

**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 Stormwater Rates and Related Charges	Fiscal Years 2022-2023
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**PHILADELPHIA WATER DEPARTMENT'S MOTION IN LIMINE
TO LIMIT OR EXCLUDE CERTAIN PORTIONS OF TESTIMONY
SUBMITTED BY LANCE HAVER**

TO HEARING OFFICER CHESTNUT:

The Philadelphia Water Department (“PWD” or “Water Department”) respectfully submits this Motion *in Limine* (“Motion”) to request that certain portions of the direct testimony of Lance Haver be barred from admission in the above-referenced proceeding. In broad terms, Mr. Haver claimed in his testimony that the public hearings held in this matter were not legitimate public hearings because, as of March 21, 2021, PWD did not know whether it would receive funds under the American Rescue Plan Act.¹ Mr. Haver, a non-attorney, opined that since the public hearings were not “real,” that no rate increase may be granted in this proceeding.² By this Motion, the Water Department contends that the legal conclusions asserted in Mr. Haver’s testimony should be excluded from admission and be disregarded in the disposition of this rate proceeding before the Philadelphia Water, Sewer and Storm Water Rate Board (“Board” or “Rate Board”).

In support hereof, PWD states as follows:

II. 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

¹ Haver Direct Testimony at ¶¶ 12, 14, 15-18.

² Haver Direct Testimony at ¶¶ 12, 16.

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. Public hearings were held in this proceeding at 1:00 p.m. and 6 p.m. on March 16, 2021 and at 1:00 p.m. and 6 p.m. on March 18, 2021.

3. On March 21, 2021, consistent with the procedural schedule set by the Hearing Officer, Lance Haver filed his prepared written testimony.

4. Mr. Haver asserted the following legal conclusions in his direct testimony: (1) the public hearings held by PWD were not “real”; (2) uncertainty surrounding the funds that may be available to PWD under the American Rescue Plan Act legally prevented the public hearings from being “real”; (3) no rate increase may be granted in this proceeding because the public hearings were not “legal” or “real”; and (4) that “no other legally permissible testimony can be proffered at this time.”³

B. Requirement to Hold Public Hearings.

5. The Rate Board’s regulations establish the requirements for public hearings.

6. The regulations require the Rate Board, or a designated member or Hearing Officer on its behalf, to hold public hearings to: (1) ensure an open and transparent rate proceeding; (2) make Departmental personnel available to answer relevant questions about the proposed changes in rates and charges; (3) permit the Department and any person or entity affected by the proposed rates and charges to provide information to the Board regarding any change in rates or charges as proposed by the Department; and (4) to assist the Board in the collection of information relevant to the Department’s proposed changes in rates and charges.⁴

³ Haver Direct Testimony at ¶¶ 12, 14, 15-18.

⁴ Hearing Regulations at Section II.B.4.

7. The Rate Board's regulations also establish requirements regarding notice, structure and presentation at the public hearings and technical hearings.⁵

III. LEGAL STANDARDS

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

8. 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.⁶

9. The Hearing Officer has the authority to exclude evidence and focus the testimony and evidence on the matters properly at issue.⁷ The same authority exists for Administrative Law Judges ("ALJs") before the Pennsylvania Public Utility Commission.⁸ For example, in *PUC v. Pennsylvania Gas and Water Company - Water Division*, the Commission upheld evidentiary rulings excluding testimony dedicated to setting forth a legal interpretation and a legal conclusion.⁹

10. Legal opinions and conclusions are not the proper subject of evidentiary proceedings. Argument as to a legal conclusion should properly be presented in a motion or brief, not in the form of testimony.¹⁰

⁵ Hearing Regulations at Section II.B.4 and II.B.5.b.5.

⁶ Hearing Regulations at Section II.B.1.b.4 and II.B.6.b.6.

⁷ *Id.*

⁸ The Board's Regulations at Section II.B.5.b.5 direct 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-fire zones. The rules of evidence can provide guidance: Under the Pennsylvania rules of evidence, testimony and evidence relevant if (a) it has 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. *See* Pa.R.E. 401.

⁹ *PUC v. Pennsylvania Gas and Water Company - Water Division*, Docket No. R-850178, Opinion and Order issued February 4, 1986; 1986 Pa. PUC LEXIS 146.

¹⁰ *Id.*

IV. REQUEST FOR MOTION IN LIMINE

11. Portions of Mr. Haver's direct testimony call in to question the legal sufficiency of the public hearings held in this proceeding on March 16 and March 18, 2021, and the procedural implications of the alleged legal insufficiency of the public hearings.¹¹

12. Mr. Haver's direct testimony before the Rate Board is intended to assist the Rate Board in deciding the interpretation of the public hearing requirement in the regulations. 42 Pa.C.S. § 2524; *Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162 (Pa.2007) (finding that the character of the actions taken by the individual in question is a significant factor in the determination of what constitutes the practice of law; and that the practice of law is implicated by the holding out of oneself to the public as competent to exercise legal judgment and the implication that he or she has the technical competence to analyze legal problems and the requisite character qualifications to act in a representative capacity).

13. Rather than presenting factual evidence, Mr. Haver offers his legal opinions and conclusions. Legal opinions and conclusions are not proper subject of evidentiary proceedings.

14. The portions of Mr. Haver's direct testimony that contain legal opinions and conclusions (Paragraphs 12, 14, 15-18) should be excluded from the record.

15. Upon information and belief, Mr. Haver is not an attorney admitted to practice before the Supreme Court of Pennsylvania.¹² In addition, Mr. Haver has not indicated that he is acting as an attorney in this proceeding.¹³

16. Mr. Haver's testimony is dedicated to setting forth legal interpretations and conclusions that are not admissible as expert testimony. Mr. Haver may raise legal arguments in his Brief. But, the submission of legal interpretations and conclusions in the form of testimony is

¹¹ Haver Direct Testimony at ¶¶ 12, 14, 15-18.

¹² <https://www.padisiplinaryboard.org/for-the-public/find-attorney>. Moreover, if Mr. Haver is an attorney, he has not entered an appearance as an attorney in this proceeding (as an attorney licensed in Pennsylvania) and/or has not sought permission as an attorney licensed in another jurisdiction to appear before the Board. *See* 204 Pa. Code Part IV, Ch 71, Subchapter C, Rule 301 (admission *pro hac vice*); 204 Pa. Code §§ 81.501-81.506 (admission *pro hac vice*). *See also* 52 Pa. Code §§ 1.24, 1.25.

¹³ *See* Haver Direct Testimony at ¶ 2-3.

improper. Inclusion of such legal interpretations and conclusions in testimony would be improper, even if Mr. Haver were an attorney (which he is not).¹⁴

17. If Mr. Haver is permitted to testify at the technical hearings on the aforementioned legal opinions and conclusions, he will be inappropriately raising issues legal issues in a role reserved for fact witnesses. This will cause harm to the PWD since it will be forced to spend time and resources to cross-examine a non-attorney on legal opinions that are properly excluded from the scope of evidentiary hearings.

WHEREFORE, on the basis of the foregoing, PWD respectfully requests that the Hearing Officer: (1) bar from admission the legal conclusions presented by Lance Haver in Paragraphs 12, 14, 15-18 of his direct testimony; (2) preclude presentation of testimony on these legal conclusions at the technical hearings; (3) disregard said testimony in the disposition of this proceeding.

Respectfully submitted,

/s/ Andre C. Dasent

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¹⁴ *PUC v. Pennsylvania Gas and Water Company - Water Division*, Docket No. R-850178, Opinion and Order issued February 4, 1986; 1986 Pa. PUC LEXIS 146 (upholding decision to strike testimony of attorney, citing in part to argument that an attorney that is a witness must testify under the same restraints as other witnesses).