

Philadelphia Water, Sewer, and Storm Water Rate Board
Special Meeting Notes
5/9/2018, 3 p.m, The Mayor's Media Room

Members Present:

Irwin "Sonny" Popowsky, Chair
Tony Ewing
Folasade A. Olanipekun-Lewis (via conference line)

Also Present:

Daniel Cantú-Hertzler
Andre Dasent
Robert Ballenger
Debra McCarty
Melissa LaBuda
Scott Schwarz
Abby Pozefsky

Susan Crosby
Jaclyn Rogers
David Jagt
Margaret Robertson
D.C. Robertson
Jacquelyn Brown
Cody Williams

Mr. Popowsky called the meeting to order at 3:07 p.m.

Mr. Popowsky explained that the sole agenda item for the Special Meeting was the consideration of the Public Advocate's Motion for Entry of Order and Certification of Issues for Appeal and request for a stay in the Rate Proceeding. A hand-out packet containing said Motion, the Water Department's Memorandum in Opposition to the Public Advocate's Motion, and the Public Advocate's Motion for Recusal of Ms. Rasheia Johnson was distributed. Additionally, Mr. Popowsky noted, the Board members had been in receipt of correspondence from Mr. Cantú-Hertzler, the Board's counsel, concerning the Public Advocate's Motion for Certification of Interlocutory Appeal and Stay.

Mr. Ewing moved that the correspondence from Mr. Cantú-Hertzler be released to Rate Case participants and to the public. Ms. Olanipekun-Lewis seconded the motion. The motion was approved, with Mr. Popowsky, Ms. Olanipekun-Lewis, and Mr. Ewing in favor, Ms. Johnson absent, and no members opposing or abstaining. Copies of Mr. Cantú-Hertzler's letter was distributed and will be posted on the 2018 Rate Proceeding website.

Mr. Ewing remarked that he had read the letter; outside of one matter Mr. Cantú-Hertzler raised which lies within the Board's discretion as one in which there are grounds for a substantive difference of opinion, there are significant concerns about the appropriateness of the Motion which Mr. Ewing understood as trumping the more ambiguous element. Mr. Ewing queried about the procedural steps for consideration of the Public Advocate's Motion.

Mr. Popowsky answered that the Board had heard from the parties to the Rate Proceeding and from the Board's counsel; the present meeting was called in order that the members of the Board discuss and vote upon the Motion, which must be done publicly under the Sunshine statute.

Ms. Olanipekun-Lewis commented that she concurred with Mr. Cantú-Hertzler's conclusion that the Public Advocate's Motion should not be granted. Mr. Cantú-Hertzler elucidated that his advice was to clarify the law rather than put forth a contention that the Board could not or should not grant relief to the Public Advocate, although he is unsure whether said relief would be availing. His letter laid out the necessary steps if the Board were to want to make the question appealable at this stage. He did not find grounds for a stay in the proceeding, but the issue of certification is up to the Board's decision.

Mr. Popowsky stated that he understands the Ordinance and the Board's Regulations as requiring the Board to reach a decision within 120 days of the commencement of the Rate Proceeding, unless the Board is "unable" to do so. He did not believe it would be appropriate for the Board itself to grant a Motion which would extend the Proceeding beyond the mandated 120 days.

Mr. Popowsky expressed concern that the granting of an interlocutory appeal may not advance the resolution of the recusal matter. The current Public Advocate's Motion came after Public Hearings, the filing of Direct Testimony, and the scheduling of Technical Hearings. At the conclusion of the Rate Proceeding, the parties will have the right to seek an appeal or review.

Mr. Ewing noted that the underlying issue is the ability of Rasheia Johnson to decide issues impartially and independently because of her position as City Treasurer, and touched on issues raised by Mr. Cantú-Hertzler in the letter, namely that there is no Order from which an interlocutory appeal may be sought and the question of the jurisdiction of the Court of Common Pleas. Mr. Ewing believed the matter would be more appropriately considered at the end of the Rate Case and that the Motion should be denied. Ms. Olanipekun-Lewis concurred with Mr. Ewing.

Mr. Popowsky invited the participants to address the merits of the motion before the Board made its decision.

Mr. Dasent reiterated his view the ordinance lays out clearly the limits and boundaries of the Board's authority; that necessity compels the conclusion of the Rate Case within 120 days; and that the Public Advocate did not sustain his position on a Motion in which he must prevail on each of the questions. The key issue, according to Mr. Dasent, is whether or not the Board makes an "adjudication"; At the conclusion of the Rate Case, a court can assess the parameters of the case and make a determination as to whether it is an "adjudication" or a "regulatory action." The Department believes that the *Brunwasser* case clearly shows that the Board's determination is a regulatory matter, which precludes an interlocutory appeal and therefore a stay.

Mr. Ballenger disagreed with Mr. Dasent. Following the principle that a legislative body's enacted language is to be given effect barring ambiguity, he stated that the City Council's clear and unambiguous institution was of an "independent rate-making body," setting rates that are subject to right of appeal within 30 days, which tracks the Commonwealth's enactment for Commonwealth and local agencies. *Brunwasser* fails to apply because the Court held that the issue is one of first impression and that the question as to whether Water Department cases are appealable has never been decided, and several cases before *Brunwasser* had in fact proceeded as appeals. Additionally, *Brunwasser* was handed down prior to the establishment of the Rate Board, during which City Council specifically included the word "appeal" in its enactment. The City Council must be presumed to have been aware of the Court's decision in *Brunwasser*; it included language allowing for "appeal" nevertheless. Mr. Ballenger stated that he understood the problematic nature of the timing of his request for a stay on Rate Case proceedings, but he chose to submit this Motion to ensure that the Board had an adequate opportunity to give these issues a full consideration. He firmly disagreed with the interpretation of the Ordinance proffered by the Department. He believes that the underlying issue here is vital to understanding the Rate Board's work and that it is important to understand that here there are two competing understandings of the law as written, and one of them ask the Board to ignore the City Council's enacted plain language.

Mr. Popowsky stated that he believed that the issue before the Board now concerned a stay and an interlocutory appeal, not the ultimate determination of whether the proceedings constituted an adjudication.

Mr. Ewing moved to deny the Public Advocate's Motion for Certification of Interlocutory Appeal and Stay. Ms. Olanipekun-Lewis seconded. The motion carried, with Mr. Popowsky, Ms. Olanipekun-Lewis, and Mr. Ewing in favor, Ms. Johnson absent, and no members opposed or abstaining.

Mr. Popowsky asked Mr. Cantú-Hertzler to prepare an Order Consistent with the Board's determination.

Mr. Popowsky adjourned the meeting at 3:32 p.m.

Minutes prepared by Cody Williams, Legal Assistant