

**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 Enlargement of Time for Hearing Officer Report**

The Public Advocate hereby moves for the enlargement of time for Hearing Officer Nancy Brockway to complete the Hearing Officer Report, dated as of June 20, 2018. The Hearing Officer Report, to which participants' exceptions are to be submitted, is defined as:

The Hearing Officer's summary of all written information submitted and all testimony presented in both public hearings and technical review hearings with the Hearing Officer's proposed findings of fact and conclusions of law for the Board's consideration. The Hearing Officer Report may also include a discussion and recommended decision.

Board Reg. §I.k

The Public Advocate appreciates the Hearing Officer's diligence in preparing the Hearing Officer Report. The Hearing Officer Report addresses some of the significant issues raised in this proceeding, and provides the Hearing Officer's "recommendations" regarding those issues.¹

However, there are many significant, material issues overlooked by the Hearing Officer for which the Board lacks an adequate summary, proposed findings of fact and/or conclusions of law. As a result, it is clear that additional time is absolutely necessary in order to complete the Hearing Officer Report in satisfaction of the Board Regulations.

Likely due to the significant time constraints imposed on the Hearing Officer by the rate review schedule in this proceeding, the Hearing Officer Report unfortunately fails to satisfy the

¹ For purposes of this Motion, the Public Advocate does not consider whether the Hearing Officer's recommendations are adequate to satisfy the requirement of the Board Regulation to include proposed findings of fact and conclusions of law.

Board Regulations. By conference call, on June 20, 2018, the Public Advocate discussed its concerns regarding the Hearing Officer Report with counsel for PWD, the Board Chairman, and the Board's Counsel, in an effort to determine whether more time should be afforded to the Hearing Officer to complete the Report in compliance with the Board Regulations. PWD's counsel opined that PWD would not support any delay.²

The Hearing Officer Report is a vital summary, intended to benefit the Board and the participants with the insight and recommendations of an impartial hearing officer. This is particularly important in this Rate Proceeding, where a new board member has been proposed late in the case, and time constraints of other board members have made it impossible for the full board to attend all public input and technical hearings. Indeed, in the absence of a Hearing Officer Report satisfying the Board's standards, Board members are deprived of an essential element of the rate process. Naturally, participants are intended to benefit from the Hearing Officer Report, as it provides a framework for the organization of exceptions. Without an adequate Hearing Officer Report, participants have no choice but to reiterate previously stated arguments or craft further arguments in reply to one another. The absence of meaningful disposition of issues in the Hearing Officer Report converts potential Exceptions into Reply Briefs, which are not part of the approved process in this rate proceeding.

At this time,³ the Public Advocate has identified the following contested issues as having been inadequately addressed in the Hearing Officer Report:

- Due Process Standards⁴ (absence of proposed findings of fact, conclusions of law, and discussion)
- Capital Account Deposit (absence of discussion)

² PWD supported the inclusion of the definition of Hearing Officer Report in the Board Regulations, set forth above. It now opposes compliance with the very regulations it supported.

³ Because of the need to simultaneously prepare the Public Advocate's Exceptions based on the June 20, 2018 Hearing Officer Report, this list is necessarily subject to expansion and/or revision.

⁴ See PA Main Brief at 19-26; PWD Main Brief at 9.

- Minimum Levels of Reserves⁵ (absence of proposed findings of fact, conclusions of law, and discussion)
- Paygo Capital⁶ (absence of proposed findings of fact and conclusions of law)
- Rate Case Expense Normalization (absence of proposed findings of fact, conclusions of law, and discussion)
- TAP Implementation Cost Normalization (absence of proposed findings of fact, conclusions of law, and discussion)
- Debt Interest Rate (absence of proposed findings of fact, conclusions of law, and discussion)
- Lost Revenue Adjustment for TAP Discounts (absence of proposed findings of fact and conclusions of law)
- TAP Administrative Costs (absence of proposed findings of fact and conclusions of law)
- TAP Arrearage Forgiveness Recovery (absence of proposed findings of fact, and conclusions of law)
- Allocation of TAP Rider (absence of proposed findings of fact and conclusions of law)
- TAP Reconciliation Process (absence of proposed findings of fact and conclusions of law)
- Implementation of TAP Arrearage Forgiveness (absence of proposed findings of fact and conclusions of law)
- Skiendzielewski (absence of proposed findings of fact and conclusions of law)

ADDITIONAL TIME MAY BE GRANTED AND WILL NOT HARM PWD

The provisions of the Board’s ordinance do not impose an absolute obligation to render a decision within 120 days of PWD’s Formal Notice. The Philadelphia Code’s 120-day period for the Board to render a decision cannot be construed as an absolute deadline. In order for the 120-day period to be an absolute deadline, PWD must *be entitled to* a final decision within 120 days. This is not the case. The Philadelphia Code sets forth with specificity that if the Board does not render its decision within 120 days, PWD may (but is not required to) implement emergency rates and charges on a temporary basis pending a final determination by the Board. Accordingly, the Philadelphia Code is clear that a final determination need not be rendered within 120 days

⁵ See, e.g., PA Main Brief at 13 (“As set forth in Section 13-101(4)(b)(i) of the Philadelphia Code, the Board must determine the ‘minimum levels of reserves to be maintained during the rate period’ when fixing rates and charges.”)

⁶ See, e.g., PA Main Brief at 45 (“Furthermore, the Board is required to determine ‘the extent to which current revenues should fund capital expenditures.’” Phila. Code §13-101(4)(b)(i)).

since, in fact, PWD is permitted, but not required, to implement emergency rates and charges “on a temporary basis pending a final determination by the Board.” Phila. Code §13-101(8).

State and federal case law supports the conclusion that the 120-day period specified is not a mandatory deadline. For example, the protest of a franchise application under the Board of Vehicles Act, which also requires a decision to be rendered within 120 days (unless extension is agreed to), has been held to be mandatory since the failure to render a timely decision constitutes a deemed grant of such franchise. Such a deemed grant is appealable. See, e.g., Ford Motor Co. v. Bd. Of Vehicle Mfrs., Dealers and Salespersons, 528 A.2d 1002 (Pa. Cmwlth. 1987).

Notably, the Ford Motor Co. case distinguished Logan v. Zimmerman Brush Co., 455 U.S. 422, a Supreme Court case which reversed and remanded the Illinois Supreme Court’s determination that an administrative agency’s failure to conduct a required due process hearing on an employment discrimination claim within a mandated 120-day period deprived the agency of jurisdiction. The Logan Court specifically held that an employee is entitled to have the administrative agency consider the merits of his charge, notwithstanding the expiration of the statutorily-mandated review period, because to hold otherwise would deprive the employee of access to the appropriate review process. Viewed together, these cases establish that a party entitled to an administrative review process cannot be deprived of it by virtue of a procedural deadline, unless the underlying statute provides that the failure to conduct such review results in a final, appealable determination.

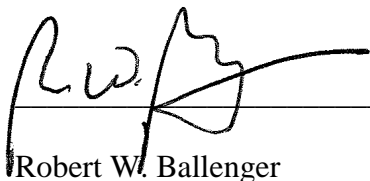
The Public Advocate submits that PWD will suffer no harm as a result of the enlargement of time. If PWD’s modified requested increase for FY 2019 were approved, as set forth in its Main Brief, a delay of one month of increased rates would amount to a small fraction of 1% of PWD’s total revenues requested for FY 2019. See PWD Main Brief, Appendix E. Certainly a

minor delay, in order to ensure that the Hearing Officer Report satisfies the Board Regulations, would not materially harm PWD. Indeed, all participants and the Board would benefit from satisfaction of the Board Regulations and would suffer harm from a noncompliant Hearing Officer Report.

CONCLUSION

For the foregoing reasons, the Public Advocate submits that the Board should provide the Hearing Officer a minimum of two weeks additional time to complete the Hearing Officer Report. Due to the upcoming July 4 holiday, the Public Advocate suggests the Hearing Officer Report be due on July 9. Thereafter, participants should be provided ample time to file exceptions, a minimum of one week. The Board can reschedule deliberations for the end of July, in order to render a determination sometime in August.

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

Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3788
rballenger@clsphila.org

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