

BEFORE THE
PHILADELPHIA WATER, SEWER AND STORMWATER RATE BOARD

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| Re Application of the Philadelphia Water Department for Increased Rates and Related Charges | Fiscal Years 2017-2018 |
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**RESPONSE TO THE PUBLIC ADVOCATE’S “DUE PROCESS” MEMORANDUM
SUBMITTED ON BEHALF OF THE PHILADELPHIA WATER DEPARTMENT**

I. QUESTIONS PRESENTED

1. Is the rate-making process for fixing and regulating water and sewer rates pursuant to Section 13-101 of the Philadelphia Code an adjudication under Pennsylvania’s Administrative Agency Law?

Proposed Answer: No

2. Is the Public Advocate barred from raising the question presented above by the doctrine of judicial estoppel?

Proposed Answer: Yes

II. ARGUMENT

The Public Advocate (“Advocate”) asserts that the new rate setting framework governing the Philadelphia Water Department (“Department” or “PWD”) is quasi-judicial (rather than regulatory) in nature; and it therefore has concomitant “due process” and “appeal requirements” attaching thereto. The Advocate argues that the newly established Philadelphia Water, Sewer and Stormwater Rate Board (“Rate Board”) is vested with authority to “adjudicate” a final rate order, subject to due process and appeal rights set forth in the Administrative Agency Law, 42 Pa. C.S. 763 (“AAL”). In this context, the Advocate also argues that the Commonwealth Court decision in *Public Advocate v. Brunwasser*, 22 A.3d 261 (2011) (“*Brunwasser*”) is inapposite to the new rate process.

The Department disagrees with the Advocate’s contentions for, although the ultimate decision maker in the rate process has changed (given the establishment of the Rate Board), the nature of the administrative action is substantially the same.¹ That is, the rate process is still regulatory (legislative), rather than adjudicatory in nature.²

¹ The time-line for authorization of changes in rates by the Rate Board has also been constrained to 120 days. This change, however, makes it more clear that the new more streamlined process is quasi-legislative in nature and is intended to provide input in the “information gathering” process, rather than yield a more extenuated process like the PUC. Looking at the rate process as operating within the framework of the Home Rule Charter, Philadelphia Code and its current regulations – clearly leads to the conclusion that the ratesetting is regulatory or quasi-legislative in nature, consistent with the Commonwealth Court determination in *Brunwasser*.

² The AAL defines adjudication as any final order, decree, decision, determination or ruling by an agency affecting personal and property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. 2 Pa. C.S. §101.

The actual process by which water and sewer rates are set in Philadelphia under the Philadelphia Code has been the subject of extensive litigation.³

In 1985, in an appeal of a water and sewer rate determination by the Water Commissioner, the appellant alleged that the City's water and sewer rate setting process then in use violated the Due Process clauses of the United States and Pennsylvania Constitutions. In *Consumer Education and Protective Association International, Inc. et al. v. Philadelphia Water Department, et al.*, 1988 WL 679818 (Pa. Com. Pl. 1988), Judge Della Porta of the Court of Common Pleas held that the City's rate setting process was not adjudicatory, but rather investigatory, in nature. Therefore, ratepayers did not have a protected property interest in the rate setting process sufficient to trigger due process protection. Judge Della Porta's decision was affirmed by the Commonwealth Court, 133 Pa. Cmwlth. 148, 575 A.2d 160 (1990), and subsequently by the Pennsylvania Supreme Court, 528 Pa. 600, 600 A.2d 189 (1992).

In 1992, in an appeal of another water and sewer rate determination by the Water Commissioner that became effective in 1991, an appellant, represented by Community Legal Services, again contended that the decision of the Water Commissioner on new rates was an "adjudication" by a government empowered person. That case was captioned *Action Alliance of Senior Citizens et al. v. Philadelphia Water Department, et al.* There, the Court of Common Pleas, citing the Supreme Court's ruling discussed above, concluded that the water rate decision was not an adjudication. *Alliance of Senior Citizens v. Philadelphia Water Department*, Phila. C.C.P. No. 9101-3008, (June 26, 1992) slip op. at 3-5 ("*Action Alliance*").

In a subsequent action filed in 1993, the Public Advocate (Community Legal Services) requested that the Court of Common Pleas enjoin a Water Department rate increase that was to become effective July 1, 1993. That case was captioned, *Public Advocate v. City of Philadelphia*, 1993 WL 1156092 (Pa. Com. Pl. 1993). There, the Court of Common Pleas, citing prior cases, again emphasized that the rate process for establishing water rates in Philadelphia was not adjudicative in nature, stating:

Although the Water Department is a utility, it is not regulated under the Public Utility Law, Act of May 28, 1937, P.L. 1053 (as amended). See *Consumer Education and Protective Association International, Inc. v. Philadelphia Water Department Commissioner William J. Marrazzo*, 133 Pa. Commw. 148, 153, 575 A.2d 160, 163 (1990), *aff'd*, 528 Pa. 600, 600 A.2d 189 (1992) ("*Marrazzo*") The Water Department is an agency of the City of Philadelphia, and a local agency. 2 P.S. §101. As water customers do not have a property interest in the rate making process, the setting of rates is regulatory and not adjudicative. *Marrazzo*, at 154, 575 A.2d at 163; *Action Alliance of Senior Citizens v. Philadelphia Water Department*, Phila. C.C.P. No. 9101-3008, (June 26, 1992) slip op. at 3-5 ("*Action Alliance*"). As the rate making process is not adjudicative, due process does not require that Water Department regulations undergo the exhaustive statutory review mandated by the Local Agency Law, 2 P.S. §§551-55, 751-54. *Action Alliance*, at 3-5.

In 2011, the Commonwealth Court in *Brunwasser*, once again addressed the question of whether PWD rate setting was regulatory (legislative) or adjudicatory in nature. In that case, the Public Advocate argued that Water Department's ratemaking procedures were fact-finding and regulatory actions, and did not constitute adjudications. The Commonwealth Court agreed, citing its decision in *Consumer Advocate and Protective Association International, Inc. v. Philadelphia Water Department Commissioner*, 575 A.2d 160 (Pa. Cmwlth. 1990) and concluded that (i) the City's ratemaking process was quasi-legislative

³ A related discussion of the historic administration of the PWD rate process is provided in the Department's Response to the Public Advocate's Motion in Limine submitted previously.

and not quasi-judicial; and (ii) the Commissioner's rate determination and regulations promulgated in compliance thereto establishing new rates were not adjudications. In reaching this conclusion, the court noted that adjudications, by nature, determine rights and obligations of the particular parties before the agency in a particular proceeding, and regulations, by contrast, are quasi-legislative agency activities that have more general application. *Id.* at 270.

Pursuant to recent changes in the Home Rule Charter ("Charter") and the Philadelphia Code, the Rate Board is now the body that conducts the rate-making process for the Water Department. The Rate Board promulgated its own regulations in December 2015 which define the process for setting the rates consistent with Charter and Philadelphia Code requirements. The Public Advocate fails to mention that these regulations closely mirror the Water Department's previous rate setting process and provide for a hearing officer and public advocate both of whom provide substantially similar functions as in the previous rate process. The regulations also provide for the same requirements to hold public input hearings and technical hearings, compilation of a hearing record and hearing officer report which were also required in the previous rate process. The major difference under the current process is that the Rate Board, not the Water Commissioner, is now responsible for making the rate determination.⁴ Most notably, as was the case when the rate determination was rendered by the Water Commissioner, the Board's rate determination will authorize new rates and charges for all Water Department customers and will not be particular to the parties that choose to participate in the ratemaking process.

The Public Advocate fails to explain why the new rate process is so different as to make the instant proceeding adjudicatory or quasi-judicial in nature even though the proceeding is substantively identical to the one in place at the time of the *Brunwasser* decision. As noted above, the nature of the agency action is pivotal in determining whether it is adjudicative or legislative in character. In this context, the nature of the agency action (rate determination) is the same – only the decision maker has changed. The Advocate cites *Public Advocate v. Philadelphia Gas Commission*, 674 A.2d 1056 (Pa. 1996) as supportive of its position. However, that decision does not analyze the nature of rate setting (adjudicative versus legislative) nor address any statutory authorization indicating the applicability of the Local Agency Law to Philadelphia Gas Commission proceedings. It bears emphasis that the new rate setting process has not substantively changed under the Rate Board. The process is still governed by the regulatory framework dictated by the Charter and Philadelphia Code and by Rate Board regulations that are substantially similar to those previously promulgated in Chapter 300 of PWD Regulations. In view of the foregoing, the holding in *Brunwasser* is therefore wholly apposite and applicable to the current rate proceeding.

Although the Department does not believe that a ruling by the Hearing Officer is necessary with regard to the Advocate's "due process" memorandum, should the hearing officer conclude otherwise, a ruling that the Public Advocate is barred by the doctrine of judicial estoppel from raising this issue once again (legislative versus adjudicative nature water rate proceedings) is warranted. The doctrine of judicial estoppel precludes a party to an action from assuming a position inconsistent with its position in a previous action if: (1) the party assumed an inconsistent position in an earlier action; and (2) the party's position was successfully maintained in that action. *Marazas v. Workers' Compensation Appeal Board*, 97 A.3d 854 (Pa. Cmwlth. 2014), citing *Canot v. City of Easton*, 37 A.3d 53, 60 (Pa. Cmwlth. 2012) (quoting *Black v. Labor Ready, Inc.*, 995 A.2d 875, 878 (Pa. Super. 2010)). As discussed above, the position presented by the Public Advocate in this proceeding is inconsistent with its position as presented and successfully maintained to the Commonwealth Court in *Brunwasser*. The Department maintains that the two elements of judicial estoppel have been met and that the Advocate should be barred from relitigating this issue.

⁴ The time-line for rate setting has also changed as noted in footnote 1.

III. CONCLUSION

For all the foregoing reasons, the Department maintains that the new framework governing its rate setting is regulatory (legislative), rather than adjudicatory in nature.

Respectfully submitted,

/s/ Andre C. Dasent

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