

## Robert Ballenger

---

**From:** Robert Ballenger  
**Sent:** Wednesday, February 10, 2016 9:45 AM  
**To:** 'Andre Dasent'; Nancy Brockway; Thu Tran; Frances.Beckley@phila.gov; Scott.Schwarz@phila.gov; Bakare, Adeolu; Daniel P. Delaney; helbing@pennfuture.org; James P. Dougherty; George Gould; Phil Bertocci; Susan.Crosby@phila.gov  
**Cc:** Thu Tran; Josie Pickens  
**Subject:** RE: Philadelphia Water Department Rate Process

Dear Hearing Officer Brockway,

Upon review of the City's response to the Public Advocate's January 21, 2016 email correspondence, concerning the due process requirements of the Board's review of PWD's rate request, I have the following brief comments.

While this is an important background issue, I concur with the City that there appears to be no necessity for a direct ruling on this issue.

However, and notwithstanding that a ruling is unnecessary, the City's response proposes that, if you are inclined to rule, you should not reach the merits of the issue, but instead apply the principle of judicial estoppel to bar the Public Advocate from raising due process concerns. This is not even arguably correct.

The purpose of judicial estoppel "is to ensure that the parties do not play 'fast and loose' *with the facts* in order to suit their interests in different actions before different tribunals." Marazas v. W.C.A.S., 97 A.3d 854, 859 (Pa. CmLth. 2014) (emphasis added). The Marazas case, relied upon by the City in its response, is clear: judicial estoppel is limited to sworn facts. Id. at 860. The Advocate's legal conclusion is beyond the reach of judicial estoppel.

Ultimately, a basic and fundamental requirement of judicial estoppel is the irreconcilability of *factual* assertions. Even though the Advocate's has expressed its legal conclusions, rather than factual assertions, the differences between the positions taken in the Brunwasser case and this proceeding are easily reconciled by changes in law (e.g., the addition in 2014 of a right and timeline of appeal pursuant to Philadelphia Code Section 13-101(9)). These changes were briefly discussed in the Advocate's earlier electronic memorandum and I do not see a need to more fully describe them here. Suffice it to say that "judicial estoppel is inappropriate when a party is merely changing its position in response to a change in the law." 28 Am. Jur. 2d §68.

Thank you for your attention to this matter.

Sincerely,

Robert W. Ballenger  
Staff Attorney  
Energy Unit  
Community Legal Services, Inc.  
1424 Chestnut Street  
Philadelphia, PA 19102  
Tel: 215.981.3788  
Fax: 267.765.6481

[RBallenger@CLSPhila.org](mailto:RBallenger@CLSPhila.org)

This e-mail, sent by Robert W. Ballenger, Attorney At Law, is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this e-mail in error, please destroy it and notify us immediately.

**From:** Andre Dasent [<mailto:andre.c.dasent@gmail.com>]

**Sent:** Tuesday, February 09, 2016 12:42 PM

**To:** Nancy Brockway; Robert Ballenger; Thu Tran; [Frances.Beckley@phila.gov](mailto:Frances.Beckley@phila.gov); [Scott.Schwarz@phila.gov](mailto:Scott.Schwarz@phila.gov); Bakare, Adeolu; Daniel P. Delaney; [helbing@pennfuture.org](mailto:helbing@pennfuture.org); James P. Dougherty; George Gould; Phil Bertocci; [Susan.Crosby@phila.gov](mailto:Susan.Crosby@phila.gov)

**Subject:** Philadelphia Water Department Rate Process

Attached please find the Department's response to the Public Advocate's Due Process Memorandum submitted in the above proceeding. Thank you for your attention to this matter.

-Andre

Andre Dasent  
1500 Market Street  
Philadelphia, PA 19102  
215 519-8654