

**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 MEMORANDUM IN OPPOSITION TO  
THE PUBLIC ADVOCATE'S MOTION FOR ENTRY OF ORDER AND  
CERTIFICATION OF ISSUES FOR APPEAL**

**I. INTRODUCTION.**

This memorandum is submitted on behalf of the Philadelphia Water Department ("Water Department" or "PWD") in response to the Public Advocate's Motion for Entry of Order and Certification of Issues for Appeal ("Certification Motion"). The Public Advocate ("Advocate") specifically requests that the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board") certify the following legal issues for interlocutory appeal to the Court of Common Pleas of Philadelphia County ("Court"):

1. Does the service of the City Treasurer, Rasheia Johnson, as a member of the Rate Board violates the requirements of Section 5-801 of the Philadelphia Home Rule Charter and Section 13-101 of the Philadelphia Code requiring that the Rate Board be established as an independent rate-making body? ("Recusal Issue")
2. Does the Rate 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? ("Rate Process Issue")

In addition, the Advocate requests that the Rate Board enter a stay so as to hold the 2018 Rate Proceeding in abeyance pending interlocutory review by the Court.

It should be noted that the foundation for the Certification Motion is the presumed authority of the Rate Board to "adjudicate" a final rate order, subject to due process appeal rights set forth in the Local Agency Law.<sup>1</sup> Contrary to the Advocate's position, however, the subject ratemaking process is

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<sup>1</sup> 2 Pa.C.S. §105, *et seq.* The provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) and Subchapter B of Chapter 7 (relating to judicial review of local agency action) are known and are often cited as the "Local Agency Law." See, 2 Pa.C.S. §§105, 551-588, 751-754. The Advocate's citation of 1 Pa. Code §35.225(a) is misplaced. That regulation is applicable to Commonwealth Agencies rendering adjudications under the Administrative Agency Law. See, 2 Pa.C.S. §103(a).

“regulatory,” rather than adjudicatory in nature; and the Local Agency Law does not apply. As explained below and in the Department’s Memorandum in Opposition to the Public Advocate’s Motion to Recuse the City Treasurer, dated April 12, 2018 (which is incorporated herein by reference), there is no adjudication from which to appeal in this rate process. Accordingly, the Advocate is not entitled to interlocutory review under 42 Pa. C.S. §702(b). It also bears emphasis that the Rate Board is not authorized by its enabling legislation to stay its decision on rates and charges. See discussion *infra*.

## **II. ARGUMENT.**

### **A. The Rate Board Has Limited Statutory Authority.**

The Rate Board lacks the requisite statutory authority to grant the relief sought by the Public Advocate. That is, as a creation of the City of Philadelphia (“City”), the Board has only the powers and authority granted to it by the City in the Philadelphia Code.<sup>2</sup> The Rate Board must act within, and cannot exceed, its jurisdiction.<sup>3</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>4</sup> Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy<sup>5</sup> or grant relief. The Rate Board is authorized to approve, modify or reject proposed rates and charges.<sup>6</sup> As explained below, nothing in the Philadelphia Code authorizes the Rate Board to grant any of the relief requested by the Certification Motion.

### **B. The Rate Board Lacks the Authority to Grant the Certification Motion.**

The Rate Board’s enabling legislation (Philadelphia Code, Section 13-101) does not authorize it to certify any issue for “interlocutory” review by the Philadelphia Court of Common Pleas (or any other part of the unified judicial system). As noted above, the Board is engaged in a regulatory process (that is

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The Rate Board is not a Commonwealth Agency, 2 Pa.C.S. §101 (definitions), and is not rendering an adjudication subject to due process and appeal rights set forth in the Administrative Agency Law, 42 Pa.C.S. §763.

<sup>2</sup> This general proposition is well-established in Pennsylvania law. See, *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, PUC Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. PUC*, 237 A.2d 602 (1967).

<sup>3</sup> This is also a well-established proposition in Pennsylvania law. See, *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa. Super. 1945).

<sup>4</sup> See, *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>5</sup> The Pennsylvania Supreme Court has observed that “subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented. Jurisdiction is a matter of substantive law.” *Commonwealth v. Bethea*, 828 A.2d 1066, 1074 (Pa. 2003), *cert. denied*, 540 U.S. 1118 (2004). See also *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

<sup>6</sup> See, Philadelphia Code § 13-101(4)(b)(iii), 4(b)(iv), 8.

not final at this stage), rather than an adjudicatory process.<sup>7</sup> Accordingly, contrary to the Public Advocate’s position, the Rate Board is not rendering an adjudication under the Local Agency Law that would be subject to the appellate jurisdiction of the courts. See, *Public Advocate v. Brunwasser*, 22 A.3d 261 (2011) (“*Brunwasser*”). Accordingly, the Certification Motion is not entitled to “interlocutory” review under 42 Pa.C.S §702(b) and should be quashed.

Even assuming the applicability of Section 702(b), the Public Advocate’s Certification Motion would still fail. The aforesaid Section provides as follows:

(b) Interlocutory appeals by permission. — When a court or other government unit, in [1] 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 [2] such order involves a controlling question of law [3] as to which there is substantial ground for difference of opinion and [4] 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. (Emphasis added.)

Per Section 702(b), each of the following criteria (paraphrased) must be satisfied: (1) there must be a final order within the court’s appellate jurisdiction; (2) the contemplated appeal must involve controlling questions of law; (3) there must be substantial grounds for difference of opinion; and (4) an immediate appeal should materially advance the resolution of the case. As discussed below, the Certification Motion satisfies none of the above criteria.

**1. There is Not a Final Order of the Rate Board.**

The Public Advocate is mistaken in its argument that the statement by Ms. Johnson at the April Rate Board Meeting (April 18, 2018) constitutes an “order” by the Rate Board.<sup>8</sup> There is no underlying “order” or action by the Rate Board. The Board makes determinations by majority rule. The Rate Board does not act officially by the vote/statement of any individual member, but only by a majority vote of a quorum of the Rate Board. Ms. Johnson has only made a public statement. Nothing equates that statement to either an order or an action of the Rate Board. Additionally, the Recusal Motion was

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<sup>7</sup> The conclusion that the PWD ratemaking process is still regulatory (not adjudicatory) in nature is addressed in the Department’s Response to the Public Advocate’s Due Process Memorandum (February 9, 2016) as well as this memorandum.

<sup>8</sup> Certification Motion at ¶¶5-7.

directed to Ms. Johnson and sought to have Ms. Johnson “recuse herself” from the 2018 Rate Proceeding. It did not explicitly request any action by the Rate Board. As of this writing, Ms. Johnson has only made a public statement in reliance upon the advice and conclusions of the City’s Law Department. Nothing equates her reliance on legal advice and opinion to either an order or an action of the Rate Board. Moreover, even assuming Ms. Johnson’s statement and/or reliance could be construed as an order or an action of the Rate Board,<sup>9</sup> 42 Pa. C.S. §702(b) would be inapplicable because the PWD ratemaking process is still regulatory (not adjudicatory) in nature.

**2. The Subject Issues Are Not Controlling Questions of Law.**

The Public Advocate argues that the subject issues are “controlling questions of law” because they impact the due process available in the 2018 Rate Proceeding.<sup>10</sup> However, neither issue identified in the Certification Motion (i.e., recusal and/or rate process issues) directly impacts due process available to participants in this case so as to separate this litigation from the last rate proceeding – which was unchallenged. Stated differently, the instant proceeding is being undertaken consistent with the requirements of the Philadelphia Code and the Rate Board’s Hearing Regulations. The Code is the same as it was in the 2016 Rate Proceeding. The Hearing Regulations are also substantially similar to the procedural rules that were used in the last rate proceeding. In short, there have been no changes of any significance in the rate process since the last proceeding or, for that matter, any new issues raised by the Advocate in its Certification Motion that would be controlling or dispositive of the entire case now before the Rate Board.

It bears emphasis that neither issue raised in the Certification Motion appears to be within the accepted scope of the phrase “controlling issues of law.” Within the context of Section 702(b), the courts have construed “controlling issues of law” to mean those issues that could resolve the entire case:<sup>11</sup>

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<sup>9</sup> The Public Advocate did not provide any legal authority for this point, and we did not locate any legal authority that would support the position being advanced by the Public Advocate.

<sup>10</sup> Certification Motion at ¶¶20(c), 22(b).

<sup>11</sup> *A Civil Practitioner’s Guide To Permissive Appellate Review of Interlocutory Orders* (“Civil Practitioner’s Guide”), 72 PA Bar Assn. Quarterly 98.

For example, as to what kinds of questions of law might be considered controlling, it appears that many of the cases in which permission to appeal has been granted involve appeals of orders denying petitions, motions, preliminary objections, or other filings that would have ended the litigation if they had been granted. In addition, courts have granted permissive appellate review where the issue involved an affirmative defense, jurisdiction, or the admission or exclusion of evidence. These types of orders are arguably controlling since questions of jurisdiction go to a court's ability to hear a case while orders allowing or disallowing affirmative defenses or admitting or precluding evidence have the potential to destroy or severely weaken one of the parties' cases. Thus it appears that whether or not an issue is considered controlling depends in large part on whether its disposition could resolve the entire case. (footnotes omitted) [Emphasis added].

*Civil Practitioners Guide*, 72 PA Bar Assn. Quarterly at 98, 101. In the instant context, neither issue raised by the Advocate is directly related to proposed rates and charges being reviewed by the Rate Board. Also, notably the Advocate does not articulate how the recusal and rate process issues raised in the Motion impact the presentation of facts or argument regarding proposed rates and charges. To be sure, the standard of judicial review for the Rate Determination would vary, if the ratemaking process is deemed adjudicatory<sup>12</sup> as opposed to regulatory.<sup>13</sup> However, the Public Advocate does not explain how the standard of review would impact the Rate Board's ability to ultimately decide the issues presented in the 2018 Rate Proceeding or weigh the evidence presented by the participants. Likewise, it does not explain how the denial of the recusal request (consistent with the requirements of the Philadelphia Code)<sup>14</sup> would perforce create an issue that would violate the legal rights of the Public Advocate (or the small user customers it represents). Taken together, there is no clear explanation by the Advocate that either issue raised in the Certification Motion is a controlling question of law.<sup>15</sup>

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<sup>12</sup> Adjudications are subject to judicial review under 2 Pa.C.S. §§753, 754. Section 754(b) provides the following: "In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. §706 (relating to disposition of appeals)."

<sup>13</sup> Regulatory determinations can be challenged by proving a cause of action within the court's original jurisdiction.

<sup>14</sup> See, Philadelphia Code, Section 20-606, *et seq.*

<sup>15</sup> The Advocate does suggest that Ms. Johnson's participation in the 2018 Rate Proceeding would create reversible error (in contending that the recusal issue is a controlling question of law). Certification Motion at ¶20. But that is not necessarily true. In Pennsylvania, action taken by a local body is void only if it passed because of a vote of the member with an actual conflict of interest.<sup>15</sup> Notably, Ms. Johnson has no such conflict. Moreover, at this point in time, it is pure speculation as (a) to how Ms. Johnson and the other Rate Board members will actually vote; and (b) the impact, if any, of Ms. Johnson's vote on the overall decision. In light of the above, there is no clear reason to believe that the recusal issue raised by the Advocate can be logically deemed to be a "controlling issue of law."

### 3. There Are Not Substantial Grounds for Difference of Opinion.

The Public Advocate argues that the PWD ratemaking process is adjudicatory in nature (because the Board is an “independent” body).<sup>16</sup> Based upon this unsupported contention, the Public Advocate concludes<sup>17</sup> that Ms. Johnson’s failure to recuse herself was wrong. However, the Advocate is mistaken again. In the instant case, there is a difference of opinion, but there does not appear to be a substantial basis to support the Public Advocate’s opinion. Neither the rate process or recusal issues raised in the Certification Motion are matters of first impression. That is, the impact of *Brunwasser* (nature of rate process) was raised in the 2016 Rate Proceeding; and a rate determination was rendered at the conclusion of that case which was never challenged. Moreover, the Board will take notice of the appointment and confirmation of the prior City Treasurer (Nancy Winkler) who served on the Rate Board prior to her retirement. Plainly stated, there is nothing novel (matters of first impression) presented in this case with respect to the issues sought to be addressed by the Certification Motion; and no substantial grounds demanding immediate attention.

Rather, the Motion is a feeble attempt to delay the rate proceeding.<sup>18</sup> As noted above, the Advocate argues (as it did in the 2016 Proceeding) that because the Board is an “independent” body, its rate determinations must be adjudications. But this is an over-simplistic analysis that completely ignores the fact that many administrative agencies render regulatory determinations, rather than adjudications. In point of fact, there are independent bodies, such as the Independent Regulatory Review Commission

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The Public Advocate’s arguments with regard to recusal also overlook the fact that there are other venues (and remedies) for the resolution of the recusal issue raised in the Certification Motion. If Ms. Johnson votes and she should have disqualified herself, she could be subject to penalties under the standards under the City’s Ethics Code and/or the Public Official and Employee Ethics Act (“State Ethics Act”).<sup>15</sup> That being said, under the above ethical standards, “conflicts” only arise from personal financial interests (as opposed to a “conflict” created by the appearance of bias, prejudice and/or impropriety).

To mitigate or avoid the potential for such penalties, Ms. Johnson could seek detailed advice from the City’s Ethics Board<sup>15</sup> and/or the State Ethics Commission before she votes on the 2018 Rate Proceeding. If she obtains such advice, Ms. Johnson is entitled to act in reasonable reliance on that advice. If she does not seek advice, it is possible that someone (including, but not limited to, the Public Advocate) could either (a) report a concern to the Ethics Board or (b) file a formal complaint with the Ethics Board. Here, given the speculative impact of Ms. Johnson’s vote and the availability of other venues and remedies, the recusal issue raised in the Certification Motion cannot be logically deemed to be a “controlling question of law.”

<sup>16</sup> Certification Motion at ¶¶12(a), 21(b)(i), 22(a).

<sup>17</sup> Certification Motion at ¶¶2, 20.

<sup>18</sup> The Board should also be reminded that Ms. Johnson was appointed to serve as a member of the Rate Board in September 2017. The fact that PWD was planning a 2018 Rate Proceeding was informally communicated to the Board and CLS in late 2017; and the Advance Notice of the rate case was filed in February of this year. Despite the above time-line, the Advocate has only recently decided to file its recusal motion; and now seeks to delay the rate proceeding.

("IRRC") that routinely review and approve regulations without rendering an adjudication.<sup>19</sup> The Rate Board, likewise, renders a regulatory determination, rather than an adjudication in deciding the merits of the Department's applications for rate relief. See, *Brunwasser*, 22 A.3d at 270. The rate determination and regulations that are the result of the rate process here are also a part of a quasi-legislative (regulatory) framework. See, Philadelphia Code 13-101. Therefore, contrary to the Advocate's position, there are no substantial grounds for differences of opinion with regard to (a) the nature of this proceeding or (b) the participation of the City Treasurer on the Rate Board. This is not a matter of first impression requiring judicial review in the middle of a rate proceeding.

**4. An Immediate Appeal Will Not Advance the Ultimate Determination of the 2018 Rate Proceeding.**

The Public Advocate erroneously asserts<sup>20</sup> that immediate judicial review may mitigate the need for future judicial review. This argument rings hollow, as it is simply too generic. The same can be said of any issue in any proceeding. Nothing in the Certification Motion suggests that an immediate appeal will materially advance the Rate Board's decision to approve, modify or reject the proposed rates and charges. That is the real issue presented here. Rather, the Certification Motion promises substantial delay associated with review by the Common Pleas Court and possibly Commonwealth Court. During this period, the projected revenues, revenue requirements and financial data underpinning the rate filing will become stale and will need to be updated. The rate model will also have to be re-run and testimony conformed to the new rate filing projections. Presumably, the Advocate and other participants will also request additional discovery. The aforesaid delay and associated increased costs (i.e., harm or damages) would be needlessly borne by ratepayers. The Department submits that, rather than advance the litigation

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<sup>19</sup> It is well-established that the Regulatory Review Act does not create any "right or benefit, substantive or procedural, enforceable at law by a person against another person or against the Commonwealth, its agencies or its officers." 71 Pa. C.S. § 745.2(b); *Small v. Horn*, 722 A.2d 664 (Pa. 1998).

<sup>20</sup> Certification Motion at ¶¶22(c), 22(d), 22(e), 22(f).

of this case, the grant of interlocutory review would create piecemeal litigation, which should be avoided.<sup>21</sup>

**C. The Rate Board Lacks the Authority to Grant a Stay Pending Appeal.**

The Advocate's request that the proceedings be stayed pending "appeal" is sophistry. The Rate Board is not authorized to stay its decision on proposed rates and charges. Section 13-101 of the Philadelphia Code directs that the decision to approve, modify or reject the proposed rates and charges shall be made in a timely manner, but no later than 120 days from the filing of notice of any proposed change in rates and charges.<sup>22</sup> Under its rules, the Rate Board may — if unable to act within 120 days — establish emergency rates and charges on a temporary basis pending a final determination by the Board.<sup>23</sup> As stated previously, the Rate Board must act within, and cannot exceed, its jurisdiction. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy or grant relief. The Rate Board is authorized to approve, modify or reject proposed rates and charges. Nothing in the Philadelphia Code or the Rate Board's Hearing Regulations authorizes the Rate Board to stay, suspend or otherwise hold in abeyance its decision on proposed rates and charges.

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<sup>21</sup> See, *Rae v. Pennsylvania Funeral Dirs. Assn*, 977 A.2d 1121, 1129 (Pa. 2009), quoting *Pennsylvania Bankers Assn v. Pennsylvania Department of Banking*, 948 A.2d 790, 800 (Pa. 2008) – [a]voiding piecemeal litigation conserves scarce judicial manpower as well as the time of witnesses, jurors, and the use of public resources.”

<sup>22</sup> See, Philadelphia Code § 13-101(4)(b)(iv), (8).

<sup>23</sup> Rate Board Hearing Regulations at Section II(1)(b).



**III. CONCLUSION.**

Based upon the foregoing, the Water Department submits that the Certification Motion filed by the Public Advocate should be quashed.

Respectfully submitted,

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