

**BEFORE THE  
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

**PHILADELPHIA WATER )  
DEPARTMENT ) FY 2019-2021 RATES**

**EXCEPTIONS OF THE PUBLIC ADVOCATE  
TO THE HEARING OFFICER REPORT**

June 26, 2018

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## I. OVERVIEW AND GENERAL EXCEPTION

Pursuant to the regulations of the Philadelphia Water, Sewer and Storm Water Rate Board (Board Regulations), the Public Advocate hereby submits these Exceptions to the Hearing Officer Report of Hearing Officer Nancy Brockway, dated June 19, 2018 (hereinafter, Report), as supplemented by the Supplemental Hearing Officer Report, submitted June 21, 2018 (hereinafter, Supplemental Report). 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.<sup>1</sup>

While the Public Advocate appreciates the Hearing Officer's diligence in preparing the Report, the Report exhibits significant omissions including, but not limited to, necessary recommendations. Likely due to the stringent time constraints imposed on the Hearing Officer by the rate review schedule in this proceeding, the Report fails to include all of the proposed findings and conclusions required by Board Regulations. By conference call, on June 20, 2018, the Public Advocate discussed its concerns regarding the 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. Thereafter, the Public Advocate submitted its Motion for Enlargement of Time for Hearing Officer Report. On

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<sup>1</sup> The Board Regulations require that the Board consider the *Hearing Officer's* proposed findings of fact and conclusions of law. Proposed findings of fact and conclusions of law submitted by PWD should be disregarded by the Board as the same were not requested by the Hearing Officer or the Board, nor are proposed findings or conclusions from any participant contemplated by City Ordinance or Board Regulation.

June 25, 2018, the Board denied the Motion for Enlargement of Time. A copy of the Public Advocate's Motion for Enlargement of Time for Hearing Officer Report is appended to these Exceptions and designated as Attachment A.

Accordingly, as set forth in detail herein, significant issues raised by PWD and the Advocate in this proceeding are apparently poised for the Board's review without the benefit of a Report consideration as required by the Board Regulations. The Board is expressly required, by its Regulations, to fully consider and give substantial weight to the Hearing Officer Report and the Hearing Record (of which the Report is a key component). Board Reg. § II.10(a). The failure of the Report to satisfy the Board Regulations renders the record before the Board incomplete and inadequate. Due to the admitted "draft" status of the Report, the Public Advocate submits that the Board has only two options available to it.

First, the Board can deny PWD's request for rate relief on the basis that no increase is warranted based on those portions of the Hearing Officer Report that reduce or dispose of significant financial assumptions underlying PWD's rate increase. The Board has the power to approve, modify or reject PWD's proposed rate increase. Phila. Code §§13-101(4)(b)(iii), 13-101(4)(b)(iv), 13-101(8). The Board can reject PWD's proposed rate increase on the basis of the Report's conclusions that: the PWD's Financial Plan assumptions are not persuasive; PWD's request to recover public fire protection costs is unlawful and unwarranted; PWD assumptions concerning future expenses (including normalization of non-recurring expenses) are unsupported; and PWD has agreed to significant downward adjustments as proposed by the Public Advocate.<sup>2</sup> As discussed more fully below, although the Report inadequately addresses

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<sup>2</sup> See *infra* at Section II (summarizing Hearing Officer revenue requirements recommendations); PA M.B. at 191-192 (summarizing agreed to adjustments). Note that, as discussed in Section X.B below, contrary to the Public

the parties' positions regarding the minimum levels of reserves to be maintained by PWD, it is undisputed that PWD will begin FY 2019 with approximately \$80 million more in its Rate Stabilization Fund than it projected when the Board last approved increased rates. Report at 19. The Report fails to consider this surplus of reserve funding, nor take into account that PWD's current projections continue to exhibit no need for a rate increase at this time.<sup>3</sup> Moreover, the Hearing Officer incorrectly concludes that the Philadelphia Code "directs the Board to consider the impact of its rate decisions on the financial stability of the Department." Report at 16. The language of the Philadelphia Code is clear: "In fixing rates and charges the Board shall recognize the importance of financial stability to customers and fully consider the Water Department's Financial Stability Plan." Phila. Code §13-101(4)(b)(i) ; PA M.B. at 45. As discussed in Section II, because PWD has not shown a necessity of a rate increase, the financial instability to customers that would be caused by a rate increase outweighs PWD's request for rates based on higher, unnecessary financial standards.

In the alternative, the Board can reach a determination that it is unable to issue its Rate Report within the 120 day period set forth in the Philadelphia Code, as specifically authorized thereby. In so doing, the Board could return the Report to the Hearing Officer for completion, and provide the participants a further opportunity to submit exceptions. The Board could then

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Advocate's Main Brief, PWD did not agree to the Public Advocate's adjustment to the chemical cost escalation factor for FY 2020.

<sup>3</sup> Even with the far-fetched assumption that PWD's projections may prove to be accurate, if the Board denies any rate increase for FY 2019 and FY 2020, PWD will still maintain in excess of the amount of cash reserves it averred were necessary (\$110 million) when the Board last increased rates. As shown on Appendix E to PWD's Main Brief, PWD requests a combined \$40.864 million in additional service revenue in FY 2019 and FY 2020. With that \$40.864 million in increased rates and charges, PWD projects having \$159.393 million remaining in its Rate Stabilization Fund at the end of FY 2020. With no rate increase whatsoever for FY 2019 and 2020, using PWD's own forecast, which has been proven to consistently understate revenues and overstate expenses, PWD would conclude FY 2020 with approximately \$118.529 million in its Rate Stabilization Fund (\$159.393 - \$40.864 = \$118.529).

resume deliberations with a complete record, in satisfaction of the requirements of the Board Regulations. As explained in the Public Advocate's Motion for Enlargement of Time, such an extension is perfectly lawful. See Attachment A. This course of action is prudent and likely avoids the necessity of multiple parties basing appeals on the inadequacy of the Hearing Officer's Report.

In the sections that follow, the Public Advocate addresses the material issues concerning PWD's rate request, incorporating the Advocate's position on issues left unaddressed in the Report, and responding, where appropriate, to the Hearing Officer's recommendations. Due to the Report's "draft" status, it is simply impossible for the Public Advocate to address every potential issue touched on by the Report relevant to the small users. The incomplete status of the Report is in and of itself cause for concern given the extent to which the Board is required to give weight to the Report in making a final determination. Accordingly, the Public Advocate hereby excepts to the failure of the Report to satisfy the prerequisites of the Board Regulations and submits that the Board should not approve any increase in PWD rates and charges on the basis of an inadequate Report. As set forth above and in the Motion for Enlargement of Time for Hearing Officer Report, unless the Board denies PWD's rate increase request, the most prudent course for the Board is to determine it is unable to fully consider the issues raised in this case at this time and provide the Hearing Officer additional time to complete her review, with a modified procedural schedule to follow after the submission of a full Report.

## **II. PWD HAS NOT MET ITS BURDEN TO SHOW THE NECESSITY OF A RATE INCREASE**

As set forth in the Public Advocate's Main Brief, after review of PWD's rate model projections, PWD's consistent "out-performance" (read: overcharging), and PWD's continued pattern of accumulating (and not spending) excess reserves from customer rates, the Public

Advocate submitted that *no rate increase whatsoever* should be approved for FY 2019 and FY 2020. See PA M.B. at 3-6. The question of whether a PWD rate increase is necessary is fundamental to this proceeding, and has been entirely omitted from the Report.<sup>4</sup> As the Public Advocate explained, PWD has the burden of proving the necessity of the relief it seeks, and must do so on the basis of substantial evidence.<sup>5</sup> PA M.B. at 18-19. The Public Advocate submits that PWD has not carried its burden. PWD’s projection methodology has consistently resulted in customers paying more than is necessary under the financial standards PWD presents when requesting increased rates. Rather than recognizing that this “out-performance” should inure directly to the benefit of current customers, who pay PWD rates and charges now, PWD posits new, higher financial standards to attempt to justify increased rates and charges. With veritable certainty, if any rate increase is approved, PWD will yet again “out-perform” – and customers will overpay.

Rather than address this reality, PWD argues that the Public Advocate’s recommendations (which would actually assist PWD in achieving the financial performance objectives its rates were approved to meet in 2016) assume facts not in evidence, place PWD at risk for a credit rating downgrade, and are otherwise reckless and/or lacking in evidentiary support. PWD M.B. at 1. Poppycock. PWD’s historical financial outperformance, the result of

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<sup>4</sup> Although the Report is silent on this issue, it is conceivable that the Hearing Officer may view this as an issue which can be revisited after the Board’s inputs are factored into PWD’s proprietary rate model. See, e.g., Report at 31-32 (submitting that PWD coverage depiction can be revisited by the Board after PWD’s rate consultants factor the Board’s adjustments into the model). Such an indirect approach to a threshold issue in this proceeding is totally inappropriate. Furthermore, even if it were appropriate to consider this issue after factoring in the Board’s specific adjustments, the Report fails to even “tee-up” this issue for an ultimate determination.

<sup>5</sup> The Report appears to contend that the “substantial evidence” standard is the incorrect standard for this proceeding, and merely a recommendation of the Public Advocate. Report at 47-48. This is clear error. The Report correctly cites provisions of the Administrative Agency Law as applicable to this proceeding. See Report at 12 (citing 2 Pa. C.S. §554, “Evidence and cross-examination”). Under the Administrative Agency Law, the evidentiary standard for this rate proceeding is the substantial evidence standard. See 2 Pa. C.S. §754; PA M.B. at 18-19.

overcharging its customers, is clear on the record of this proceeding. Moreover, that this “outperformance” results from continuing the overly conservative methodology employed by PWD’s excessively-complex, proprietary and enigmatic rate forecast methodology has been conclusively demonstrated. PWD’s response to these facts is likewise categorically unsatisfactory. Indeed, PWD simply avers that under its new financial performance objectives, it must raise rates yet again to meet higher standards, with the goal of benefiting future customers, sometime down the line.<sup>6</sup> This purely speculative benefit is just a thinly disguised and specious justification for PWD’s actual goal of improving its already high credit rating and placating what the PWD financial advisors (who serve pursuant to contracts with the City Treasurer)<sup>7</sup> claim to be the desires of the credit rating agencies. PWD M.B. at 1, 14, 17-25. As the Public Advocate has explained, “credit rating agencies do not set ratemaking standards” and there is no justification for projections of future revenue requirements that are certain to be wrong.<sup>8</sup> PA M.B. at 40.

The Public Advocate submits that PWD’s request for increased rates and charges is inadequately supported. As shown in PWD’s Main Brief, PWD’s FY 2019 increase now seeks \$7.884 million in additional service revenues. At the same time, PWD anticipates starting FY 2019 with nearly \$190 million in reserves. On its face, PWD has no need for a rate increase at

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<sup>6</sup> See, e.g., PWD M.B. at 17 (“Consistent reasonable rate increases will allow PWD to address capital needs without over-burdening *future ratepayers*.”); PWD M.B. at 20 (“Similarly situated utility systems, which have been able to fund significant portions of their capital programs with annual revenues, are able to manage their debt without significantly burdening *future ratepayers*.”) (emphasis added).

<sup>7</sup> See, e.g., PA M.B. at 20, n. 14, 91; See also Recusal Motion, Motion for Appeal.

<sup>8</sup> PWD’s Main Brief conclusively establishes the need for Ms. Rasheia Johnson to be recused from this proceeding. PWD’s entire rate case is built on the foundation of new financial standards which have as their express intent to improve PWD’s credit rating. Ms. Johnson’s role as City Treasurer renders her participation on the Board an absolute conflict of interest.



this time. Furthermore, the Hearing Officer has made sound recommendations, which the Board should not disturb, regarding the following underpinnings of PWD’s proposed rate increase:

- PWD’s goals for debt service coverage are not persuasive and the Board need not predetermine a desired coverage ratio. Report at 31.<sup>9</sup>
- PWD’s goals for paygo capital funding are not persuasive and should not be adopted for ratemaking purposes. Report at 34.<sup>10</sup>
- PWD cannot legally charge customers an additional \$8 million per year for public fire protection service. Even if it were legal, doing so would be unfair and lead to inequities shown by the Public Advocate. Report at 107.<sup>11</sup>
- Non-recurring expenses for TAP Implementation Costs and Rate Case Expense should be normalized. This adjustment would reduce PWD’s revenue requirements by \$1,963,000 per year over a two year rate period or \$2,617,440 per year over a three year rate period. Supplemental Report at 7.<sup>12</sup>

These further proposed reductions to PWD’s financial goals and associated revenue requirements add support to the clear conclusion that PWD does not require a rate increase at this time.

Ultimately, PWD’s Main Brief makes clear that its request for an increase at this time is motivated less by necessity than by a desire to demonstrate to credit rating agencies that the

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<sup>9</sup> This recommendation is consistent with the Public Advocate’s position. As set forth in the Public Advocate’s Main Brief, PWD’s coverage depiction is a reflection of a calculation that takes into account PWD voluntary spending decisions. The coverage depiction is a number which PWD’s rate consultants “solve for” in part by shifting discretionary dollars to or from anticipated reserves. The Public Advocate submits that the Board is obligated to ensure that legally-mandated coverage is satisfied, and can enable PWD to depict higher coverage, but has no authority to mandate higher coverage and lacks operational oversight of PWD to ensure higher coverage is achieved. See PA M.B. at 62-63.

<sup>10</sup> As set forth below, the Public Advocate submits that the Board should nonetheless specify a reasonable minimum level of paygo funding, as required by the Philadelphia Code. For this purpose, the Public Advocate recommends that \$45 million is a reasonable minimum to utilize for ratemaking purposes.

<sup>11</sup> This recommendation is consistent with the Public Advocate’s position. See PA M.B. at 63-70.

<sup>12</sup> This recommendation is consistent with the Public Advocate’s position. See PA M.B. at 83-89.

Board will provide annual rate increases, regardless of whether PWD actually needs them. In other words, PWD asks the Board to “send a signal to the rating agencies and potential lenders that the Rate Board is supportive of PWD’s efforts to maintain and improve its financial ratios as compared to its peers.”<sup>13</sup> PWD M.B. at 25. This is, simply put, not an appropriate justification for a rate increase and the Board should reject PWD’s proposed increase for all of the reasons set forth in the Public Advocate’s Main Brief, the Report and Supplemental Report, and these Exceptions.

### **III. DUE PROCESS PRINCIPLES APPLICABLE TO BOARD RATE PROCESS**

The Public Advocate previously submitted its April 6, 2018 Motion for Recusal of Ms. Rasheia Johnson and accompanying Memorandum of Law (together, hereinafter, “Recusal Motion”) and April 25, 2018 Motion for Entry of Order and Certification of Issues for Appeal (hereinafter, “Motion for Appeal”). As set forth in those documents, and the Public Advocate’s Main Brief, there is no question that this rate proceeding constitutes an appealable adjudication, to which principles of due process apply by virtue of the Pennsylvania Constitution and the Pennsylvania Administrative Agency Law. See PA M.B. at 19-26. The Report provides no summary, proposed findings of fact or conclusions of law directly addressing this vital issue, an omission which if left uncorrected would invalidate this entire proceeding. Accordingly, the Public Advocate expressly incorporates into these Exceptions the discussion, found in the Recusal Motion, Motion for Appeal, and the Public Advocate’s Main Brief, of the sound legal bases for the unavoidable conclusion that the Rate Board’s determination constitutes an appealable adjudication. And, as a consequence of this legal conclusion, the Board must avoid

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<sup>13</sup> To the Public Advocate’s knowledge, there has been no call for such a signal from the credit rating agencies. Certainly PWD points to no indication on the record that such a signal has been requested.

even the appearance of potential bias or lack of impartiality. This legal requirement dictates that the City Treasurer must not participate in rendering a decision on PWD's requested rate increase.

PWD dedicates a single paragraph of its Main Brief to the consideration of due process principles in this proceeding. As expected, PWD contends that this proceeding does not affect the rights of the parties, because its actions are not "particular to the parties," and is "legislative (regulatory) in nature." PWD M.B. at 9. Of course, this contention entirely disregards PWD's status as a party to this proceeding, seeking from the Board the right to increase customer rates and charges (which it has no right whatsoever to accomplish without Board approval), as well as the clear language of the ordinance establishing the Rate Board. See PA M.B. at 22-24.

Ultimately, while this issue is not squarely addressed in the Report, the Hearing Officer presents at least one finding that indicates agreement with the Public Advocate's position. In correctly disposing of PWD's Motion in Limine,<sup>14</sup> the Hearing Officer states:

I recommend that the Motion *in Limine* be denied. According to Pennsylvania statute law, Proceedings before the Board need not follow the strict rules of evidence applied in civil courts. As set out in Article II of the Pennsylvania Consolidated Statutes:

**§ 554. Evidence and cross-examination.**

Local agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received.

Report at 12.

The Hearing Officer's citation to this section of the Pennsylvania Administrative Agency Law indicates her concurrence with the Public Advocate's sound contention that the rate

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<sup>14</sup> PWD may assert that the Board should overrule the Hearing Officer's determination on PWD's Motion in Limine. The Board should not do so, as the Hearing Officer's ruling correctly concludes that the motion serves no legitimate purpose, submits unpersuasive arguments, and, if granted, would restrict the Public Advocate from responding to PWD's own evidence. Report at 13. The Hearing Officer's conclusion was correctly reached, pursuant to her express authority under the Board Regulations to "make all procedural rulings necessary to conduct a fair, impartial and expeditious hearing process, including the exclusion of irrelevant or redundant testimony or evidence." Board Regulation II.3(b)(4).

determination constitutes an adjudication. Indeed, local agencies like the Board are, by virtue of the Administrative Agency Law, not required to observe technical rules of evidence. At the same time, local agencies cannot rely solely on hearsay, unsworn and uncorroborated accusations by witnesses not subject to cross-examination, or other unreliable evidence. See, e.g., Wilson v. Warminster Twp., 74 Pa. D&C 2d. 407 (Bucks CCP, 1976). This language of the Administrative Agency Law applies specifically to the conduct of adjudicatory hearings, and not to quasi-legislative or regulatory processes. See, e.g., Kazmarek v. New Bethlehem Borough Council, 478 A.2d 514 (Pa. Commw. 1984); Wilson v. City of Philadelphia, 329 A.2d 908 (Pa. Commw. 1974). The Public Advocate agrees with the Hearing Officer's disposition regarding PWD's Motion in Limine. Furthermore, the Advocate submits that the Administrative Agency Law is applicable to rate proceedings before the Board which appears to be consistent with the Hearing Officer's view.

As set forth at length in the Public Advocate's Main Brief, Recusal Motion and Motion for Appeal, participation by the City Treasurer in PWD's rate determination is a clear violation of the due process protections guaranteed in local agency adjudications. The City Treasurer's participation creates an appearance or impression of bias, and potential actual bias, which must not be permitted. The City Treasurer should be recused from participation in this rate proceeding. See PA M.B. at 19-26.

#### **IV. USE OF FULLY PROJECTED TEST YEARS**

The Public Advocate concurs with the Hearing Officer's recommendation that the Board limit its consideration in this proceeding to a potential rate increase for FY 2019 and FY 2020. See Report at 25-26; PA M.B. at 39-45. Notwithstanding the Public Advocate's support for the Hearing Officer's recommendation, the Public Advocate excepts to the Hearing Officer's

conclusion that the “known and measurable” concept does not apply to PWD ratemaking. Report at 25. The Hearing Officer cites no authority for this conclusion, which is at odds with Pennsylvania law and Pennsylvania ratemaking. See PA M.B. at 27-28.<sup>15</sup> Ultimately, the Hearing Officer’s recommendation does not rest on her belief that the “known and measurable” concept is inapplicable. The Hearing Officer’s erroneous conclusions concerning the application of the “known and measurable” ratemaking principle should be considered dicta.

## **V. PWD FINANCIAL STABILITY PLAN**

The Public Advocate generally concurs with the Hearing Officer’s conclusions regarding PWD’s Financial Stability Plan. Specifically, the Public Advocate wholeheartedly agrees with the Hearing Officer’s conclusion that “[t]he Board need not pre-determine the desired coverage ratio” but can determine whether legally required and adequate coverage can be maintained after determining the effect of other revenue requirement adjustments. Report at 31. The Public Advocate also agrees with the Hearing Officer’s criticism of PWD’s paygo proposal and determination that PWD’s proposed use of an increased Capital Account Deposit is “theoretical.”<sup>16</sup> Report at 34. However, because of the requirements of the Philadelphia Code, the Public Advocate respectfully submits that the Report failed to adequately address the positions of the parties regarding the extent to which current revenues should fund capital expenditures. This determination is a required component of the Board’s Rate Report for which proposed resolution by the Hearing Officer is essential. See Phila. Code §13-101(4)(b)(i); PA

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<sup>15</sup> Section 315 of the Pennsylvania Public Utility Code and portions of an associated proposed rulemaking regarding use of a Fully Projected Future Test Year for ratemaking were included in the Public Advocate’s Hearing Exhibit 7 at pages 1-21. These authorities provide no support for the Hearing Officer’s conclusion.

<sup>16</sup> As described more fully below, the Public Advocate agrees with this premise due to the arguments advanced in its Main Brief, including that the Board cannot increase the mandatory Capital Account Deposit set forth in the General Bond Ordinance. However, to the extent the Hearing Officer’s position is predicated on an assumption that the source of paygo funding (e.g., the Capital Account Deposit versus the Residual Fund) does not matter, the Public Advocate strongly disagrees and directs the Board to the discussion in its Main Brief on pages 53-61.

M.B. at 45. Accordingly, the Public Advocate excepts to the portion of the Report addressing paygo.

The apportionment of paygo funds between the various “funds” derived from current customer revenues is a significant issue in this case. The Hearing Officer’s summary of the Public Advocate’s position regarding paygo erroneously contends that the Public Advocate supports \$45 million as a minimum “Capital Account Deposit.” Report at 32. To the contrary, the Public Advocate supports \$45 million as an aggregate minimum of paygo funding, to be sourced through an annual Capital Account Deposit of approximately \$24 million per year in FY 2019 and FY 2020, and the balance contributed via the Residual Fund. See PA M.B. at 54-62; PA M.B. at Appendix A. For the reasons set forth at length in the Public Advocate’s Main Brief, the Board cannot and should not approve PWD’s request to increase the Capital Account Deposit. PA M.B. at 54-56. Aside from being completely outside of the Board’s authority, approving an increase to the required Capital Account Deposit negatively impacts upon total debt service, modifies PWD’s financial presentation, and impermissibly alters the flow of funds through the revenue “waterfall” established by the General Bond Ordinance by at least \$12 million per year. PA M.B. at 54-57.

In the Board’s determination of paygo, the Board must only direct that PWD utilize the existing Capital Account Deposit (set by ordinance at 1% of depreciated plant, property and equipment). The Board must then determine whether an additional amount of paygo should be transferred from the Residual Fund to the Construction Fund. For this purpose, an appropriate minimum amount of *total* paygo funding is \$45 million per year, as explained in the Public Advocate’s Main Brief and summarized in the Report. PA M.B. at 56-61; Report at 32-33. Accordingly, for ratemaking purposes the Board should target an annual minimum paygo

amount of approximately \$24 million funding from the Capital Account Deposit and approximately \$21 million from the Residual Fund. See PA M.B. at Appendix A. PWD's ability to out-perform provides it an opportunity to contribute more funds to paygo from the Residual Fund. PA M.B. at 60-61.

## **VI. CAPITAL PROGRAM SPEND RATE**

The Public Advocate excepts to the Hearing Officer's recommendation that the Board utilize an assumed 82.12% "spend rate" (the amount of PWD's capital budget which it is reasonable to expect PWD would actually spend) for PWD's Capital Improvement Program. Report at 39. While the Hearing Officer correctly concludes that PWD's proposed 90% spending rate is speculative, the recommendation to utilize an 82.12% spend rate is contrary to the weight of evidence. As shown on page 38 of the Report, over the past five fiscal years, PWD's capital spending rate has ranged from 60.82% of budget to 82.12% of budget. Importantly, however, 82.12% is a clear outlier, representing a spend rate almost 15% higher than any other year in the five year history. Selecting this single year's spending experience is clearly unreasonable. Indeed, the same logic (using a single year's spending rate) would support utilizing a rate of 65.90%, the rate experienced in 2015, which is more representative of PWD's actual experience for the four years 2013-2016. A single year's data is insufficient and unreliable. The Board should reject this proposed "judgment call" as it is contrary to the evidence and deviates from any reasonably scientific method to establish rates and charges. See PA M.B. at 19. Rather, the Board should utilize the Public Advocate's proposed 76% rate of spending, which continues to be a conservative and favorable rate, considering that in four of the past five years, PWD's spending rate did not exceed 67.45%.

The Hearing Officer appears to rely upon PWD's projected capital cost increases for the proposition that the spend rate should increase. Report at 38. This is simply an incorrect view of the issue. PWD's spend rate is based on actual capital expenditures compared to budgeted capital expenditures. As PWD's capital budget increased steadily from 2013 through 2016, its spend rate has hovered in the low to mid-60% range. See Report at 38. In other words, as PWD's capital costs rose over that four year period, *PWD's spend rate did not increase*. In 2017, for the first time, PWD's spend rate increased to 82.12%. This single year experience is not demonstrative of a trend, nor does it support a conclusion that PWD will achieve that level of actual spending in future years. Indeed, it is more likely that PWD's spend rate will decline in future years, as shown by the up and down percentage rate of expenditure between 2013 and 2016. The Hearing Officer correctly observes that "a longer view of actual experience supports the Advocate's 3-year average figure of 76%." Report at 39. The Board should be guided by this longer view of experience, and reject the Hearing Officer's recommendation to rely upon 2017's spending rate, which is a clear outlier not likely to be repeated.

## **VII. MINIMUM LEVEL OF RESERVES**

The Public Advocate submitted that the Board should "take note of the sufficiency of PWD reserves at the current time, and determine for ratemaking purposes that PWD should aim to maintain at least \$100 million in combined Rate Stabilization Fund and Residual Fund reserves." PA M.B. at 53. This is to be distinguished from PWD's position that the Board should approve rates with a target anticipated balance, after three successive rate increases in FY 2019, FY 2020 and FY 2021, of \$150 million in the Rate Stabilization Fund and \$15 million in the Residual Fund. See PA M.B. at 50. As the Public Advocate explained, the issue of minimum levels of PWD reserves is legally required to be addressed in the Board's Rate Report.



See PA M.B. at 50; Phila. Code § 13-101(4)(b)(i) (requiring the Board's report to set forth the Board's determination of minimum levels of reserves to be maintained during the rate period).

In the Report, the Hearing Officer generally discusses the Rate Stabilization Fund in the context of the use of fully projected future test years, debt service coverage, paygo and revenue requirements. The Hearing Officer also sets forth PLUG's position on the Rate Stabilization Fund in a separate section. See Report at 39. However, the Report does not summarize the position of the Public Advocate or PWD on the minimum levels of reserves the Board should determine are reasonable for PWD to maintain during the rate period. As set forth in the Public Advocate's Main Brief, the Board should utilize a combined \$100 million minimum level of reserves in the Rate Stabilization Fund and Residual Fund for purposes of satisfying the requirements of the Philadelphia Code. As explained more fully in the Public Advocate's Main Brief, PWD's historical inaccuracies in forecasting reserve balances (consistently maintaining reserves in excess of projections utilized in rate cases) have been conclusively demonstrated. PA M.B. at 50-52. Moreover, additional sources of cash, such as Equity in the Treasurer's Account, are utilized for peer comparisons. These amounts, when combined with Rate Stabilization and Residual Fund reserves, demonstrate PWD has significant access to working capital beyond the designated reserves included in PWD's rate model. PA M.B. at 53-54.

PWD has no need to increase its target for Rate Stabilization and Residual Fund balances, which are more than adequate for PWD's operations and credit profile. Ultimately, the Board's obligation is to establish a *minimum level of reserves*, not to target increasingly high levels of reserve funding as PWD proposes. The Board should utilize \$100 million as a combined total of the Rate Stabilization Fund and Residual Fund as the minimum level of reserves for this purpose.

PA M.B. at 53. The Public Advocate respectfully incorporates herein the argument set forth in its Main Brief in support of this exception. See, e.g., PA M.B. at 3-8; 42; 48; 50-53.

### **VIII. AGREED UPON REVENUE REQUIREMENT ADJUSTMENTS**

Based on the lack of discussion, the Public Advocate infers that the Hearing Officer supports the expense adjustments designated as “Public Advocate adjustments acceptable to the Water Department” in Transcript Response 23A. The Public Advocate concurs that the Board should approve these concessions by PWD. However, the Public Advocate submits that the Report should, at a minimum, reach a conclusion that these adjustments should be approved by the Board.

### **IX. SMIP/GARP**

The Hearing Officer recommends that PWD’s proposed \$10 million increase in SMIP/GARP funding be included in PWD’s projected test years for ratemaking purposes. The Public Advocate excepts to this recommendation. Although the Hearing Officer’s summary includes the Public Advocate’s observations regarding PWD’s inconsistent explanations regarding the rate impact of its proposal, as well as the Public Advocate’s concerns regarding the inequities of these costs, the Hearing Officer did not make a determination regarding rate impact when making a recommendation. Indeed, the central issue regarding the funding of SMIP/GARP, as presented by the Public Advocate, is the extent to which a higher budget necessitates a rate increase.

The Hearing Officer’s recommendation gives undue credit to PWD’s claimed spending need in this one category. The establishment of rates and charges effectively functions as a “black box” for purposes of most spending decisions. The Board does not set rates and charges for SMIP/GARP, nor for a multitude of other expenses, but instead seeks to establish just and reasonable rates, overall, balancing PWD’s interests against those of its customers. In this

instance, where PWD has demonstrated not only the desire, but the capability, of directing discretionary resources to SMIP/GARP projects, that fact must be given significant weight for ratemaking purposes. Similarly, PWD's consistent outperformance and accumulation of excess reserves must be taken into consideration when PWD proposes a voluntary, single year increase of \$10 million in one category of expense that has already increased by 72.9% over the preceding two years. PA M.B. at 71; Report at 42.

As the Public Advocate explained, PWD denied any nexus between its excess SMIP/GARP spending and the present availability of reserves in its Rate Stabilization Fund. This assertion ignores the historical fact that the Rate Stabilization Fund would have been the repository for a corresponding amount of unspent revenues if PWD had not chosen to increase SMIP/GARP funding beyond what the Board included in approving PWD's last rate increase. PA M.B. at 72. In other words, PWD would now be projecting *an even higher* balance in the Rate Stabilization Fund at the end of FY 2018 if it had not directed discretionary revenues toward additional SMIP/GARP expense.

The Hearing Officer disregards the Public Advocate's criticism of PWD's statement that it intends to utilize the Rate Stabilization Fund to support SMIP/GARP expenditures going forward. PA M.B. at 72. Overlooking PWD's inconsistent claims regarding its ability to fund SMIP/GARP from reserves and the accumulation of additional reserves from customers is a significant error in the Report. PWD consistently under-utilizes its Rate Stabilization Fund reserves, projecting withdrawals that simply do not occur. PWD asserts (a) there has been no connection between SMIP/GARP expenditures and its Rate Stabilization Fund, and (b) it will utilize Rate Stabilization Funds to support SMIP/GARP. These statements are incompatible. Furthermore, PWD has identified no mechanism to track whether Rate Stabilization Fund

withdrawals are utilized for any specific category of expense, because there is none.

Accordingly, the recommendation to include \$10 million in additional O&M expenditures for SMIP/GARP ensures that PWD will not utilize its reserves to fund these programs and will instead continue to amass reserves beyond projections.

The Board should reject the Hearing Officer's recommendation, and approve the Public Advocate's proposal to omit any increase in SMIP/GARP for ratemaking purposes at this time. The Public Advocate's position reflects the reality of PWD past expenditures, and the need for the Board to take concrete steps to minimize the extent to which PWD's rate projections consistently operate to PWD's advantage, and to customers' disadvantage. If the Board instead adopts the Hearing Examiner's recommendation, at a minimum the Board should require a full *long-term* cost-benefit analysis of PWD's SMIP/GARP grants to assess the impact of those grants (as well as the projects they fund) on all customers.

## **X. ESCALATION FACTORS**

### **A. Power and Gas Costs**

The Hearing Officer errs in accepting PWD's proposed escalation factor of 3% for Power and Gas Costs for the rate period.<sup>17</sup> As set forth in the Public Advocate's Main Brief, this escalation factor of 3% was proposed solely for FY 2021. PA M.B. at 77. PWD confirms in its Main Brief that the sole issue for consideration by the Hearing Officer is the proposed 3% escalation factor for FY 2021. PWD M.B. at 39. The Hearing Officer recommends, however, that the Board confine its determination to two years, and only consider potential rate relief for FY 2019 and FY 2020. Accordingly, the Hearing Officer's apparent recommendation that the

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<sup>17</sup> The Hearing Officer addresses Power and Gas Costs in two sections of the Report. Report at 46-48; 60-62. In the first, the Hearing Officer recommends PWD's proposal be used. In the second, the Hearing Officer appears to recognize that the escalation adjustment for these costs falls outside of the recommended rate period.

Board endorse PWD's 3% escalation factor is beside the point, as this factor applies only after the conclusion of the rate period proposed.

Nevertheless, should the Board approve a three-year rate period, the Board should determine that the Hearing Officer erred in concluding that the Public Advocate has utilized a standard of proof not applicable in this case. As discussed above, it is PWD, not the Advocate, who bears the evidentiary burden. The Advocate maintains that PWD must satisfy the "substantial evidence" standard. See *supra* Section II; PA M.B. at 18-19. Even if the Board does not accept this conclusion, the Board should conclude that PWD has failed to make even a *prima facie* case that its estimate is reasonable or reliable. PWD's projected 3% escalation factor for FY 2021 is simply a contingency factor, as PWD readily acknowledges. It is based on no substantive estimation of future expenses, but solely on a memorandum from the City's Energy Office stating that the Energy Office "recommends" a standard escalation of 3%. Report at 47; PA M.B. at 77-79.

As the Public Advocate explained, PWD seeks to support its position solely by averring that it is unreasonable to assume that there will be no increase. It is inappropriate for the Hearing Officer to credit this assertion, which would in effect reverse PWD's burden. Those contesting PWD's estimated increases do not have to prove that an absence of increase is reasonable. To the contrary, PWD must satisfy the burden of proving the assumptions it seeks to utilize in this case. Indeed, with respect to power and gas costs, PWD's position fundamentally departs from its own methodology to escalate costs. PA M.B. at 78.<sup>18</sup> Furthermore, this estimate is based solely on a memorandum produced by the City's Energy Office, which has neither appeared in

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<sup>18</sup> "PWD uses fully projected test years in establishing rates that incorporate (i) *any known changes* to O&M expenditures as part of a normal budgeting best practice, and (ii) *reasonable assumptions that are based on historical actual experience*." PWD St. 1R at 7:19-22 (emphasis added).

this proceeding, nor provided any evidentiary support for this projection. There has been no explanation of the basis of the 3% escalation, how it was calculated, or even who calculated it and what information was taken into consideration in doing so. The 3% escalation factor is completely unreliable and unsupported. The Board has before it no reliable evidence upon which to approve this escalation. See *supra* at Section III (explaining that the Board cannot rely solely upon hearsay, unsworn and uncorroborated evidence).

Regardless of the evidentiary standard in this case, the Public Advocate's position must prevail. As the Public Advocate submitted: "Under any conceivable standard for the projection of future O&M expenses, PWD's 3% expense escalation falls short and is nothing more than a contingency, that lacks any reasonable basis whatsoever." PA M.B. at 78-79. The Board should only consider establishing rates and charges for a two year rate period. But if it does consider a three year rate period, the Board must reject PWD's escalation factor for power and gas costs.

#### **B. Chemical Cost Escalation**

As the Hearing Officer summarized, the Public Advocate submitted that PWD accepted the Public Advocate's witness' adjustment for FY 2019 and FY 2020, eliminating the chemical cost escalation for those two fiscal years. The Hearing Officer addresses chemical costs in two different sections of the Report. Report at 48-50; 62-64.

In the first instance, the Hearing Officer, recommending only a two year rate period, concluded that PWD's chemical cost escalation for FY 2021 was beyond the recommended rate period, and did not evaluate PWD's proposed escalation factors on their merits. Regrettably, the Public Advocate's Main Brief unintentionally misstated PWD's position. As set forth in Transcript Response 23A and explained in PWD's Main Brief, PWD accepted the Public Advocate's adjustment for FY 2019, eliminating the 6.7% escalation factor for chemical costs

for that year. PWD maintained that an escalation factor of 3.8% should apply in FY 2020 and a 1% escalation factor should apply in FY 2021. The Public Advocate apologizes for the confusion it created.

In the second instance, the Hearing Officer appears to recommend approval of PWD's proposed chemical cost escalation. The Hearing Officer provides no proposed findings or conclusions. Instead, in a single sentence, without explanation, the Hearing Officer contends that "the Department's approach appears better reasoned." Report at 64. The Public Advocate excepts to this recommendation.

The Board should approve no escalation factor for chemical costs. As set forth in the Public Advocate's Main Brief, PWD actually experienced yearly *decreased costs* for chemicals in FY 2015 and FY 2016. PA M.B. at 79-80. PWD provided no support for increased chemical costs in FY 2020 or FY 2021, simply averring that the expertise of its staff in procuring chemicals should be recognized and, presumably, afforded deference in this proceeding. The Board must recognize that PWD originally submitted in this case that chemical costs would increase by 6.7% in FY 2019, but subsequently acknowledged that no increase in such costs should be projected for FY 2019. There is simply no basis upon which the Board could conclude that PWD's chemical cost escalation factors for FY 2020 and FY 2021 are appropriate for purposes of setting rates and charges. Indeed, PWD points to no ratemaking standard or principle that could even arguably support these escalation factors.

As with power and gas costs, there has been no explanation of the basis of PWD's 3.8% and 1% escalation factors for chemicals, how they were calculated, who calculated them, and what information was taken into consideration in deriving these figures. PWD's chemical cost escalation factors are completely unreliable and lacking in evidentiary support on the record of

this proceeding. The Board should reject PWD's proposed 3.8% escalation factor for chemical costs in FY 2020. The Board should not reach PWD's 1% escalation factor for FY 2021, since it is beyond the Hearing Officer's recommended two year rate period. But, if the Board does consider a three-year rate period, the Board should likewise reject PWD's 1% escalation factor for chemical costs in FY 2021.

### **C. Class 200 Service Expenses and Class 800 Transfers**

The Hearing Officer Report includes discussion of PWD's proposed escalation factor adjustments for Class 200 Services and Class 800 Transfers in two sections. In the first section, beginning on page 50, the Hearing Officer sets forth the arguments of the Public Advocate and PWD regarding these factors. The Hearing Officer concludes: "Having not gone to all the source material to determine which description of the factor determinations is correct, I have no recommendation at this time." In the second section, beginning on page 64, the Hearing Officer again sets forth the arguments of the Public Advocate and PWD regarding these factors, but concludes: "On this one, however, the balance favors the view of the Public Advocate and the concept that 2021 is too remote to be a sure enough estimate." This recommendation does not appear to be related to the discussion of Class 200 Services and Class 800 Transfers.

This appears to be another instance of the Hearing Officer simply running out of time to complete an aspect of the Report. The Public Advocate relies upon the position set forth in its Main Brief and submits that, for the reasons set forth therein, the Board should approve a 1.98% escalation factor for Class 200 Services and Class 800 Transfers, using the methodology advanced by the Public Advocate's witness. PA M.B. at 81-83. If the Board does not agree with this position, at a minimum, the Board must adjust PWD's proposed 3.4% escalation factor for Class 200 Services to 3.3%, to be consistent with PWD's own data. See PA M.B. at 81.



## **XI. DEBT INTEREST RATE**

The Report includes no discussion or proposed findings of fact or conclusions of law concerning the Public Advocate's adjustment to PWD's debt interest rate *for FY 2017 and FY 2018 bond issues*. Interest payments on these bond issues are included in the revenue requirements for the rate period. As set forth in its Main Brief, the Public Advocate recommended that PWD's debt interest rate for FY 2017 and FY 2018 bond issues be reduced from 5.25% to 5.00% to reflect the actual stated interest rate set forth in PWD's Official Statements. PA M.B. at 89-91.<sup>19</sup> The Public Advocate's adjustment should be approved as set forth in its Main Brief, which is incorporated herein by reference.

## **XII. COLLECTION FACTORS**

The Public Advocate excepts to the Hearing Officer's recommendation that the Board approve the use of PWD's calculation of collection factors for the vast majority of PWD customers (designated here as "non-stormwater only" customers). The Hearing Officer provides no clear explanation or basis for this recommendation, merely suggesting that: "the Department's analysis appears to model actual experience more closely than that of the Advocate." Report at 59. This statement is illogical, given that the Public Advocate's adjustment is based on *precisely the same* actual collection factors utilized by PWD.

The Report incorporates the Public Advocate's and PWD's arguments, verbatim, and, with a single sentence, suggests that actual experience, upon which both parties rely, somehow favors PWD more than the Public Advocate. The Hearing Officer articulates no basis for this recommendation, makes no findings of fact or conclusions of law, and provides no explanation upon which to evaluate this recommendation. The Report fails to evaluate or even consider that

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<sup>19</sup> It appears this adjustment was inadvertently omitted from Transcript Request 23A, but it is described in the Public Advocate's Main Brief and included in the Public Advocate's response to Transcript Request 17.

PWD's proposal is a significant modification to the methodology of calculating the collection factor approved by the Board in the last rate proceeding, and upon which the Public Advocate's adjustment is based. The lack of thorough consideration of the Public Advocate's proposal is inappropriate. The Public Advocate's proposed adjustment has an approximately \$4 million annual impact on customer rates and charges, and requires a thorough evaluation.

Whatever the reason for the Hearing Officer's cursory recommendation, it is simply incorrect to conclude that PWD's analysis models actual experience more closely than the Advocate's calculation. As set forth in the Public Advocate's Main Brief, PWD's methodology provides equal weight to the current year collection rate for FY 2012 as it does FY 2016. Actual experience shows that *PWD's FY 2016 current year collection rate was 2.17% higher than FY 2012's current year collection rate.* Report at 54; 56-57; PA M.B. at 75. As shown in the Public Advocate's response to Transcript Request 17, the impact of even a small percentage increase in the projected collection factor is significant. Indeed, a 0.58% upward adjustment to the collection factor, as proposed by the Public Advocate, results in an approximate \$4 million increase in anticipated revenues in FY 2019 and FY 2020. PA M.B. at 75. Similarly, as the Public Advocate explained, PWD actually out-performed its projections of service revenues by almost \$20 million in FY 2016 and FY 2017 combined! PA M.B. at 75.

Given the lack of explanation, the Public Advocate must guess as to why the Hearing Officer made this recommendation. It is possible that the Hearing Officer was persuaded by PWD's discussion of the collection factor for "stormwater only" customers, and the fact that the Public Advocate did not propose an adjustment to PWD's collection factors for those customers. Report at 57-58. As a preliminary matter, the fact that the Public Advocate did not propose an adjustment to the "stormwater only" collection factor is completely irrelevant to assessing the

merits of the Public Advocate’s proposed adjustment for the “non-stormwater only” customers. The Board is no doubt aware that the “non-stormwater only” customers include the overwhelming majority of PWD customers – the hundreds of thousands of residential, commercial, and industrial users of PWD’s services. “Stormwater only” customers are an exceedingly small group, with correspondingly minor contributions to overall revenue requirements. Furthermore, the Board is no doubt aware that the Public Advocate represents the interests of a large subset of “non-stormwater only” customers, designated as “small users.” As defined by the Board, “small user” means the class of water, sewer and storm water customers consisting of residential customers and small businesses, but not including large apartment buildings.<sup>20</sup> The Public Advocate simply does not represent the interests of “stormwater only” customers in this proceeding; those customers are not small users.

If the Hearing Officer’s recommendation relies upon the absence of a recommendation by the Public Advocate to modify the “stormwater only” collection factor, such reliance is misplaced. For that to be a reasonable basis for recommending against the Public Advocate’s proposal, the Hearing Officer would at a minimum have to evaluate the significance of a corresponding adjustment to the “stormwater only” collection factor. The Report makes no effort to consider whether an adjustment to the “stormwater only” collection factor has any bearing on this rate proceeding. Indeed, an adjustment to the collection factor for “stormwater only” customers, to be consistent with the Public Advocate’s adjustment to the collection factor for “non-stormwater only” customers would result in an adjustment of approximately fifty thousand dollars to PWD’s annual revenue requirements. That the Public Advocate chose to

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<sup>20</sup> See August 18, 2017 RFP for Public Advocate Services, Contract Opportunity No. 21170727103903 (further clarifying that, for this definition, small businesses generally are those whose storm water charge is not individually assessed.)

focus on the significant collection factors, those applicable to small user customers whose interests it represents, is clearly justified and appropriate.

The Public Advocate's proposed adjustment to PWD's collection factor is reasonable and appropriate, as shown by the Board's previous reliance upon the *exact same methodology* in the 2016 rate proceeding. If anything, PWD has failed to justify a departure from the methodology the Board previously approved. The Hearing Officer's recommendation is contrary to the evidence, and the Board should approve the use of the 97.12% collection factor for non-stormwater only customers proposed by the Public Advocate. If in the interests of consistency the Board desires to utilize the same methodology for calculating the collection factor for stormwater only customers, the Public Advocate certainly voices no objection, given the de minimis impact of that potential adjustment.

### **XIII. NORMALIZATION OF EXPENSES**

The Public Advocate concurs in the Hearing Officer's recommendation that PWD normalize (or amortize) rate case expense and TAP implementation costs. The Public Advocate submits that the Hearing Officer has clearly made a typographical error, in the following passage, referring to the Public Advocate's proposed normalization of rate case expense:

The balance, \$2,826,160, should be normalized over two years. This results in a downward expense adjustment of \$1,413,080 for FY 2019 and FY 2020. This amount, \$1,413,080, should be dropped from the revenue requirement if the Board authorizes rate for FY 2021. If the Department prefers, the \$2,826,160 could be normalized over three years, resulting in a downward expense adjustment of \$1,884,107 for FY 2019, FY 2020 and FY 2021.

Supplemental Report at 7 (emphasis added).

The Public Advocate submits that the word "Board" should be substituted for the underlined word "Department" in the above passage.

#### **XIV. TAP ADMINISTRATION IMPROVEMENTS**

The Hearing Officer includes in the Report the Public Advocate's proposed improvements to the administration of the Tiered Assistance Program (TAP). Report at 68-74. The Hearing Officer also includes PWD's opposition to these improvements, which is largely predicated on PWD's belief that the Board has no power to direct PWD to undertake them and no power to require PWD to report on the issues raised by the Public Advocate. Report at 74. Although the Hearing Officer recognizes that the newness of TAP has contributed to some of the problems with TAP administration identified by the Advocate (Report at 75), the Hearing Officer correctly rejects PWD's argument regarding the scope of the Board's authority as follows:

The evidence presented by Mr. Colton, a nationally recognized expert in the field of affordability rates, makes it clear that many customers who could be taking service under the TAP rate are not doing so, because of the impediments to signing up. To use a term from utility rate design, the TAP rate is not in fact "available" to the customers who are defined in the rate as those to whom the rate is available (and who could be benefiting from the rate nominally available to them). The Board cannot be powerless to direct the administration of a rate that is failing of its purpose. To deny this authority would be to render the Board impotent to see that its rate decisions are implemented as intended. The success of the Department's offer of the TAP rate also has direct effect on the revenue requirements that must be met depending on the numbers of customers taking the rate.

Report at 75.

The Public Advocate concurs in this clear articulation of the Board's authority over the availability of its approved rates. In anticipation of PWD's argument to the contrary, the Public Advocate incorporates by reference herein its legal analysis of the scope of the Board's authority, set forth at length in its Main Brief. See PA M.B. at 29-33; 100-101.

Notwithstanding the recognition that the Board has the authority to take actions to address the issues in TAP administration identified by the Public Advocate, the Hearing Officer does not provide a clear recommendation to the Board. The Hearing Officer concludes:

Mr. Colton has suggested a number of steps that would drastically reduce the barriers that have kept many eligible households from obtaining TAP service. At the very least, the Board should require the Department to report on the extent to which it has adopted these suggestions, rejected them, or chosen other means to achieve the same improvement in participation.

Report at 75.

While the Advocate appreciates the Hearing Officer's recognition that, at a minimum, the Board should impose an informational reporting obligation, the Advocate nonetheless stands by its expert's recommendations and so excepts to the Hearing Officer's recommendation. The Advocate submits that the Board should explicitly adopt Mr. Colton's recommendations to improve TAP administration in its final Rate Report. The Public Advocate acknowledges that, having done so, the enforcement of such determinations may be the subject of consideration in another forum or a future proceeding. See PA M.B. at 115. As the Public Advocate and Hearing Officer both recognize, the Board has the clear and necessary power to ensure that its approved rates are available, and to make determinations regarding the changes necessary to effectuate that outcome. This is part and parcel of the Board's authority to fix and regulate rates, as set forth in the Philadelphia Code. Phila. Code §13-101(3). See PA M.B. at 30-33.

Accordingly, the Public Advocate submits that the Board should make clear findings that PWD's TAP processes require improvement to ensure customer access to the TAP rate. Furthermore, the Board should approve the Public Advocate's recommendations for proposed improvements to be undertaken by PWD, for the reasons explained in the Public Advocate's Main Brief and the testimony of Mr. Colton. These recommendations include:

- Addressing the delay in enrollment through retroactive billing adjustments. PA M.B. at 101-105.
- Eliminating TAP application requirements for Social Security Numbers. PA M.B. at 105.

- Eliminating statements of unreasonable and unenforceable time limits for returning TAP applications. PA M.B. at 106.
- Include in TAP enrollment materials the ability of a customer to direct PWD to determinations of income and/or residency made pursuant to Philadelphia's Owner Occupied Payment Agreement program (OOPA). PA M.B. at 106-107.
- Eliminating unnecessary acknowledgements and requirements from TAP applications. PA M.B. at 107-108.
- Complying with the clear language of the Philadelphia Code regarding coordination of TAP enrollment with OOPA agreements through an information sharing agreement, to the extent necessary. PA M.B. at 112.
- Utilizing information from PGW to identify eligible customers for TAP. PA M.B. at 112.
- Engage community based organizations (CBOs) to conduct TAP outreach and intake, making resources available, including blank applications in non-English languages as identified by the CBOs. PA M.B. at 112-113.

## **XV. TAP ADMINISTRATIVE COSTS**

The Report incorporates the Public Advocate's position regarding a necessary limitation on PWD's recovery of TAP administrative costs. PWD does not squarely address the Public Advocate's proposal in its Main Brief. The Hearing Officer proposes no findings of fact or conclusions of law regarding the Public Advocate's proposal, and makes no recommendation to the Board. Report at 81-82. The Public Advocate maintains that the Board should establish a limitation on PWD's rate recovery of TAP administrative expenses, not to exceed 10% of the aggregate program benefits provided. PA M.B. at 127. The Public Advocate incorporates by

reference the section of its Main Brief describing this proposal, and submits that the Board should approve it. PA M.B. at 125-127.

The Public Advocate notes that the Report appears to present the issue of TAP administrative cost as an issue for the TAP rider. This is incorrect. No TAP administrative expense is proposed for recovery through the TAP rider. See, e.g., PWD M.B. at 54. The Public Advocate's limitation on TAP administrative cost is a base rate issue, not a TAP rider issue. The Board should approve the Public Advocate's limitation on recovery of TAP administrative cost, as PWD must be required to avoid excessive administrative expenses currently associated with its unprecedented, unsupportable, duplicative and unnecessary "two-tier" system of TAP application review. PA M.B. at 127.

#### **XVI. IMPLEMENTATION OF TAP ARREARAGE FORGIVENESS**

The Report appears to include the Public Advocate's position on implementation of TAP arrearage forgiveness verbatim from the Advocate's Main Brief. Report at 87-89. The Report makes no recommendation to the Board on this issue. The Public Advocate incorporates by reference the position set forth in Main Brief. As discussed therein and below, the issue presented to the Board is the approval of a TAP rate rider that includes cost recovery of non-pretextual arrearage forgiveness, as required by the Philadelphia Code. PA M.B. at 115. In approving a rate mechanism to recover arrearage forgiveness, the Board would be acting within the clear bounds of its jurisdiction over rates and charges.<sup>21</sup>

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<sup>21</sup> The Advocate recognizes that the Board may lack direct enforcement authority (enforcement may be available in another forum), but would maintain the ability to determine and consider noncompliance with its rate order in reviewing future rate proposals. See PA M.B. at 115.



## **XVII. TAP RIDER DESIGN**

The Report's discussion of the positions of PWD and the Public Advocate concerning the appropriate design of the TAP rider is confusing. The Report duplicates language from the briefs of the parties, virtually verbatim, and does not reflect the "voice" of the Hearing Officer. In at least one instance (discussed below), language from one party's brief is not attributed, but appears to represent a summary of basic TAP rider design. Additionally, portions of the discussion are not organized by issue, instead setting forth the Public Advocate's position on multiple issues, followed several pages later by PWD's position on the same issues. The Report correctly indicates that the Public Advocate and PWD have found common ground on multiple TAP rider design elements. These areas of agreement are set forth in a bullet-point list on pages 75-76 of the Report, and the Advocate submits that the Hearing Officer should recommend that these agreed-upon modifications be approved by the Board.

### **A. Erroneous Depiction of TAP Rider "Basic Formula"**

The Report appears to adopt PWD's "basic formula" for TAP rider design, to which the Public Advocate excepts. Report at 76. The formula and explanation, which are copied verbatim from PWD's Main Brief, do not correctly depict the Public Advocate's position nor do they correctly summarize what the parties have agreed to support. As described below, the Public Advocate submits that arrearage forgiveness should be recovered through the TAP rider, and has consistently submitted that arrearage forgiveness should be a required component of the TAP rider. PWD's basic formula omits the Public Advocate's proposal. In addition, PWD's basic formula is incorrect in several other respects. It appears PWD has largely duplicated the basic formula from its rebuttal testimony, and failed to reflect the modifications agreed to by the Public Advocate and PWD. See PWD St. 5-R at 4; TR-22.

As set forth in the Report, PWD’s proposed basic formula (which is incorrect) is:

$$\text{TAP-R} = \frac{(\text{C}) - (\text{E} + \text{I})}{\text{S}}$$

The components of PWD’s basic formula are:

TAP-R: TAP Rider Rate (\$ per MCF)

C: Cost in dollars of the estimated TAP Billing Loss for the projected period (i.e. discounts provided to TAP customers).

E: The net over or under collection of the TAP-R for the most recent period. The E factor reconciles actual experienced TAP Revenue Loss (resulting from discounts provided to TAP customers) with the TAP-R revenues from Non-TAP customers.

I: Interest on any over or under recovery of the TAP-R for the most recent period. Interest is computed on an annual basis at a simple annual interest rate based on the net over or (under) collect (i.e. E-Factor) for the most recent period.

S: Projected sales in MCF for Non-TAP customers.

PWD’s formula includes several errors. First, as to the C factor (cost), effective with the first reconciliation filing, the TAP rider will not rely upon projections of TAP billing loss, but will use actual reconcilable TAP revenues and expenses from the prior period (with two to three months of estimated data).<sup>22</sup> As PWD set forth in response to Transcript Request 22: “During the annual reconciliation submission, the TAP Rider will be calculated based on both the reconcilable TAP expenses (in this case the TAP revenue loss associated with providing discounts to TAP program participants) and the amount of TAP-R surcharge revenue collected through the rider from the Non-TAP customers.”<sup>23</sup> Accordingly, effective with the first

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<sup>22</sup> See also Direct Testimony of Roger D. Colton, PA St.-3 at Schedule RDC-3, setting forth the Advocate’s position that the C factor would be calculated as the reconcilable costs for the 12 month period preceding the reconciliation.

<sup>23</sup> As discussed in Section XVII.B below, the annual reconciliation filing process should include participation by the Public Advocate and a mechanism to submit for detailed review. PWD should not utilize projected TAP revenue losses as doing so would create an unavoidable need for such detailed review, given PWD’s historical inaccuracy in projecting TAP expenses. As Mr. Colton explained: “In FY2018, PWD included \$16.3 million in projected TAP costs in rates. (PA-V-49). In reality, PWD expects to incur only \$3.9 million in TAP costs during FY2018. (PA-V-50).” PA St. 3 at 45:6-8.

reconciliation filing, for FY 2020, PWD’s basic formula misstates the starting point of the calculation, the C factor utilized in the TAP rider, which is the reconcilable TAP discounts for the 12 months preceding the effectiveness of the TAP rider.<sup>24</sup> As discussed below, this amount would be adjusted by an embedded lost revenue discount, which the Advocate proposes be set at 13.1%. PWD’s basic formula appears to omit any lost revenue discount, even though PWD has also proposed such a discount. See PWD M.B. at 56-58.

In addition, PWD’s purported “basic formula” fails to use of the 52-week Treasury Bill rate for calculating interest on any under- or over-recovery, as agreed to by PWD and the Public Advocate. PWD’s “I factor” (interest) includes an undesignated “simple annual interest rate” and omits mention of the methodology of calculating the applicable interest rate agreed to by the parties.

The Public Advocate excepts to the Report’s inclusion of PWD’s erroneous TAP rider “basic formula” and submits that the parties’ agreements should be approved. This includes the calculation of reconcilable TAP discounts (less an uncollectible discount) for the 12 months preceding the effectiveness of the TAP rider (beginning in FY 2020) as the “C factor” in the calculation, and the use of the 52-week Treasury Bill rate to calculate the “I factor” interest rate on under- or over-recovery. See PA M.B. at 116-117.

## **B. TAP Rider Disagreements**

The Report sets out the Public Advocate’s positions regarding several unresolved issues concerning the TAP rider design, apparently verbatim from the Public Advocate’s Main Brief.

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<sup>24</sup> The Report duplicates PWD’s further misstatement of the TAP rider calculation, set forth in its Main Brief: “The reconciliation component would begin with the filing of the FY 2020 surcharge rates, which will include a projection for FY 2020 TAP revenue loss and reconcile actual discounts provided to TAP participants with revenue recovered via the TAP-R surcharge from Non-TAP customers.” PWD M.B. at 56, n. 299; Report at 77 (emphasis added).

To the extent PWD's Main Brief also addressed these issues, the Report appears to set out PWD's position verbatim from its Main Brief. In each respect, the Report fails to make proposed findings of fact or conclusions of law, and provides no recommendation from the Hearing Officer. The Public Advocate submits that the Board should approve the following TAP rider design proposals in the Public Advocate's Main Brief, for the reasons set forth therein, and incorporates those portions of the Main Brief into these Exceptions:

- For purposes of the TAP rider, TAP discounts should be adjusted by an embedded lost revenue discount of 13.1% to take into account an appropriate uncollectible rate for low income customer bills. See PA M.B. at 199-122.
- TAP customers should earn arrearage forgiveness over a period of 24 months participation in TAP, and the TAP rider should recover the value of forgiven arrears, subject to a bad debt offset of 90.66%. See PA M.B. at 122-124.<sup>25</sup>
- The TAP rider should be allocated to non-TAP customer bills on the basis of prior fiscal year revenues, not PWD's forecast revenue requirements for FY 2019. PA M.B. at 123.
- The annual TAP reconciliation process should include participation by the Public Advocate as well as a right to request more detailed review via complaint or other submission to the Board. PA M.B. at 124-125.<sup>26</sup>

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<sup>25</sup> The TAP rider would also reconcile for any past over- or under-collection of TAP arrearage forgiveness based on expenses and revenues during the 12 months preceding the effectiveness of the reconciled rider. See PA St. 3, Sch. RDC-3.

<sup>26</sup> The Public Advocate notes that the Report includes PWD's false claim that analogous reconciliation proceedings are "uniformly carried out without a hearing." Report at 87, n. 152. The analogous rider for Philadelphia Gas Works, Philadelphia's other municipal utility, is subject to annual review in a PUC proceeding that includes statutory advocates, intervenors, formal discovery, testimony and scheduled evidentiary hearings before an administrative law judge. See, e.g., PUC Docket No. R-2018-2645938.

## **XVIII. SHUT OFF NOTICES AND RESTORATION CHARGES**

The Hearing Officer errs in recommending that the Board obtain guidance from the Law Department regarding PWD's unfair and deceptive shut off notice practices.<sup>27</sup> Report at 90. The Hearing Officer incorrectly concludes that "the Public Advocate does not make a strong connection...between the shut-off policy and the TAP or other rate." Report at 90. In fact, as the Report recognizes, and as detailed in its Main Brief, the Public Advocate has directly connected PWD's unfair and deceptive shut off notice practices to the increased miscellaneous charge for service restoration that PWD has proposed *in this very case*. PA M.B. at 127-131. Indeed, the Public Advocate's two-part proposal is that the Board "enter an order in this 2018 Rate Case: (1) finding that that PWD's shut off notice practices require reform, and (2) denying PWD's request to increase its miscellaneous charge for restoration of service after termination for non-payment." PA M.B. at 127.

The Hearing Officer directly addresses PWD's requested miscellaneous charge for restoration of service, recommending that the Public Advocate's proposal to reject PWD's increase be accepted and indicating the Department "has failed to support the need for the increases." Report at 92. The Public Advocate concurs in this recommendation. In addition, however, as submitted by the Public Advocate, the Board's determination should specifically address PWD practices in recognition of the fact that PWD "can resubmit its request to increase the restoration charge in a future rate proceeding, based on the cost of service recalculated as of such time, and after presumably addressing those deficiencies with [PWD's shut off notice]

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<sup>27</sup> This recommendation may be simply an erroneous inclusion in the draft Report. This recommendation appears in the draft Report immediately following discussion of PWD's Motion in Limine, which the Hearing Officer correctly denies. Furthermore, the gravamen of the Public Advocate's submission regarding PWD's shut off notice practices is detailed in the Hearing Officer's discussion of "Miscellaneous Charges" which concludes that PWD's charge for restoration after non-payment shut off should not be increased as PWD has proposed. Report at 90-93.

practices that the Board finds require remediation.” PA M.B. at 130. Based on the Hearing Officer’s recommendation, with which the Public Advocate agrees, such resubmission would also require additional support for the need to increase the miscellaneous charge.

However, there is no need for any advice from the Law Department regarding the Public Advocate’s proposal. Furthermore, unless the Board extends the review schedule in this case, there is no time or basis for considering any such advice, even if it were necessary. The demonstratively unreasonable and unfair shut off notice practices PWD employs are thoroughly documented on the record of this proceeding,<sup>28</sup> and the Board’s consideration of an associated miscellaneous charge places these issues squarely before the Board for its determination. As the Public Advocate explained, its recommendations regarding PWD’s shut off notice practices are “specifically tied to a rate recommendation, which provides PWD the financial incentive to improve and directly aligns with the Board’s authority to assess PWD’s practices for purposes of future rate relief.” PA M.B. at 130, n. 60; Report at 92-93.

The Public Advocate submits that the Board should approve the two component parts of the Public Advocate’s recommendation concerning PWD shut-off notice practices. Accordingly for the reasons fully set forth in the Public Advocate’s Main Brief (incorporated herein by reference), the Public Advocate submits that the Board should find and conclude that PWD’s shut off notice practices require reform and deny PWD’s requested increase in its miscellaneous restoration charge for service terminated due to non-payment. PA M.B. at 127-131.

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<sup>28</sup> As set forth in the Report, the Hearing Officer correctly denied PWD’s Motion in Limine, and so the evidentiary record of this proceeding includes testimony from witnesses for the Public Advocate and PWD regarding PWD’s shut off notice practices. See Report at 12.

**XIX. CONCLUSION**

For the reasons set forth herein, and in the Public Advocate's Main Brief, the Public Advocate submits that the Board should grant these Exceptions.

Respectfully submitted,

Robert W. Ballenger  
Joline R. Price  
Philip A. Bertocci  
Josie B.H. Pickens

Community Legal Services, Inc.  
*For the Public Advocate*

Attachment A:

Public Advocate  
Motion for Enlargement of Time for  
Hearing Officer Report



**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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

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,<sup>3</sup> the Public Advocate has identified the following contested issues as having been inadequately addressed in the Hearing Officer Report:

- Due Process Standards<sup>4</sup> (absence of proposed findings of fact, conclusions of law, and discussion)
- Capital Account Deposit (absence of discussion)

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> See PA Main Brief at 19-26; PWD Main Brief at 9.

- Minimum Levels of Reserves<sup>5</sup> (absence of proposed findings of fact, conclusions of law, and discussion)
- Paygo Capital<sup>6</sup> (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

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<sup>5</sup> 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.”)

<sup>6</sup> 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.

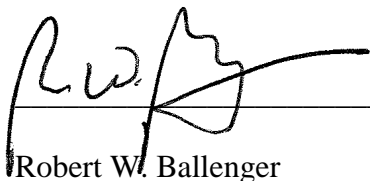
The Public Advocate submits that PWD will suffer no harm as a result of the enlargement of time. If PWD’s modified requested increase for FY 2019 were approved, as set forth in its Main Brief, a delay of one month of increased rates would amount to a small fraction of 1% of PWD’s total revenues requested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

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