Robert Ballenger

From: Robert Ballenger
Sent: Thursday, January 21, 2016 11:49 AM
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Subject: Public Advocate Due Process Memorandum

Dear Ms. Brockway,

Following upon our January 12 teleconference, I am submitting this email in response to your request for a memorandum concerning the "quasi-judicial" nature of PWD rate proceedings, and the concomitant due process requirements attaching thereto. This memorandum only considers this issue under Pennsylvania's Administrative Agency Law, 2 Pa. C.S § 101, et seq. (AAL), and does not address due process requirements arising under federal law. There is no room for question that this proceeding must satisfy the due process requirements applicable to an adjudication of a Local Agency, as set forth in the AAL.

The holding of Public Advocate v. Brunwasser, 22 A.3d 261 (Pa. Cmwlth. 2011), does not apply to this proceeding. In the Brunwasser case, the Commonwealth Court upheld the procedural appropriateness of the Public Advocate's complaint in equity challenging PWD's 2008 rate change regulations and reversed the trial court's dismissal, premised on its mistaken view that the Advocate failed to exercise appeal rights supposedly available under the AAL. That case was applicable to a framework for PWD ratemaking that no longer exists. At that time, rates and charges were established by the PWD Commissioner, the head of the Water Department with no quasi-judicial authority. This ratemaking authority was vested in the PWD Commissioner by the Home Rule Charter, and neither the Charter nor any PWD regulation gave any participant in PWD ratemaking proceedings a right of appeal. The only available procedure for challenging the Commissioner's rate regulations was an equity challenge. The process for determining potential changes in rates and charges commenced with a PWD filing of proposed regulations, subject to an advisory hearing process, ultimately culminating in the adoption of final regulations. These regulations were the subject of the Public Advocate v. Brunwasser case, which ultimately held that they could only be challenged at equity. The simple and dispositive fact the Commonwealth Court relied upon was that the promulgation of a regulation is not appealable under the AAL.

Since the Brunwasser case, changes in the Home Rule Charter and the Philadelphia Code have revolutionized the PWD ratemaking framework in Philadelphia. On December 3, 2012, pursuant to a referendum, the citizens of Philadelphia amended Home Rule Charter Section 5-801 to provide that "City Council may by ordinance, establish an *independent rate-making body* to be responsible for fixing and regulating rates and charges for water and sewer services." Pursuant to this Charter amendment, City Council amended Chapter 13-100 of the Philadelphia Code to eliminate the authority of the Water Commissioner and the PWD to set water and wastewater rates, and to provide for the establishment of a five member "independent rate making

body." This body, the Board, presides over a *required* "open and transparent" ratemaking process, that culminates in the issuance of a written report, setting forth its decision to "approve, modify or reject" PWD's proposed rates and charges. Final rates and charges are to be set forth in a "tariff," which must conform to the Board's rate report. Council specifically provided that any "party" to the rate proceeding, including the PWD, may appeal the Board's rate report to the Philadelphia Court of Common Pleas. Phila. Code § 13-101(9).

The Brunwasser case simply is not applicable to the ratemaking framework that is now in place under the current Home Rule Charter and the Philadelphia Code. The new structure has all the hallmarks of a final, appealable adjudication, consistent with the AAL and Philadelphia Code. In this structure, the Rate Board is a Local Agency, with authority to adjudicate a final rate order, under and subject to the due process and appeal rights set forth in the AAL.

In a virtually identical structure, state courts have long recognized that rate determinations by the Philadelphia Gas Commission, a Local Agency under the AAL, establishing rates and charges for the Philadelphia Gas Works, were appealable adjudications. See Action Alliance v. Phila. Gas Comm'n, 6 D&C 3d 144 (Phila. CCP 1977) (holding that PGC rate determinations constitute final, appealable adjudications, subject to state due process requirements and that aggrieved customers may appeal); Public Advocate v. Phila. Gas Comm'n, 674 A.2d 1056 (Pa. 1996) (procedural history describing case commenced as appeal from PGC rate determination). At the time of the Gas Commission appeals in the cases described above, PGW was, like PWD still is, subject only to local ratemaking oversight (PGW became subject to PUC jurisdiction only in 1999). I note that a contrasting case, holding that a portion of the ratemaking function is purely legislative, predates and is inconsistent with the appeal structure of both the AAL and the Public Utility Code. City of Pittsbugh v. Pa. PUC, 126 A.2d 777 (Pa. Super. 1956).

For all of these reasons, the Board's rate determinations must satisfy the requirements of the AAL applicable to Local Agency adjudications. See, e.g., 2 Pa. C.S. §553 (hearing record), §554 (evidence and cross-examination), §555 (contents and service of adjudication). I hope this information is helpful to you as you consider the various concerns that are raised in this matter and guide the participants through the new rate review structure.

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