

**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 ENLARGEMENT OF TIME
FOR HEARING OFFICER REPORT**

I. INTRODUCTION.

This memorandum is submitted on behalf of the Philadelphia Water Department ("Department" or "PWD") in response to the Public Advocate's Motion for Enlargement of Time for Hearing Officer Report ("Motion"). The Public Advocate ("Advocate") specifically requests that the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board") provide additional time for preparation of the Hearing Officer's Report ("Report"). In addition, the Advocate requests that the Rate Board hold the 2018 Rate Proceeding in abeyance pending completion of its deliberations (indicating no harm will result).¹ The Department maintains that the Rate Board does not have the authority to enlarge the time for submission of a supplemental Report as proposed by the Advocate. Moreover, as explained below, there is no need to do so.

II. ARGUMENT.

A. The Rate Board Cannot Accommodate the Public Advocate's Request.

The Rate Board lacks the statutory authority to grant the relief sought by the Public Advocate. Section 13-101 of the Philadelphia Code ("Rate Ordinance") dictates the timeline for the rate process.² The Rate Board is not authorized to suspend or otherwise hold in abeyance its decision on proposed rates

¹ The Department observes that a delay in the timely implementation of the new TAP Rate Rider (effective September 1, 2018) will cause harm to the utility and our customers. A delay in the rate schedule would certainly negatively impact the TAP Rate Rider reconciliation, as the surcharge would be delayed. Financial plans currently being reviewed by the Rate Board would also be impacted by a delay in the implementation of new rates.

² See, Philadelphia Code §13-101(4)(b)(iv), 8.

and charges.³ The Rate Ordinance provides 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.⁴ Under its rules, if Rate Board is unable to act within 120 days, PWD can establish emergency rates and charges on a temporary basis pending a final determination by the Board.⁵ 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 suspend or otherwise hold in abeyance its decision on proposed rates and charges.⁶

B. There is No Need to Enlarge the Period for Submission of the Report.

The Hearing Officer’s Report merely offers guidance to the Rate Board. It is the Rate Board (not the Hearing Officer or the Hearing Officer Report) that makes the actual decision on the proposed rates and charges.⁷ The Hearing Officer’s Report, in and of itself, has no legal or binding effect.⁸ The Report can be adopted, modified or rejected by the Rate Board.⁹ Since the Report can be rejected in its entirety, any errors or omissions in the Report do not affect the Rate Board’s ability to decide any issue related to the proposed rates and charges.

³ The Rate Board has only the powers and authority granted to it by the City in the Philadelphia Code. The Rate Board must act within, and cannot exceed, its jurisdiction. 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). Jurisdiction may not be conferred by the parties where none exists. *See, Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy or grant relief. *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). The Rate Board is authorized to approve, modify or reject proposed rates and charges. *See*, Philadelphia Code § 13-101(4)(b)(iii), 4(b)(iv), 8. Nothing in the Philadelphia Code authorizes the Rate Board to grant any of the relief requested by the Motion.

⁴ *See*, Philadelphia Code §13-101(4)(b)(iv), (8).

⁵ Rate Board Hearing Regulations at Section II(1)(b); Philadelphia Code §13-101(8).

⁶ *See* Letter of May 9, 2018 to Board Members Concerning Motion for Certification of Interlocutory Appeal and Stay from Law Department (Daniel W. Cantú-Hertzler, Senior Attorney). This letter states in footnote 6 that: “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 *See*, Philadelphia Code §§13-101(4)(b)(i), (ii), (iv) and 13-101(8).

⁸ Nothing indicates that the Hearing Officer’s Report become final by operation of law or otherwise. To the contrary, both the Hearing Regulations and the Rate Ordinance require action by the Board on the proposed rates and charges.

⁹ Rate Board Hearing Regulations at Section II(10)(a).

Here, the Hearing Officer has already submitted, during the course of this week, initial and supplemental reports on June 19 and 21, respectively. The aforesaid reports cover the waterfront of issues presented in the rate case and encompass over 111 pages. This is not to say that the Department agrees with every finding of the Hearing Officer. However, any short-comings that we may identify can be adequately addressed in Exceptions. The Rate Board also has access to a voluminous record (written testimony, exhibits, discovery responses and hearing transcripts).¹⁰ The Department will further direct the Rate Board to the PWD Brief and its proposed findings of fact and conclusions of law with regard to any issue not otherwise sufficiently addressed in the numerous articulated findings in the Report. The Advocate had the option of preparing its own proposed findings of fact and conclusions of law, but chose not to do so. This omission, on its part, can also still be remedied – at its option.

C. The Rate Board Decision Must Allow Time for the Logistics of Rate Implementation.

The Rate Board should also be aware that there are logistical requirements associated with the implementation of new rates and charges. That is, following the Rate Board's rate determination (presumably in mid-July), there is a required compliance filing and, upon approval, numerous billing system changes that are required to implement approved changes in rates and charges and to (hopefully) implement the new TAP Rate Rider. This is a complicated process that the Advocate ignores altogether. The rate calendar for the 2018 Proceeding partially addresses these issues, but does not capture the time required for billing changes, to comport with the rate determination. The table below depicts a likely time-line for (i) Exceptions, (ii) the Rate Board's deliberations and decision, (iii) the compliance filing and approval, (iv) required billing system changes and (v) submission of approved rates to the Department of Records – with no changes in scheduling.

¹⁰ See, PWD Brief at 2-5. The Rate Board website sets forth the rate filing in its entirety, including the Advance Notice, Formal Notice, discovery responses, written testimony and exhibits of all participants, public input and technical hearing transcripts, hearing exhibits, transcript responses and various submissions by customers directed to the Rate Board. Taken together, whether or not a Rate Board member was physically present at every hearing, there is an extensive record available for each member's review – as well as briefs summarizing the record.

Timeline for Implementation of New Rates

<u>Projected Date</u>	<u>Description of Event</u>	<u>Parameters</u>
June 27	Exceptions	One week following Report
June 27- July 10	Rate Board Deliberations	
July 12	Rate Board Decision	No later than 120 days following Formal Notice
July 20	PWD Compliance Filing/Approval	
July 23-August 22 ¹¹	Customer Billing System Changes to Comport with Rate Board Decision	Basis-2 changes will require more than 30 days for new base rates
August 22	Compliance Filing Made with Department of Records	Filing required at least 10 days before new rates become effective.

In addition to the foregoing, PWD needs to notify customers of changes in rates and charges at least 30 days before implementation. PWD submits that there is no time for a two-week extension for the Report. There is barely enough time to implement the present schedule (with very minor deviation).¹² The Advocate’s request that the time-line for the proceedings be enlarged beyond the period dictated by the Rate Ordinance cannot be accommodated.¹³

D. The Rate Process Is Not Adjudicatory in Nature.

The Rate Board should finally note that the Advocate’s Motion is, in part, based upon the presumed authority of the Rate Board to “adjudicate” a final rate order, subject to due process appeal

¹¹ This is an estimate, as over 30 days are required to make billing system changes.

¹² PWD notes that the Board Chair took great care to schedule deliberations within the 120-day decision period and around Board Members availability. The Department has also worked diligently to meet rate schedule deadlines throughout the proceeding.

¹³ See footnote 5. The Advocate relies upon *Ford Motor Co. v. State Board of Vehicle Manufacturers*, 107 Pa. Cmwlth. 313, 528 A. 2d 1002 (1987) to support of its position. This case, however, is inapposite. In *Ford*, the State Board of Vehicle Manufacturers failed to render a determination within the statutory decision period (120 days), as extended by agreement of the parties (McCrackin-Sturman Ford and Ford Motor Company). The case also addressed whether the merits of the disposition were constitutionally resolved. Curiously, that proceeding was brought under the Court’s original jurisdiction.

In any event, *Ford* does not support the Advocate’s contention here. In the first instance, this is because the facts of that case and the instant proceeding are distinguishable. The parties in *Ford* waived the 120-day statutory decision period (under Sections 7 and 18 of the Board of Vehicles Act). There is no such waiver here. Second, the Commonwealth Court never reached the critical holding the Advocate anticipates in citing *Ford* in its Motion (with regard to a denial of due process rights). That is, McCrackin contended that the state’s failure to issue a final determination within the 120-day time limit as extended and the consequent decision in *Ford*’s favor, deprived McCrackin of due process (administrative review) in its attempt to protect its “property” interests. However, based upon the facts presented there, the Court could not conclude that the 120-day decision rule denied McCrackin’s due process rights (even assuming property rights were implicated). *Ford*, 528 A.2d at 1008. Finally, in the instant case, there has been no denial of administrative review. Quite the opposite is true. As stated in the PWD Brief, there has been an extensive administrative review of the rate filing which is also subject to judicial review under the Court’s original jurisdiction. See, PWD Brief at 4, 9.

rights set forth in the Local Agency Law.¹⁴ This issue is raised once again in the context of “Due Process Standards” in the Motion.¹⁵ Same was also raised in connection with the Advocate’s Motion to Recuse the City Treasurer (dated April 6, 2018) and Motion for Entry of Order and Certification of Issues for Appeal (dated April 25, 2018) – both of which were denied by the Rate Board. Contrary to the Advocate’s position, the instant rate process is “regulatory,” rather than adjudicatory in nature; and the Local Agency Law does not apply. As explained in the Department’s Memorandum in Opposition to the Public Advocate’s Motion to Recuse the City Treasurer (dated April 12, 2018) and Memorandum in Opposition to the Public Advocate’s Motion for Entry of Order and Certification of Issues for Appeal (dated May 4, 2018), this is not an adjudicatory process. Accordingly, to the extent the requested relief is based on these grounds – it is unnecessary. Further, the Hearing Officer has provided a supplemental submission (dated June 21, 2018) addressing “normalization adjustments” which should be accepted and utilized by the Board.¹⁶ Finally, the purpose of Exceptions is to address any short-comings in the Report. Simply put, the Exception procedure gives the Advocate (and others) both notice and the opportunity to be heard on any issue raised (or not raised)¹⁷ in the Report. Since the Report did not include proposed findings and conclusions, the Advocate can provide proposed findings of fact and conclusions of law with its Exceptions as the Department provided with its Brief.

¹⁴ 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 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.

¹⁵ See, Motion at 2.

¹⁶ PWD will file Exceptions addressing normalization adjustments as well as other issues addressed in the Recommended Decision. This is the appropriate purpose for Exceptions.

¹⁷ Exceptions may identify any “error or omission” in the Report. See, Rate Board Hearing Regulation at Section II(8)(a)(3).

III. CONCLUSION.

Based upon the foregoing, the Water Department submits that the Public Advocate's Motion for Enlargement of Time for Hearing Officer Report should be denied. The circumstances presented do not justify delay by the Board in acting on the proposed rates and charges.

Respectfully submitted,

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Date: June 22, 2018