



CITY OF PHILADELPHIA

LAW DEPARTMENT
One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595
Marcel S. Pratt, City Solicitor

Daniel W. Cantú-Hertzler
Senior Attorney
215-683-5061 (direct dial)
215-683-5069 (fax)
daniel.cantu-hertzler@phila.gov

May 9, 2018

PRIVILEGED AND CONFIDENTIAL

Via Hand Delivery

Sonny Popowsky, Chair
Folasade Olanepikun-Lewis, Member
Tony Ewing, Member
Rasheia Johnson, Member
Water, Sewer and Storm Water Rate Board

Re: Public Advocate's Motion for Certification of Interlocutory Appeal and Stay

Dear Mr. Popowsky:

The Public Advocate submitted a motion on April 25, 2018, concerning Member Rasheia Johnson's statement at the April 18, 2018 meeting of the Water, Sewer and Storm Water Rate Board that she would not recuse herself generally from all proceedings of the Rate Board. The Public Advocate has requested that the Rate Board certify for immediate interlocutory appeal the questions (1) whether Ms. Johnson's service on the Rate Board while she is also City Treasurer violates the requirements of Section 5-801 of the Philadelphia Home Rule Charter and Section 13-101 of the Philadelphia Code that the Rate Board be an "independent rate-making body"; and (2) whether the Rate Board's ultimate determination of rates and charges constitutes an "adjudication" under the Local Agency Law, 2 Pa. C.S. §§ 105, 551-588, 751-754. The Public Advocate has further asked the Rate Board to stay its proceedings pending the outcome of such appeal.

At its May 2, 2018, the Rate Board asked for legal advice concerning its options in response to this Motion. This letter conveys a summary of such advice, pursuant to Sections 4-400(a) and 8-410 of the Philadelphia Home Rule Charter ("Charter"). In formulating this advice, I have reviewed the Motion and the Water Department's Memorandum in Opposition, and have conducted additional research. This legal advice is privileged and confidential. You may, but need not, release a copy to the participants in the rate case.

1. There may be no order from which an interlocutory appeal may be taken. Neither Ms. Johnson nor the Rate Board has issued to date an "order" from which an interlocutory appeal might conceivably be taken. Ms. Johnson stated that she would not recuse herself generally. Neither she nor the Rate Board took formal action on the Public Advocate's previous motion asking her to recuse herself, and her statement does not commit her to deny recusal on any future substantive decision of the Rate Board. Should the Rate Board wish to certify an interlocutory appeal, it must issue an order formally denying the Public Advocate's earlier motion.

2. The Court of Common Pleas lacks jurisdiction over appeals from an interlocutory order unless it has jurisdiction over the Rate Board's final order. No statute makes any interlocutory order of the Rate Board automatically appealable immediately. The Public Advocate cites a state statute that provides for the possibility of interlocutory appeal only if the Rate Board's "final order would be within the jurisdiction of an appellate court." 42 Pa. C.S. § 702(b), which Section 701(a) applies to "the courts of common pleas when sitting as appellate courts." In my published letter of April 17, 2018 to Ms. Johnson, I advised that the Rate Board's *final* order would not be appealable at all, but rather only subject to an original jurisdiction lawsuit. If I am correct, Section 702(b) is simply inapplicable here; it would not permit the Court of Common Pleas to agree to hear an interlocutory appeal, because the Court is not permitted to hear an appeal from the Rate Board's decisions at all. The requested certification would thus be inappropriate. Should the Rate Board wish to certify an interlocutory appeal, it should state in its order that its certification is contingent on the Court's finding, contrary to my prior advice, that any review by the Court of a *final* Rate Board order will be by way of appeal rather than by an original jurisdiction challenge.

3. The Rate Board may not certify an order for potential interlocutory appeal if the order does not involve a controlling question of law as to which there is substantial ground for difference of opinion. One of the prerequisites to any decision by the Rate Board to certify an order for potential interlocutory appeal is a finding that the order involves at least one controlling question of law as to which there is substantial ground for difference of opinion. The Public Advocate has identified two potentially controlling questions of law¹: whether Ms. Johnson's service on the Rate Board while she is City Treasurer violates the requirements of the Philadelphia Home Rule Charter and Code that the Rate Board be an "independent rate-making body," and whether the Rate Board's ultimate decision as to rates and charges will constitute an "adjudication" of private interests within the meaning of the Local Agency Law and thus require an absence of any appearance of bias in favor of the City Administration. I have already advised Ms. Johnson, and by extension the Rate Board, of my conclusions, and I stand by them. However, these appear to be questions of first impression, which can be appropriate for permissive interlocutory appeals.² In my opinion, the Rate Board would be within its discretion to certify that these issues are controlling questions of law as to which there is substantial ground for difference of opinion, although I remain comfortable with the advice I have given on the questions.

¹ I do not believe that the "controlling question of law" requirement is as exacting as counsel for the Water Department has suggested. While a treatise suggests that "controlling" "depends in large part on whether its disposition could resolve the entire case," O.J. Kelley, *A Civil Practitioner's Guide to Permissive Appellate Review of Interlocutory Orders*, 72 Pa. B.A. Q. 98, 101 (July 2001), courts have occasionally certified permissive appeals of recusal denials pursuant to 42 Pa. C.S. § 702(b). See, e.g., *Sullivan v. County of Bucks*, 92 Pa. Commw. 213, 237 n.26, 499 A.2d 678, 691 n.26 (1985) (denying permissive appeal), *alloc. denied*, 516 Pa. 623, 532 A.2d 21 (1986). See also *U.S. Steel Corp. v. Papadacos*, 63 Pa. Commw. 213, 216, 437 A.2d 1044, 1046 (1981) (denying mandamus concerning recusal in part on ground that party could attempt certification of interlocutory appeal under Section 702(b)).

² See *Commonwealth v. Tilley*, 566 Pa. 312, 317, 780 A.2d 649, 651 (2001); *Venosh v. HENZES*, 40 Pa. D. & C. 5th 423, 2014 WL 12746881, *2 (C.C.P. Lackawanna); Kelley, *supra*, 72 Pa. B.A. Q. at 102 & n.36 and cases cited.

4. It is unlikely that an immediate appeal may materially advance the ultimate termination of the matter. An interlocutory appeal appears more likely to delay than to advance ultimate resolution of this matter, and is thus improper for this reason as well. To certify an order for the Court of Common Pleas to consider for interlocutory review under Section 702(b), the Rate Board would also need to find, in effect, that an appeal now would be likely to speed up ultimate resolution of Water Department rates and charges.³ Here, it is unclear that any participant will file any challenge to the Rate Board's decision at all, as no participant did so following the previous rate cases determined by the Rate Board. Conversely, there is no indication that the Public Advocate or other parties would be substantially less likely to seek review again were the Court of Common Pleas to grant interlocutory review now. Moreover, in deciding on the propriety and materiality of Ms. Johnson's membership on the Rate Board, a reviewing court could well want to consider the specific questions Ms. Johnson was asked to join in deciding, whether and on what grounds she recused herself from any of them, how she voted, and whether her vote was necessary to the Rate Board's determination.⁴ In the meantime, the Rate Board is expected to render its decision in any event in approximately two months. Thus, the requested certification would appear not to meet the standard set forth in the statute, even if the Court could take jurisdiction over an appeal, which I have advised it could not.

5. I see no basis for the Rate Board to stay proceedings even if it enters an order certifying the possibility of interlocutory appeal. The Public Advocate asks the Rate Board to stay all proceedings in the current rate case because, according to the Public Advocate, the Court of Common Pleas is likely to grant permission for an interlocutory appeal, because proceedings in the meantime "could result in irreparable harm in the form of waste and duplication of expense and effort by multiple parties," and because a stay "would not materially harm other participants and would advance the public interest." But as noted above, waste is more likely to result from interlocutory review than from the lack of it. The participants have produced and received large amounts of data concerning their respective contentions, and their experts are poised and ready for the technical hearings set to begin tomorrow. Any significant delay for interlocutory review could require new data, and would require substantially more time, effort, and expense by the participants and their experts.⁵ Moreover, the Code requires the Rate Board to decide on appropriate rates and charges within 120 days from the Water Department's filing of the Formal Notice, and thus prohibits the Rate Board from taking any action, including

³ See, e.g., *Kenzey v. Kenzey*, 877 A.2d 1284, 1289 (Pa. Super. 2005) (denying certification of interlocutory appeal, despite controlling question of law as to which there was substantial ground for difference of opinion, because court was convinced that interlocutory appeal would be followed by another appeal rather than by settlement). Cf. *Venosh*, 2014 WL 12746881 at *3 (granting certification because discovery would continue and appeal of novel issue would be decided by the time of scheduled trial).

⁴ See *Lesho v. Board of School Directors of Hanover School Dist.*, 54 Pa. Commw. 585, 587, 422 A.2d 1198, 1199 (1980) (action of school board granting salaried position to board member was not void despite his vote for this action, since the member's vote was not determinative).

⁵ The Public Advocate could have moved for recusal and sought court review months ago, even prior to the Advance Notice, with far less disruption to the process.

entering a stay, that would cause the rate case to take longer than that.⁶ And with a stay of the Rate Board's proceedings that caused a delay beyond 180 days, the Water Department could put its proposed rates and charges in effect in their entirety, albeit on a temporary, emergency basis.⁷ Both on the merits and for lack of authority to stay the proceedings, the Rate Board should deny a stay even if it certifies an order for interlocutory appeal.

Please do not hesitate to contact me with any questions you may have.

Sincerely,


Daniel W. Cantú-Hertzler

⁶ Phila. Code §§ 13-101(4)(b)(iv), 13-101(8). The Rate Board would likely have the authority to enter a stay if the law afforded it no discretion but to enter a stay. In such a case, the stay would not be the cause of the delay. But that is not the case here.

⁷ Phila. Code § 13-101(8).