board"). The Public Advocate is free to present testimony regarding TAP cost recovery, TAP administrative costs and the TAP Rider, as to which PWD has no objection.

In support hereof, PWD states as follows:

**I. BACKGROUND**

**A. Procedural History.**

1. The Department filed its Advance Notice of the proposed rates and charges for Fiscal Years 2019 through 2021 with Philadelphia City Council and the Rate Board on February 12, 2018 (together with extensive supporting documentation, prepared written testimony and exhibits). Thereafter, on March 14, 2018, the PWD filed its Formal Notice of proposed rates and charges with Rate Board and the Department of Records.

2. On April 20, 2018, consistent with the procedural schedule set by the Hearing Officer, the Public Advocate filed, *inter alia*, the prepared written testimony of Roger D. Colton (Public Advocate Statement 3).

3. Mr. Colton's testimony is divided into four parts:

- Part 1 – Structure and Operation of TAP;
- Part 2 – TAP Cost Recovery;
- Part 3 – Public Fire Costs; and
- Part 4 – Barring Unfair and Deceptive Shutoff Notices.

#### **B. Structure and Operation of TAP.**

4. TAP is the City's new affordability program for residential customers who meet low-income or special hardship criteria.<sup>1</sup> TAP regulations, an amendment to Chapter 2 of PWD Regulations, were effective on March 24, 2017.<sup>2</sup>

5. To implement TAP, the Water Revenue Bureau ("WRB") and PWD collaborated with a wide range of groups<sup>3</sup> to develop necessary procedures and rules. Such partners included (but are not limited to) UESF, the NECs and Community Legal Services, which is the Public Advocate in this proceeding.

6. WRB began accepting TAP applications from customers on July 1, 2017.<sup>4</sup>

7. The City extended shut-off holds for TAP applicants so they would not be without service while their TAP status was in process.<sup>5</sup>

#### **C. Shut-Off Notices.**

8. Before a customer is shut off for non-payment, the WRB will send notice(s) to the customer.<sup>6</sup> Under certain circumstances, the customer can prevent or postpone their service from being shut off.<sup>7</sup>

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<sup>1</sup> PWD Statement 8 at 6.

<sup>2</sup> PWD Statement 8 at 6.

<sup>3</sup> PWD Statement 8 at 6.

<sup>4</sup> PWD Statement 8 at 6.

<sup>5</sup> PWD Statement 8 at 14.

<sup>6</sup> <https://beta.phila.gov/services/water-gas-utilities/water-sewer-services/water-shutoffs/reasons-for-water-shutoff/>.

9. The form and content of the shut-off notices were developed by the WRB and PWD by working together and with partners, such as Community Legal Services/Public Advocate.

## **II. LEGAL STANDARDS.**

10. A motion *in limine* is a motion made to determine a matter affecting the conduct of the hearing, such as preclusion of testimony or evidence.<sup>8</sup>

### **A. The Rate Board Has Limited Jurisdiction.**

11. In 2016, the Board asked the Law Department for its advice regarding the scope of Board authority to direct the Water Department (and by extension the WRB) to take specific actions to improve the customer service experience.<sup>9</sup>

12. The Law Department advised,<sup>10</sup> *inter alia*, that: (a) the Rate Board has authority to fix and regulate rates and charges, which includes the power to deny any rate increase above the baseline required by the Home Rule Charter and Code on any reasonable basis, and the power to grant a rate increase for a shorter period than the Water Department has requested; and (b) the Rate Board does not have the power to direct how the Water Department (and WRB) provides service.

13. The Board accepted the advice of the Law Department.<sup>11</sup>

### **B. The Hearing Officer May Exclude Irrelevant Testimony and Evidence.**

14. The Board's Hearing Regulations authorize the Hearing Officer to control the receipt of testimony and evidence into the record, including the exclusion of irrelevant testimony or evidence.<sup>12</sup>

15. The Hearing Officer has the authority to exclude evidence that is beyond the proper scope of a rate proceedings and focus the testimony and evidence on the matters properly at issue. The same

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<sup>7</sup> <https://beta.phila.gov/services/water-gas-utilities/water-sewer-services/water-shutoffs/prevent-water-shutoffs/>.

<sup>8</sup> See, e.g., *Commonwealth v. Pikur*, 596 A.2d 1253, 1259 (Pa.Cmwlth. 1991) (defining an *in limine* motion as a motion or petition submitted to the court in a pending matter either pretrial or during trial whereby exclusion is sought of anticipated prejudicial evidence, keeping extraneous issues out of the underlying proceeding, precluding reference to prejudicial matters, or preventing encumbering the record with immaterial matter.).

<sup>9</sup> 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39-40 and Appendix B. The Rate Board's Determination on the Water Department Rates and Charges for FY 2017-2018 was issued on June 7, 2016, following the Rate Board's vote on June 6, 2016.

<sup>10</sup> 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39 and Appendix B.

<sup>11</sup> 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39.

<sup>12</sup> Rate Board Hearing Regulations at §3(b)(4), 8(b)(3).

authority exists for Administrative Law Judges (“ALJs”) before the Pennsylvania Public Utility Commission.<sup>13</sup> For example, in *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*,<sup>14</sup> the ALJ struck prepared written testimony regarding proposals to undertake a cost-benefit analysis and other studies, noting that such issues were beyond the scope of that proceeding.<sup>15</sup>

### III. PWD’S REQUEST FOR MOTION IN LIMINE.

16. This rate proceeding is related to the Water Department’s proposed rates and charges for Fiscal Years 2019 through 2021.

17. Mr. Colton’s testimony, on behalf of the Public Advocate, includes testimony regarding both the structure and operation of TAP (Part 1)<sup>16</sup> and shut-off notices (Part 4);<sup>17</sup> such testimony is not related to granting or denying (in whole or in part) the proposed rate increase and is not reasonably a part of the Public Advocate’s case regarding the proposed rate increase.

18. The only reason for Mr. Colton’s testimony on said issues and proposals is to direct how the Water Department (and by extension the WRB) provides service.

19. If Mr. Colton’s is permitted to testify at the technical hearings on said issues and proposals, he will be raising issues and proposals that are beyond the scope of the subject rate proceeding and are, therefore, legally irrelevant. This will cause harm to the Department as it be forced to spend time and resources to respond to matters that are properly excluded from the scope of the subject rate proceeding.

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<sup>13</sup> The Board’s Regulations at Section 7(b)(5) direct the use of procedural standards analogous to those utilized in utility ratemaking proceedings at the Pennsylvania Public Utility Commission (“PUC”). Those standards allow administrative law judges to exclude testimony and evidence. See, 52 Pa.Code §5.403. Moreover, while neither the PUC nor the Rate Board are bound by the rules of evidence, 2 Pa.C.S. §§505, 554, this does not mean that such proceedings are evidentiary free-fire zones. The rules of evidence can provide guidance. Under the Pennsylvania rules of evidence, testimony and evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action of the court. See Pa.R.E. §401.

<sup>14</sup> PUC Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015).

<sup>15</sup> See also *Pa. Public Utility Commission, et al. v. Pennsylvania American Water Co.*, PUC Docket No. R-00932670 *et al.*, 1994 Pa. PUC LEXIS 120 at \*158 (Final Order entered July 26, 1994) (adopting ALJ’s conclusion that the issues raised by OCA were outside the scope of the rate case and would be better addressed in a statewide rulemaking proceeding); *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) (“The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.”).

<sup>16</sup> Public Advocate Statement 3 at 7-58.

<sup>17</sup> Public Advocate Statement 3 at 103-109.

WHEREFORE, on the basis of the foregoing, PWD respectfully requests that the Hearing Officer issue an order: (1) limiting the scope of this proceeding to exclude the issues and proposals presented by the Public Advocate regarding the structure and operation of TAP (Part 1 of Public Advocate Statement 3) and shut-off notices (Part 4 of Public Advocate Statement 3); and (2) striking both Part 1, Public Advocate Statement 3 at 7-58 (the structure and operation of TAP), and Part 4, Public Advocate Statement 3 at 103-109 (shut-off notices), of the direct testimony submitted by Roger D. Colton on behalf of Public Advocate relating to said topics so as to preclude the presentation of testimony and evidence on these topics at the technical hearings.

Respectfully submitted,

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