

Paragraphs 1 and 3. Clearly, neither the Hearing Officer nor the Advocate should be required to search for privileges which PWD can neither find nor articulate to justify its objections.

PWD's effort to apply these General Objections to each specific data request, without explanation or context, must fail. These objections are devoid of any individualized factual analysis and are properly categorized as "shotgun" or "Rambo-style" objections, a form of stonewalling disfavored by the courts and the legal profession. Such objections do not provide sufficient information to enable the Hearing Officer or other parties to evaluate the applicability of their claims. These objections do not show specifically how each question is irrelevant, overly broad, burdensome, oppressive, duplicative, cumulative, or assert that responsive material is within or outside of PWD's or the Public Advocate's possession or control. The courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. *Ruddy v. Pennsylvania Gas & Water Co.*, 36 Pa. D&C2d 705, 707 (1965). The Pennsylvania Public Utility Commission specifically requires that an objecting party "include a description of the facts and circumstances purporting to justify the objection." 52 Pa. Code § 5.342(c)(3). The PUC has specifically found objections nearly identical to the General Objections listed by PWD "**highly improper.**" See *Pa. PUC v. Pa. American Water Co.*, 2011 Pa. PUC LEXIS 1523 (July 21, 2011).

Without sufficient specificity, PWD's General Objections cannot be evaluated on their merits. They should be denied.

II. Response to PWD's Specific Objections

PA-EXE-4.

The Public Advocate requested a quantification of the annual increase in 5/8" General Service volume usage during FY 2019, 2020, and 2021 resulting from AMI.

PWD objected, asserting that this information is not relevant, not material and not reasonably calculated to lead to the discovery of admissible evidence. It summarized: "Simply put, the information requested is beyond the Rate Period (FY 2017-2018)." Notwithstanding its objection, PWD claims that

even though it is seeking rate recovery for AMI, it does not have “ready access” to provide basic information about AMI sought by the Public Advocate.

PWD’s objection should be overruled and PWD should be directed to provide a full response. PWD’s rate filing turns, in part, on assumptions and projections utilized in PWD’s five year plan. PWD’s Financial Plan, filed as BV- S1, attached to PWD St.-9B, on Page 1, clearly states:

This document summarizes the assumptions used in developing the revenue and revenue requirement projections for the Philadelphia Water Department’s Financial Plan for FY 2016 - FY 2021 projection period in conjunction with the FY 2017 - FY 2018 Rate Proceedings.

Accordingly, by PWD’s own admission, its financial plan for the five year period ending FY 2021 is relevant and material to its rate request. Certain portions of PWD’s filed testimony rely, in large part, on the assumptions over this period. See, e.g., PWD St.-9A, 39-40, Exhibit C-1. Finally, as required by Philadelphia Code § 13-101, PWD must submit its Financial Stability Plan for consideration in connection with its rate increase request, and has done so in the form of PWD Ex. 2. Not surprisingly, PWD’s Financial Stability Plan also details policies and assumptions over the period FY 2016 through FY 2021. Clearly, City Council has determined that these assumptions, over a period longer than the rate period, are vital to PWD’s rate request, and should therefore be considered in any evaluation of the rate change request.

Finally, it should be noted that PWD anticipates implementing AMI during the proposed rate period, and has identified this project as an additional operating expense for which it proposes higher rates. See BV-S1 at 6. PWD has set forth an extremely broad estimate (between \$200,000 and \$1,900,000) of projected “cost savings” from AMI during the three fiscal years following the rate period. See BV-S1 at 8. It is fully appropriate for the Public Advocate to inquire about the basis for PWD’s assumption of cost savings; it is a subject PWD itself has raised, ostensibly in support of its request for rates to fund AMI implementation.

PA-EXE-5

The Public Advocate requested a worksheet showing the derivation of annual additional revenue during FY 2019, 2020, and 2021 relating to the implementation of AMI. PWD objected for the same

reasons stated in its objection to PA-EXE-4. For the reasons described at length above, in response to PWD's objection to PA-EXE-4, PWD's objection to PA-EXE-5 should be overruled.

In addition, PWD's Official Statement (PWD Exhibit 4 – SI-31) is not responsive to this request. The complete discussion of PWD's proposed AMI implementation in PWD's Official Statement consists of the following:

During Fiscal Year 2014, the Water Department's AMI team began studying Second Generation Advanced Metering Infrastructure (AMI), which is intended to provide enhanced capabilities in water consumption, management and revenue generation. The AMI team contains representatives of the Water Department and the Water Revenue Bureau and continues to provide executive decision-makers with the data and information to develop a strategic plan for the funding and implementation of the AMI System.

The Advocate maintains that PWD must respond to the data requests in order that customers can assess the justness and reasonableness of PWD's rate request, which includes higher rates from customers to fund PWD's future investment in AMI.

PA-EXE-6

The Public Advocate requested any business case or presentations made to management regarding the AMI project. PWD objected on the basis that this information is within the deliberative process privilege. PWD further explains that, in fact, it does not have authorization from City Council to proceed with the AMI project and that, to the extent it ultimately receives approval, the impact of AMI on the rate period is *de minimis*.

PWD's objection should be overruled for multiple reasons. First, PWD has not properly raised the deliberative process privilege. It is well-settled in Pennsylvania that the deliberative process privilege only applies to "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *Com. v. Vartan*, 557 Pa. 390, 399 (1999) (citing *Redland v. Dept. of the Army of the U.S.*, 55 F.3d 827). PWD has not asserted that any documentation concerning AMI is confidential in nature. Given that PWD would be required by City Council to provide any information requested by Councilmembers concerning this project, this information *cannot* be confidential.

Furthermore, the deliberative process privilege can only apply to documentation that is deliberative in character. Specifically, it can only apply to communication made before the deliberative process was completed. *Com. v. Vartan*, 557 Pa. 390, 401. According to PWD's Official Statement and its rate filing, which seeks new revenues for implementation of AMI, PWD completed the deliberative process. PWD Commissioner McCarty testified that AMI "is another significant initiative *being launched* during the Rate Period." PWD St.-1 at 8. It is abundantly clear that PWD has concluded that it should implement AMI; it is now seeking to convince City Council and the Board to permit it to go forward and to charge customers higher rates to fund AMI implementation. Any communication of business case or presentations after the date on which PWD concluded it should go forward with AMI cannot be protected by the deliberative process privilege.

Finally, the privilege does not attach to any information that is purely factual, even if that information is used by decision-makers in their deliberations. *Id.* The Public Advocate's request is for factual information. A business case or management presentation regarding AMI would include discussion of logistics, comparisons to other known AMI implementations (e.g., other utility experience), the impacts of AMI in other utility service territories, and projections of impact on PWD. This information is purely factual and the deliberative process privilege does not apply to it.

Ultimately, the deliberative process privilege is a qualified one. Even if PWD is capable of properly asserting the privilege, which it cannot, disclosure may be ordered if the Public Advocate can demonstrate the need for disclosure of the material is greater than PWD's interest in non-disclosure. See *Star-Kist Foods, Inc. v. U.S.*, 600 F.Supp. 212, 217 (CIT 1984). PWD has not alleged any interest in non-disclosure. It has submitted nothing more than a barebones assertion of the existence of the privilege itself. Because PWD's proposal is subject to City Council approval, where PWD would be required to provide any information supporting AMI that is requested by Councilmembers, PWD has no actual interest in non-disclosure. In contrast, the Advocate's interest in information is a significant one. The Public Advocate seeks information from PWD to assess the justness and reasonableness of PWD's request for additional revenues (higher customer rates) to fund AMI implementation. The interest in

information sufficient to determine the justness and reasonableness of PWD rates outweighs any potential deliberative process privilege PWD may be able to raise.

PA-EXE-7

The Public Advocate requested an explanation of the planned implementation of the AMI project, including the estimated number of meters affected, and annual and total capital expenditures for the project. PWD objected, on the basis that this request is protected by the deliberative process privilege, is duplicative with PA-EXE-6, and is over-broad, and otherwise burdensome. Without waiving its objection, PWD responds that all meters will be affected and that capital expenditures have not been finalized. PWD appears to object solely to the Public Advocate's request for an explanation of the planned implementation of the AMI project.

For the reasons discussed at length above, regarding PWD's objection to PA-EXE-6, the Hearing Officer should reject PWD's assertion that the deliberative process privilege protects "planned implementation" of AMI from discovery.

Regarding whether the Advocate's request is duplicative, over-broad or burdensome, PWD's objection must be rejected. To the extent the request could conceivably be duplicative rests upon an assumption that the planned implementation of AMI is discussed within business case or management presentations concerning AMI. PWD may not object that a question is duplicative simply because the answer to it has been withheld pending resolution of an objection to another question. Moreover, PWD makes no effort to explain how the request is over-broad or burdensome.¹ Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy v. Pennsylvania Gas & Water Co., 36 Pa. D&C 2d 705, 707 (1965). An objection reciting that interrogatories are "extremely broad, burdensome and improper" is inadequate because it requires a court to guess at the basis for objections. Hilton v. Willought, 13 Pa. D&C3d 587,

¹ Responding to discovery requests necessarily creates some burden. The Advocate assumes PWD intended to complain that responding to this would be overly burdensome.

591. PWD has provided no explanation whatsoever, leaving the Hearing Officer to guess why PWD believes the request to be over-broad or burdensome.

In fact, the request is not over-broad and it is not burdensome. PWD has simply been asked to supply an explanation of its planned implementation of AMI. The AMI project directly impacts customer rates, and understanding the implementation of AMI is essential to determining if and when any benefits to customers would result from AMI.

PA-EXE-8

The Public Advocate requested a narrative explaining the functionalities and capabilities of AMI employed by PWD. PWD objected that this request is over-broad, the response is within the deliberative process privilege, and is burdensome. As with PA-EXE-7, PWD asserts that this is a duplicative request, presumably because the information the Public Advocate seeks is included within business case or management presentations concerning AMI. As explained above, this is not a valid objection. PWD's assertion of a deliberative process privilege should be denied for the reasons described in response to PWD's objection to PA-EXE-4. It is clear that PWD has made its final determination regarding AMI, and the requested information can no longer be characterized as "deliberative."

PWD directs the Advocate to PWD St.-1 at 8-9, which asserts that AMI generally provides a number of potential functionalities, including the ability to obtain hourly readings, real time alerts about usage on inactive accounts and zero usage on active accounts, and can help detect losses more quickly. PWD St.-1 also describes the objectives PWD hopes to obtain by implementing AMI. Although helpful, this information is not responsive. The request is for an explanation of the specific functionalities and capabilities of the particular AMI platform PWD will implement, not for a listing of some of the general features of AMI.

Finally, regarding whether the request is over-broad or burdensome, the Public Advocate asserts that PWD has made no claim in support of either of these grounds for objection. As with PA-EXE-7, PWD's objection should be denied. The request is reasonable to assess PWD's plans for AMI, in order to

determine the justness and reasonableness of higher rates PWD seeks to charge to PWD customers for AMI implementation.

III. Conclusion

The Advocate submits that the Hearing Officer should deny PWD's Objections and direct it to answer the Advocate's discovery requests. PWD's Objections, if sustained, would undermine the free-flow of information that is required in order for a full and transparent review of PWD's rate change request to be conducted, and, ultimately, in order for the Board to establish rates and charges that satisfy the legal requirement that PWD rates be just and reasonable. PWD's discovery objections amount to nothing more than an unconstructive and unnecessary procedural dispute, undermining the public purpose objectives of this proceeding. The Hearing Officer should deny PWD's Objections in order to ensure that discovery continues without the further introduction of unnecessary procedural wrangling.

Respectfully submitted,



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January 19, 2016

APPENDIX

RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OF THE PUBLIC ADVOCATE

The Philadelphia Water Department (“Department” or “PWD”) objects to the Public Advocate’s First Set of Interrogatories and Requests for Production of Documents, PA-EXE: 4-8 (the “Interrogatories and Requests”) for the following reasons.

General Objections

1. The Department objects to each Interrogatory and Request identified below insofar as it seeks production or disclosure of documents or information subject to any applicable privilege (including government decision-making and deliberations), rule, doctrine or immunity whether created by statute or common law. PWD believes that PA-EXE 6 through 8 violate the deliberative process privilege in requesting business case or presentations made to management regarding the AMI project. The deliberative process privilege permits the government to withhold documents containing confidential or law or policymaking reflecting opinions, recommendations and advice. The privilege protects the decision making process of administrators. The purpose of the privilege is to protect the free exchange of ideas and information within government agencies.¹

2. By answering any part of the Interrogatories and Requests and/or by providing any part of the requested information, the Department does not concede the relevance, materiality or admissibility of any of the information sought therein for use as evidence in any hearing. PWD expressly reserves the right to object to further discovery on the subject matter and claims in any of these Interrogatories and Requests.

3. The Department objects to each Interrogatory and Request insofar as it seeks production or disclosure of documents or information subject to any applicable privilege (including government decision-making and deliberations; attorney-client privilege; and attorney work product), rule, doctrine or immunity whether created by statute or common law.

4. The Department objects to each Interrogatory and Request to the extent that it seeks confidential, privileged, proprietary or other privileged information.

5. The Department objects to each Interrogatory and Request identified below to the extent that they seek information that is not relevant and not material to the subject matter and claims in this proceeding, and as such, are not reasonably calculated to lead to the discovery of admissible evidence. PWD believes that PA-EXE-4 and 5 address matters outside the Rate Period and will not lead to the admission of discoverable evidence.

6. The Department objects to each Interrogatory and Request to the extent it is duplicative and cumulative.

7. The Department objects to each Interrogatory and Request to the extent that it seeks information that is not in its possession, custody or control, and to the extent it seeks documents which are already in the possession of the Public Advocate.

8. The applicable general objections, as stated above (“General Objections”), are incorporated into each of the specific objections and responses that follow. Stating a specific objection or response shall not be construed as a waiver of these General Objections.

¹ See, *Ario v. Deloitte*, 934 A.2d 1290 (2007); *Commonwealth v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

Responses to Interrogatories and Requests for Production of Documents

Relevance

PA-EXE-4. Please provide the quantification of the annual increase in the 5/8” meter General Service volume usage during FY 2019, 2020 and 2021 resulting from the decrease in theft due to implementation of the Advanced Metering Infrastructure (AMI). In your response include an explanation the cause of the significant growth from year to year.

Response: Objection. The Department objects to the above interrogatory and request for production of documents to the extent that same seek to discover information that is not relevant and not material to the subject matter and claims in this proceeding, and as such, are not reasonably calculated to lead to the discovery of admissible evidence. Simply put, the information requested is beyond the Rate Period (FY 2017-2018). The General Objections are incorporated herein by reference. Without waiving the objection, the parties should note that PWD does not have ready access to the information needed to answer this question.

PA-EXE-5. Please provide an electronic worksheet showing the derivation of the annual addition revenue relating to the implementation of the AMI for FY 2019, 2020 and 2021 of \$0.4 million, \$1.25 million and \$2.1 million, respectively.

Response: Objection. The Department objects to the above interrogatory and request for production of documents to the extent that same seek to discover information that is not relevant and not material to the subject matter and claims in this proceeding, and as such, are not reasonably calculated to lead to the discovery of admissible evidence. As stated with regard to the previous interrogatory, the information requested is beyond the Rate Period (FY 2017-2018). The General Objections are incorporated herein by reference. Without waiving this objection, the parties are directed to the PWD Official Statement (PWD Exhibit 4 – SI-31).

Deliberative Process Privilege

PA-EXE-6. Please provide any business case or presentations made to management regarding the AMI project.

Response: Objection. PWD objects to the above interrogatory and request for production of documents because same requests privileged information (related to government decision-making and deliberations). The General Objections set forth above are incorporated in this response. PWD maintains that the information requested (business case and presentations to management) is pre-decisional and deliberative in nature and is appropriately excluded from the public record, as it reflects matters leading to the final decision of a government agency including a description of the process used by the agency in reaching its decision, together with opinions as to policy matters. Final authorization of this project will require Philadelphia City Council approval and is only noted in the rate filing because of its significant impact in the forecast period. AMI has *de minimis* impact during the FY 2017-2018 rate period.

PA-EXE-7. Please explain the planned implementation of the AMI project and include in the explanation the estimated number of meters that will be affected and annual capital expenditures by year and in total for the project through its completion.

Response: Objection. PWD objects to the above interrogatory and request for production of documents because same are over-broad, request privileged information (government decision-making and deliberations) and are otherwise burdensome. The Department maintains that this is a cumulative request that is directly related to PA-EXE-6. The objections stated with regard to PA-EXE-6 and the General Objections are incorporated herein by reference. Without waiving this objection, the parties are directed to the PWD Official Statement (PWD Exhibit 4 – SI-31) for a description of the AMI project. All meters will be affected by this project; annual capital expenditures through the completion of the project are not finalized.

PA-EXE-8. Please provide a narrative that explains the specific functionalities and capabilities of AMI employed by PWD. Also in your response, explain how the system will reduce theft.

Response: Objection. PWD objects to the above interrogatory and request for production of documents because same are over-broad, request privileged information (related to government decision-making and deliberations) and is otherwise burdensome. The Department maintains that this is a cumulative request that is directly related to PA-EXE-6. The objections stated with regard to PA-EXE-6 and the General Objections are incorporated herein by reference. Without waiving this objection, the parties are directed to the PWD Official Statement (PWD Exhibit 4 – SI-31). See also, Testimony of Debra McCarty (PWD Statement 1 at pages 8-9).

All responses provided by Debra McCarty.