

**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 THE TESTIMONY
OF MICHAEL SKIENDZIELEWSKI**

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 exclude certain issues and proposals to be presented by Michael Skiendzielewski related to:

- (i) allegations of "financial impropriety" in the operation, management and disposition of the HELP Loan program, (ii) allegations of misconduct by Counsel for Water Revenue Board ("WRB"), and (iii) allegations related to the 2017 investigation by Mr. Cantu-Hertzler.

By this Motion, the Water Department contends that the issues raised by Mr. Skiendzielewski concerning the above-described issues are beyond the scope of a rate proceeding before the Philadelphia Water, Sewer and Storm Water Rate Board ("Board" or "Rate Board") and that Mr. Skiendzielewski should be precluded from the presentation of testimony and evidence on the above-described topics at the technical hearings.

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. Prepared written testimony by participants was due on March 22, 2021, consistent with the procedural schedule set by the Hearing Officer.

3. Mr. Skiendzielewski did not submit prepared written testimony on March 22, 2021.

4. On April 5, 2021, via an email exchange with the Hearing Officer, Mr. Skiendzielewski raised the issues described in the initial paragraph of this Motion.

5. On April 5, 2021, Mr. Skiendzielewski dispatched discovery requests to the Department seeking information related to the operation, management and disposition of the HELP Loan program over the last 12 years. The Department's response is due on Monday, April 12, 2021 (which is seven days after the service of the discovery requests).

6. Technical hearings are scheduled to commence on April 13, 2021.

B. Testimony At The Technical Hearing By Mr. Skiendzielewski On The Above-Described Issues Should Be Excluded As Beyond The Scope Of The Rate Proceeding

7. The topics identified and described-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, testimony at the technical hearing by Mr. Skiendzielewski on the above-described issues should be excluded as beyond the scope of the rate proceeding.

II. LEGAL STANDARDS

A. The Rate Board Has Limited Jurisdiction.

8. The Law Department advised,¹ *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.

¹ 2016 Determination of Water Department Rates and Charges for FY 2017-2018, at 39 and Appendix B.

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.”²

10. The Board accepted the advice of the Law Department.³

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.⁴

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

12. The Hearing Officer also 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 authority exists for Administrative Law Judges (“ALJs”) before the Pennsylvania Public Utility Commission.⁵ For example, in *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*,⁶ 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.⁷

² 2016 Determination of Water Department Rates and Charges for FY 2017-2018, at 39 and Appendix B.

³ 2016 Determination of Water Department Rates and Charges for FY 2017-2018, at 39.

⁴ Rate Board Regulations at § II.B.1.b.4 and II.B.6.b.6.

⁵ 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 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.

⁶ Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015).

⁷ *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.”).

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. Skiendzielewski proposes to raise issues that are **not** related to the granting or denying of PWD's proposed rate increase.

15. As the Rate Board does not have the authority to direct how the Water Department operates programs, testimony at the technical hearing by Mr. Skiendzielewski on allegations of "financial impropriety" in the operation, management and disposition of the HELP Loan program should be excluded from the scope of the rate proceeding. The issue to be presented by Mr. Skiendzielewski relates to the administration of a program and how services to customers are provided. That issue 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.

16. As the Rate Board does not have the authority to investigate, administer or enforce public integrity laws or ethical codes, testimony at the technical hearing by Mr. Skiendzielewski on allegations of misconduct by Counsel for WRB or allegations related to the 2017 investigation by Mr. Cantu-Hertler (or both) should be excluded from the scope of the rate proceeding. These issues to be presented by Mr. Skiendzielewski do **not** relate to granting or denying PWD's proposed rate increase.

17. If Mr. Skiendzielewski 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, therefore, legally irrelevant. This will cause harm to the PWD since the PWD 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:

Limiting the scope of this proceeding to exclude the issues and proposals presented by Mr. Skiendzielewski regarding:

- (i) allegations of “financial impropriety” in the operation, management and disposition of the HELP Loan program, (ii) allegations of misconduct by Counsel for Water Revenue Board (“WRB”), and (iii) allegations related to the 2017 investigation by Mr. Cantu-Hertzler.

The requested relief would preclude the presentation of testimony and evidence on these topics at the technical hearings.

Respectfully submitted,

/s/ Andre C. Dasent

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