

**BEFORE THE
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

In the Matter of the Philadelphia Water Department's
Proposed Changes in Water, Wastewater and Storm-
water Rates and Related Charges

Fiscal Years 2022-2023

**PHILADELPHIA WATER DEPARTMENT'S MOTION IN LIMINE
TO LIMIT OR EXCLUDE CERTAIN PORTIONS OF THE TESTIMONY
OF ROGER D. COLTON SUBMITTED BY THE PUBLIC ADVOCATE**

TO HEARING OFFICER CHESTNUT:

The Philadelphia Water Department ("PWD" or "Water Department") submits this Motion *in Limine* ("Motion") to request that the scope of the technical hearing be limited to:

(a) exclude certain issues and proposals presented by the Public Advocate ("PA") including those related to (i) the establishment of a new customer service program, (ii) the reformulation of City established policies related to the Tiered Assistance Program ("TAP") (arrearage forgiveness), (iii) the structure and operation of TAP, and (iv) various customer service and collection related issues (liens, threshold amount for service disconnection); and

(b) strike portions of the Direct Testimony of Roger D. Colton (PA Statement 3): Part 1 (COVID-19 Emergency Relief),¹ Parts 1, 3 and 4 (TAP Operations/Implementation/Arrearage Forgiveness),² and Part 5 (Customer Service Issues).³

¹ The portion of testimony requested to be excluded/stricken relates to the Mr. Colton's proposed Emergency COVID-19 Relief Program for residential customers (Public Advocate St. 3 at 30-32); his proposed extension of the shut-off moratorium at least through June 30, 2023 (Public Advocate St. 3 at 30); and his proposed policies for the collection and settlement of debt (Public Advocate St. 3 at 30).

² The portion of testimony requested to be excluded/stricken relates to Mr. Colton's recommendations concerning the structure and operation of TAP (including proposed revisions to enrollment procedures, recertification process, tenant policies, reformulation of existing policy related to arrearage forgiveness, TAP denials and customer outreach) (Public Advocate St. 3 at 31, 52-59, 64-86).

³ The portion of testimony requested to be excluded/stricken relates to Mr. Colton's recommendations concerning language access, arrearage amount triggering service disconnection and lien policy (Public Advocate Statement 3 at 87-113).

By this Motion, the Water Department contends that the issues raised by Mr. Colton concerning COVID-19 relief, the structure and operation of TAP, and customer service issues are beyond the scope of a rate proceeding before the Philadelphia Water, Sewer and Storm Water Rate Board (“Board” or “Rate Board”). The Public Advocate is free to present testimony regarding TAP cost recovery, TAP administrative costs and the TAP Rider, as to which the Water Department has no objection.

In support hereof, PWD states as follows:

I. BACKGROUND

A. Procedural History.

1. The Water Department filed its Advance Notice of proposed changes in rates and charges for Fiscal Year 2022 and Fiscal Year 2023 with Philadelphia City Council and the Rate Board on January 15, 2021 (together with extensive supporting documentation, prepared written testimony and exhibits). Thereafter, on February 16, 2021, the PWD filed its Formal Notice of proposed changes in rates and charges with Rate Board and the Department of Records.

2. On March 22, 2021, consistent with the procedural schedule set by the Hearing Officer, the Public Advocate filed, *inter alia*, the prepared written testimony of Roger D. Colton (Public Advocate Statement No. 3).

3. Mr. Colton’s testimony is comprised of seven Parts:

- Part 1 – COVID-19 and Emergency Relief
- Part 2 – TAP Rate Issues
- Part 3 – The TAP Arrearage Forgiveness Program
- Part 4 – TAP Implementation Needs
- Part 5 – Customer Service Issues
- Part 6 – Collection Fees Imposed on TAP Participants
- Part 7 – Economic Development Impacts of PWD Infrastructure Investment

B. Mr. Colton’s Recommendations in Parts I, III, IV and V of His Testimony Should be Excluded and Stricken.

4. Part 1 of Mr. Colton’s testimony includes the following recommendations (i) the implementation of an Emergency COVID-19 Relief Program for residential customers;⁴ (ii) an extended moratorium on utility shut-offs until June 30, 2023;⁵ (iii) policies relating to the abatement and settlement of debt for payment troubled customers;⁶ and (iv) policies related to processes for TAP application and recertification.⁷

5. Parts 1, 3 and 4 of Mr. Colton’s testimony also include recommendations regarding both the structure and operation of TAP.⁸ Mr. Colton suggests modifications to TAP enrollment procedures, the TAP recertification process, tenant policies and customer outreach efforts. He also recommends the reformulation of City policy with regard to arrearage forgiveness.

6. Part 5 of Mr. Colton’s testimony includes recommendations related to customer service issues.⁹ Mr. Colton’s proposals include modifications to PWD’s language access plan, policy recommendations concerning the arrearage amount at which disconnection is triggered and lien policy.¹⁰

7. All recommendations in the subject areas summarized above are not appropriately raised in this rate proceeding because the Rate Board does not have authority to rule on these matters. The Hearing Officer may exclude irrelevant testimony and evidence to direct customer service improvements. In view of the above, designated pages of Public Advocate Statement 3, Parts 1, 3, 4 and 5 should be excluded as beyond the scope of the rate proceeding.

⁴ Public Advocate St. 3 at 30-32.

⁵ Public Advocate St. 3 at 30.

⁶ Public Advocate St. 3 at 30.

⁷ Public Advocate St. 3 at 31.

⁸ Public Advocate St. 3 at 30, 43-59, 64-86.

⁹ Public Advocate St. 3 at 87-113.

¹⁰ Public Advocate St. 3 at 87-113.

II. LEGAL STANDARDS

A. The Rate Board Has Limited Jurisdiction.

8. The Law Department advised,¹¹ *inter alia*, that: (a) the Rate Board has authority to fix and regulate rates and charges, which includes the power to approve or deny any rate increase consistent with the requirements of the Philadelphia Home Rule Charter and the Philadelphia Code; and (b) the Rate Board does not have the power to direct how the Water Department provides service.

9. The Law Department also advised that “[u]nder the Charter, only the Law Department has authority to settle delinquent debts, and the Rate Board’s authority for ‘fixing and regulating rates and charges’ does not extend to directing the Revenue and Law Departments in the collection (or abatement) of those amounts. Rather, the Rate Board should set overall rates and charges, taking into account the impact on revenues of the Administration’s abatement policies.”¹²

10. The Board accepted the advice of the Law Department.¹³

11. The Board’s Regulations authorize the Hearing Officer to control the receipt of testimony and evidence into the record, including the exclusion of irrelevant testimony or evidence.¹⁴

B. The Hearing Officer May Exclude Irrelevant Testimony and Evidence.

12. The Hearing Officer has the authority to exclude evidence that is beyond the proper scope of a rate proceedings and focus the testimony and evidence on the matters properly at issue. The same

¹¹ 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39 and Appendix B.

¹² 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39 and Appendix B.

¹³ 2016 Determination of Water Department Rates and Charges for FY 2017-2018 at 39.

¹⁴ Board Regulations at Section II.B.1.b.4, II.B.6.b.6.

authority exists for Administrative Law Judges (“ALJs”) before the Pennsylvania Public Utility Commission.¹⁵ For example, in *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*,¹⁶ the ALJ struck pre-served written testimony regarding proposals to undertake a cost-benefit analysis and other studies, noting that such issues were beyond the scope of that proceeding.¹⁷

III. REQUEST FOR MOTION IN LIMINE

13. This rate proceeding is related to the Water Department’s proposed changes in rates and charges for Fiscal Year 2022 and Fiscal Year 2023.

14. Mr. Colton’s testimony, on behalf of the Public Advocate, proposes an Emergency COVID-19 Relief Program for residential customers (Part 1);¹⁸ such testimony is **not** related to the granting or denying of PWD’s proposed rate increase.

15. Mr. Colton’s testimony also proposes the extension of PWD’s moratorium on nonpayment shutoffs at least through June 30, 2023 (Part 1);¹⁹ such testimony relates to City policy and administrative functions and is **not** related to the granting or denying of PWD’s proposed rate increase.

16. Mr. Colton’s testimony on COVID-19 relief also relates to the collection and settlement of debt²⁰ for payment troubled customers (Part 1) which is outside of the Rate Board’s jurisdiction; such testimony relates to City policy and administrative functions and is **not** related to the granting or denying of

¹⁵ The Board’s Regulations at Section II.B.5.b.5 directs the use of procedural standards analogous to those utilized in utility ratemaking proceedings at the Pennsylvania Public Utility Commission. Those standards allow administrative law judges to exclude testimony and evidence. *See* 52 Pa. Code § 5.403-5.403. Moreover, while neither the PUC nor the Rate Board are bound by the rules of evidence, 2 Pa. C.S. § 505, 554, this does not mean that such proceedings are evidentiary free zones. The rules of evidence can provide guidance: Under the Pennsylvania Rules of Evidence, testimony and evidence are relevant if (a) they have any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action of the tribunal. *See* Pa. R.E. 401.

¹⁶ Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015).

¹⁷ *See also Pa. Public Utility Commission, et al. v. Pennsylvania American Water Co.*, Docket No. R-00932670 *et al.*, 1994 Pa. PUC LEXIS 120 at *158 (Final Order entered July 26, 1994) (adopting ALJ’s conclusion that the issues raised by OCA were outside the scope of the rate case and would be better addressed in a statewide rulemaking proceeding); *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) (“The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.”).

¹⁸ Public Advocate St. 3 at 30-32.

¹⁹ Public Advocate St. 3 at 30.

²⁰ Public Advocate St. 3 at 30.

PWD's proposed rate increase. As the Rate Board does not have the authority to direct how the Water Department collects (or abates) delinquent debts or customer service issues, the testimony should be excluded from the scope of the rate proceeding.

17. Mr. Colton's testimony also includes recommendations regarding both the structure and operation of TAP (Parts 1, 3 and 4).²¹ Mr. Colton suggests modifications to TAP enrollment procedures, recertification process, tenant policies and customer outreach efforts. He also recommends the reformulation of City policy with regard to arrearage forgiveness. Such testimony relates to the administration of TAP and how services to customers are provided and is **not** related to granting or denying PWD's proposed rate increase. As the Rate Board does not have the authority to direct how PWD/WRB provides service, portions of Parts 1, 3 and 4 of Mr. Colton's testimony addressing these issues should be excluded from this proceeding.

18. Part 5 of Mr. Colton's testimony is described by Mr. Colton as addressing "Customer Service Issues."²² Mr. Colton's proposals include modifications to PWD's language access plan, a modification of the arrearage amount at which disconnection is triggered and lien policy. All recommendations in this subject area are not appropriately raised in this rate proceeding because the Rate Board does not have authority to direct customer service improvements. In view of the above, Part V of Mr. Colton's testimony should be excluded as beyond the scope of the rate proceeding.

19. Mr. Colton's testimony as to all of the aforementioned issues and proposals is to direct how the Water Department (and by extension the WRB) provides service to its customers (new assistance programs, TAP operation and administration) and policies related to how PWD collects (or abates) delinquent debts.

20. If Mr. Colton is permitted to testify at the Technical Hearings on said issues and proposals, he will be raising issues and proposals that are beyond the scope of the subject rate proceeding and are,

²¹ Public Advocate St. 3 at 31, 43-59, 64-86.

²² Public Advocate St. 3 at 87-113.

therefore, legally irrelevant. This will cause harm to the PWD as it will be forced to spend limited hearing time and resources to respond to matters that are properly excluded from the scope of the rate proceeding.

WHEREFORE, on the basis of the foregoing, PWD respectfully requests that the Hearing Officer issue an order granting the Motion *in Limine* and providing the following relief:

(a) Limiting the scope of this proceeding to exclude the issues and proposals presented by the Public Advocate regarding (i) the COVID-19 Emergency Relief Program and related issues (Part 1 of Public Advocate Statement No. 3), (ii) the reformulation of established City policies related to arrearage forgiveness (Part 3 of Public Advocate Statement 3), (iii) the structure and operation of TAP (Part 4 of Public Advocate Statement No. 3) and (iv) customer service and collection related issues (Part 5 of Public Advocate Statement No. 3); and

(b) Striking Part 1, Public Advocate Statement No. 3 at 30-32 (COVID-19 Emergency Relief); striking Part 3, Public Advocate Statement 3 at 43-59 (reformulation of City policy related to arrearage forgiveness); striking Part 4, Public Advocate Statement No. 3 at 64-86 (the structure and operation of TAP); and striking Part 5, Public Advocate Statement No. 3 at 87-113 (customer service and collection related issues), of the direct testimony submitted by Roger D. Colton on behalf of Public Advocate relating to said topics so as to preclude the presentation of testimony and evidence on these topics at the technical hearings.

Respectfully submitted,

/s/ Andre C. Dasent

Andre C. Dasent, Esquire
Centre Square – East Tower
1500 Market Street, 12th Floor
Philadelphia, PA 19102

Carl R. Schultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101

Date: April 6, 2021

