

BEFORE THE
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD

In the Matter of the Philadelphia Water Department's Proposed Change in Water, Wastewater and Stormwater Rates and Charges	Fiscal Years 2022-2023
--	------------------------

**PHILADELPHIA WATER DEPARTMENT'S
MEMORANDUM IN OPPOSITION TO
LANCE HAVER'S MOTION FOR CONTINUANCE**

I. INTRODUCTION.

This memorandum is submitted on behalf of the Philadelphia Water Department ("Department" or "PWD") in response to Lance Haver's Motion for Continuance ("Motion").

In his Motion, Mr. Haver specifically requests that the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board") hold the 2021 Rate Proceeding in abeyance pending governmental determinations regarding the distribution of funds under the Consolidated Appropriations Act of 2021, enacted on December 27, 2020,¹ and the American Rescue Plan Act,² enacted on March 11, 2021 (collectively, the "federal legislation").

The central question presented by the Motion is:

Does the Rate Board have the authority to accommodate Mr. Haver's request to continue or delay these proceedings?

The Department maintains that the Rate Board does not have the power to extend or delay this proceeding, as proposed by Mr. Haver. Moreover, as explained below, there is no need to do so.

¹ 116 P.L. 260; 134 Stat. 1182. Section 501 of the Consolidated Appropriations Act allocates \$638 million to the U.S. Department of Health and Human Services (HHS) to carry out a Low-Income Household Drinking Water and Wastewater Emergency Assistance Program. *See, e.g.*, 15 USC § 9058a.

² Public Law No: 117-2. Section 9901 of the American Rescue Plan Act, *inter alia*, provides funds to certain governmental entities that may be used, among other things, to make necessary investments in water, sewer, or broadband infrastructure. Section 2912 of American Rescue Plan Act allocates \$500 million to the HHS to assist low-income households that pay a high proportion of household income for drinking water and wastewater services. The funds under Section 2912 of American Rescue Plan Act are in addition to the funds under Section 501 of the Consolidated Appropriations Act.

II. ARGUMENT.

A. The Rate Board Has Limited Statutory Authority.

The Rate Board lacks the requisite statutory authority to grant the relief sought by Mr. Haver. That is, as a creation of the City of Philadelphia (“City”), the Board has only the powers and authority granted to it by the City in the Philadelphia Code.³ The Rate Board must act within, and cannot exceed, its jurisdiction.⁴ Jurisdiction may not be conferred by the parties where none exists.⁵ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy⁶ or grant relief. The Rate Board is authorized to approve, modify or reject proposed rates and charges.⁷ As explained below, nothing in the Philadelphia Code authorizes the Rate Board to delay the proceeding preventing its conclusion within 120 days.

B. The Rate Board Lacks the Statutory Authority to Extend the Rate Proceeding.

Mr. Haver’s request that the proceedings be delayed until determinations are made by governmental authorities is untenable. That is not to say that the issue should be ignored. It is to state, however, that the Rate Board is not authorized by the Philadelphia Code to delay or extend the statutory period for its decision on proposed rates and charges.

Section 13-101 of the Philadelphia Code (“Rate Ordinance”) directs that the decision to approve, modify or reject the proposed rates and charges shall be made in a timely manner, but no later than 120 days from the filing of notice of any proposed change in rates and charges.⁸ Under its regulations — if the Rate Board is unable to act within 120 days — PWD may establish emergency rates and charges on a

³ This general proposition is well-established in Pennsylvania law. See, *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, PUC Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. PUC*, 237 A.2d 602 (1967).

⁴ This is also a well-established proposition in Pennsylvania law. See, *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa. Super. 1945).

⁵ See, *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁶ The Pennsylvania Supreme Court has observed that “subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented. Jurisdiction is a matter of substantive law.” *Commonwealth v. Bethea*, 828 A.2d 1066, 1074 (Pa. 2003), *cert. denied*, 540 U.S. 1118 (2004). See also *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

⁷ See, Philadelphia Code § 13-101(4)(b)(iii), 4(b)(iv), 8.

⁸ See, Philadelphia Code § 13-101(4)(b)(iv), (8).

temporary basis pending a final determination by the Board.⁹ Nothing in the Philadelphia Code or the Rate Board’s Hearing Regulations authorizes the Rate Board to extend the statutory period or otherwise hold in abeyance its decision on proposed rates and charges.¹⁰ As explained below, the federal legislation does not render the Rate Board unable to act on the Department’s rate request.

C. There is No Need to Enlarge the Period for Rate Proceeding

The Department’s requests and proposals are not just about the proposed increase to base rates. Some of the proposed charges are going down. For example, the fee for reviewing post-construction stormwater management plans in Section 8.1(a)(2) of PWD Rates and Charges will go down from \$285 to \$65 upon submission, and from \$150 per hour to \$120 per hour for review time. Another important part of the general rate case is the proposal to revise the formula for the TAP-R Rate Rider in Section 10.1 of PWD Rates and Charges to include arrearage forgiveness.

The Department’s proposed rates and charges must be developed in accordance with sound utility rate making practices and consistent with the current industry standards.¹¹ The Department uses a cash basis accounting.¹² Under the “cash flow” method, rates are set by determining the appropriate levels of cash, debt service coverage and other financial metrics necessary to enable the utility to pay its bills and maintain access to the capital markets at reasonable rates.¹³

In the 2021 Rate Proceeding, the Department presents a multi-year Rate Period consisting of two fully projected test years (FPFTY). One for the period of September 1, 2021 to August 31, 2022 (“FY 2022”) and one for the period of September 1, 2022 to August 31, 2023 (“FY 2023”).

⁹ Rate Board Regulations at Section II(1)(b).

¹⁰ See Letter of May 9, 2018 to Board Members Concerning Motion for Certification of Interlocutory Appeal and Stay from Law Department (Daniel W. Cantú-Hertzler, Senior Attorney), which is posted on the Rate Board’s website at: <https://www.phila.gov/media/2018051111903/DCHLetterReStay.pdf>. This letter states in footnote 6 that: “The Rate Board would likely have the authority to enter a stay if the law afforded it no discretion but to enter a stay. In such a case, the stay would not be the cause of the delay. But that is not the case here.”

¹¹ See PWD Statement 2 at 22; PWD Statement 7A at 5-9.

¹² PWD Statement 2 at 30.

¹³ PWD Statement 2 at 30.

Nothing requires absolute certainty in a FPFTY. All forward-looking projections are subject to a number of assumptions, uncertainties and other factors. It is reasonable to expect that actual results may vary from said projections.¹⁴ The appropriate test is whether the projection is reasonable.

The federal legislation or governmental decisions with regard to the anticipated distribution of funding do not render the Rate Board unable to act on the Department's rate request. To the extent that Mr. Haver believes that PWD's projections for the Rate Period of its revenues or its revenue requirement are unreasonable due to the anticipated receipt of funds (pursuant to federal legislation), he may propose an adjustment to the PWD's revenues or revenue requirement (or both). If his proposed adjustments are measurable with a reasonable degree of accuracy and have a high probability of being in effect in the adjusted fiscal year, the Rate Board may be persuaded to adopt his proposed adjustments.¹⁵

That being said, it should be noted that there are numerous uncertainties surrounding the disposition of funds under the federal legislation. Neither the federal legislation or the Motion explain or establish the eligibility criteria, the amount, frequency, and conditions for receipt of the funds. In fact, Paragraph 8 of the Motion acknowledges that uncertainty exists as to the timing and amounts of funds that PWD will receive under the federal legislation.

D. The Rate Proceeding is Not Premature.

Mr. Haver suggests that the instant proceeding is premature given the anticipated funding of certain programs pursuant to the recent federal legislation. The Department disagrees for several reasons. Section 5-801 of the Charter establishes that the Water and Wastewater systems shall be self-sustaining. Specifically, the Charter mandates that rates and charges shall be fixed so as to yield at least an amount

¹⁴ Forecasts or projections are required, since City Council has not approved budgets for the Rate Period (and the Study Period) before the commencement of this rate proceeding. For each FY, the Department has two budgets, the operating budget and the capital budget. See PWD Statement 2 at 33-34. Both of these budgets are annually approved by City Council. See PWD Statement 2 at 33-34.

¹⁵ "It is important to understand that if the Board approves a proposed downward adjustment to the revenue requirements, that does not mean that the Board has set the revenue requirement below the cost to the Department (or lower than its target for financial stability). Rather, it means that the Board is persuaded by the participant offering the adjustment that the expenses in the [FPFTY(s)] will be lower [than the Department's projections]." 2018 Rate Determination at 38.

equal to operating expenses and debt incurred or about to be incurred by the Department.¹⁶ The Charter also intends that the determination of the Department's rates and charges be removed from political pressures.¹⁷

Notably, under the Rate Ordinance, PWD's rates and charges must be just and reasonable.¹⁸ This means that rates and charges must, among other things, (a) provide the PWD with adequate funding for both operating and capital costs (which include, but are not limited to, planned and actual debt service coverage)¹⁹ and (b) provide for PWD's financial stability over a reasonable number of years.²⁰

In the instant context, to implement rates by September 1st, the Department must commence a rate proceeding early in the calendar year (2021). This timing is based on the above-described 120-day period and the time required by the Department and other participants to present testimony, exhibits and supporting documentation, answer discovery, participate in rate hearings and brief our respective positions. Also within this limited period, the Hearing Officer must prepare her recommended decision and the Board must render its final Rate Determination. In short, there is much to be done without delay.

Please also be reminded that PWD is in a financial deficit, according to the supporting financial and accounting documentation as well as the prepared direct testimony and related schedules and exhibits proffered by the Department. This means that the utility is experiencing a revenue shortfall with rates not high enough to meet revenue requirements; and, as a consequence, forcing PWD to draw down limited

¹⁶ "The standards pursuant to which rates and charges shall be fixed shall be such as to yield to the City at least an amount equal to operating expenses and interest and sinking fund charges on any debt incurred or about to be incurred for water supply, sewage and sewage disposal purposes." Section 5-801 of the Charter. "In computing operating expenses, proportionate charges for all services performed for the Department by all departments, boards or commissions of the City are also included." *Id.*

¹⁷ See, Annotation to Section 5-801. In November, 2012, Philadelphia voters approved an amendment to the Charter to allow City Council to establish, by ordinance, an independent ratemaking board responsible for fixing and regulating rates and charges for water, sanitary sewer and stormwater services. Under the Rate Ordinance adopted by the Council, the Board replaces the Water Department as the entity responsible for setting water, wastewater and storm water rates. The Rate Ordinance, which is Rate Ordinance is Chapter 13-100 of the Philadelphia Code, became effective January 20, 2014. The Board's first rate proceeding was completed in 2016.

¹⁸ See, Philadelphia Code §13-101(4)(d). In his email serving the Motion, Mr. Haver states that "Without taking the time to review how those funds will be allocated, no just decision can be made." That statement departs from the legal standards in the Charter, the Rate Ordinance, and the City's Restated General Water and Wastewater Revenue Bond Ordinance of 1989.

¹⁹ See, Philadelphia Code §13-101(4)(a); PWD Statement 2 at p. 11-12.

²⁰ See, Philadelphia Code §13-101(2), (4)(d)

financial reserves to make up the difference. Needless to say, these circumstances are unsustainable. That is why rate relief is needed now.

The Department believes that the requested delay in the timely implementation of rate relief will harm the utility and our customers. PWD has to maintain service reliability and support its operations generally as well continue needed capital improvements. Additional revenues are needed for this purpose. Nothing in the federal legislation or the Motion contain any actual indication that the Department will receive sufficient funds to materially offset the need for the proposed increased rates. It is therefore practical (as well as consistent with the Rate Ordinance) to maintain the schedule agreed to by the participants on February 24, 2021. In any event, the participants can propose adjustments to the Department's rate request (premised upon whatever evidence they have) without delaying the rate case.

III. CONCLUSION.

Based upon the foregoing, the Department submits that the Motion for Continuance should be denied and dismissed. The circumstances presented do not justify delay by the Rate Board in acting on the proposed rates and charges.

Respectfully submitted,

/s/ Andre C. Dasent

Andre C. Dasent, Esquire
Centre Square – East Tower
1500 Market Street, 12th Floor
Philadelphia, Pennsylvania 19102
(215) 625-0555

Of Counsel:

Ji Jun, Esquire
Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

Counsel to Philadelphia Water Department