



April 9, 2021

Ms. Marlane Chestnut, Hearing Officer  
c/o Philadelphia Water Sewer and Storm Water Rate Board  
1515 Arch Street, 17<sup>th</sup> Floor  
Philadelphia, PA 19102-1595

RE: Philadelphia Water Department Proposed Increases in Water, Sewer and Storm Water Rates and Charges, FY 2022-2023

**Memorandum in Lieu of Answer in Support of Lance Haver April 5, 2021  
Submission (Request for Review of Material Question)**

Mr. Lance Haver, *pro se*, has filed a document styled as a “Direct Appeal of PWD Hearing Examiner Chestnut’s Decision To Not Rule On Lance Haver’s Motion For Continuance” on April 5, 2021 (April 5 Filing). In general, the April 5 Filing seeks the Board’s review and response to his underlying motion, submitted on March 15, 2021, to continue the hearings in the matter of the Philadelphia Water Department’s requests for increased rates and charges for FY 2022 and 2023 (Motion for Continuance). For the reasons set forth in this Memorandum, the Public Advocate submits that Mr. Haver’s April 5 Filing raises a material question necessitating interlocutory review by the Board.

As background, the Board’s regulations do not bind the Hearing Officer to formal rules of procedure, but “generally employ procedural standards analogous to those utilized in utility ratemaking proceedings at the Pennsylvania Public Utility Commission.”<sup>1</sup> The most analogous procedure applicable in PUC utility ratemaking proceedings is the process for seeking interlocutory review set forth in PUC regulations.<sup>2</sup>

The Public Advocate submits that Mr. Haver’s April 5 Filing should be considered by the Hearing Officer<sup>5</sup> and/or the Board as a petition to review and answer a material question.<sup>6</sup> Such

---

<sup>1</sup> Board Reg. § II.B.5(b)(5).

<sup>2</sup> See 52 Pa. Code §§5.301, et seq.

<sup>5</sup> As provided in 52 Pa. Code §5.305, even if the Hearing Officer were to consider Mr. Haver’s April 5 Filing, styled as an “appeal” to be premature, the Hearing Officer is nonetheless authorized to submit a material question to the Board for its review and consideration.

<sup>6</sup> 52 Pa. Code § 5.302.



a petition does not require an underlying interlocutory order, but must only identify a material question which has arisen or is likely to arise.<sup>7</sup>

The standards for interlocutory review by the PUC are well established. The PUC’s Regulations require that the petitioning party “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.”<sup>8</sup> The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, whether the error and any prejudice flowing therefrom could not otherwise be satisfactorily cured during the normal review process.<sup>9</sup>

The Public Advocate shares Mr. Haver’s concern regarding the ability of the parties to PWD’s rate increase proceeding to evaluate projected revenue requirements from rates in light of forthcoming and existing stimulus funds, expected shifts in costs between PWD and other City departments, as well as the pronouncement that the City will reduce PWD’s pension fund liability by more than \$25 million annually starting in FY 2022.<sup>10</sup> PWD failed to identify any impacts on revenue requirements based on these factors in its Advance and Formal Notices.<sup>11</sup>

Although the Public Advocate’s direct testimony criticized PWD’s omission of any stimulus fund receipts from its projections, the failure to identify and disclose ongoing analyses of pension expense adjustments and potential shifts in costs among City departments prejudices the Public Advocate and other parties, who were unable to conduct discovery prior to the deadline for non-PWD party direct testimony. The Public Advocate is in the process of conducting further discovery and review regarding the expected cost shifts and reduction in future pension fund liability. However, the Public Advocate and other parties had only a few days to conduct discovery on these new disclosures and the parties will not have an opportunity to present further testimony based on discovery responses. In essence, these late disclosures

---

<sup>7</sup> See., e.g., *D’Ignazio’s Townhouse, Inc. v. Pa. PUC*, 60 Pa. P.U.C. 591 (Nov. 27, 1985) (prosecutorial staff seeking review of scope of evidentiary hearing on remand). The Public Advocate notes that holding in abeyance a decision on Mr. Haver’s Motion for Continuance may not constitute an interlocutory order within the meaning of the Judicial Code. See 42 Pa. C.S. §702. But the framework of the Judicial Code does not apply to Mr. Haver’s April 5 Filing. Instead, because the Board’s regulations require utilizing procedures analogous to those of the PUC, Mr. Haver’s April 5 Filing should be liberally construed “to secure the just, speedy and inexpensive determination” by the Board. See, e.g., 52 Pa. Code §1.2(a), (c) and (d).

<sup>8</sup> 52 Pa. Code § 5.302(a).

<sup>9</sup> See *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

<sup>10</sup> See March 26, 2021 letter from Director of Finance Rob Dubow to Deputy Water Commissioner La Buda, available at: <https://www.phila.gov/media/20210405171512/Water-memo-3.30.21.pdf>. Note that, although dated March 26, 2021, this letter was not shared with the rate case participants until March 30, 2021.

<sup>11</sup> Mr. Haver correctly observes that, because these circumstances were not publicly acknowledged until late March, the public will also be deprived of a meaningful opportunity to comment on the significant, and acknowledged, changes to PWD’s financial outlook resulting from the Director of Finance’s correspondence.



materially modify PWD's projected revenues, expenses and revenue requirements, yet they have not been presented by PWD in a manner which provides other parties sufficient opportunity to respond.

Viewed in this light, Mr. Haver's April 5 Filing raises the following material question for the Board:

Given the recognized certainty<sup>12</sup> that PWD's projected revenue requirements from rates are overstated, based on the failure to (1) include reasonable estimates of stimulus funding, (2) take into account costs shifted to other departments, and (3) reflect significantly reduced future pension expenses, could the prejudice to the parties satisfactorily be cured during the normal review process?

The Public Advocate respectfully submits that the answer to this question is "no." Proceeding without any modification would prevent the Public Advocate from completing the analysis necessary to diligently, expeditiously and effectively represent the interests of small user customers. Furthermore, proceeding while substantial questions remain unanswered risks violating the Board's responsibility to oversee an open and transparent rate proceeding. Finally, advancing toward a final determination without resolving significant questions about the reasonableness of PWD's revenue requirements jeopardizes the Board's ability to fulfill its Constitutionally-based mandate to ensure that customers are charged just and reasonable rates, established on a reasonably scientific basis.

Undoubtedly, PWD will submit that the Board cannot suspend the proceeding or extend the duration of the rate case due to the requirement in the Philadelphia Code that the Board approve, modify or reject the proposed rates within 120 days.<sup>13</sup> But the provisions of the Board's ordinance do not *actually* oblige the Board to render a decision within 120 days. The Philadelphia Code's 120-day period for the Board to render a decision is not an absolute deadline. In order for the 120-day period to be an absolute deadline, PWD must *be entitled to a* final decision within 120 days. As a matter of statutory interpretation and construction,<sup>14</sup> it is clear that is not the case.

The Philadelphia Code sets forth with specificity the consequences that flow from the Board's inability to render its decision within 120 days. The Philadelphia Code is clear that the Board is not required to render a final determination within 120 days because, if it fails to do so, PWD is permitted (but not required) to implement emergency rates and charges "on a temporary basis pending a final determination by the Board."<sup>15</sup> Properly construing the Philadelphia Code

---

<sup>12</sup> See March 30, 2021 letter from Commissioner Randy E. Hayman to Hon. Darrell Clarke, City Council President, available at: <https://www.phila.gov/media/20210405171316/Hayman-Clarke-letter-response.pdf>.

<sup>13</sup> Phila. Code §13-101(8).

<sup>14</sup> *City of Philadelphia v. Litvin*, 235 A.2d 157, 159 (Pa.Super.1967) ("In construing a city ordinance, the same rules are applied as those which govern the construction of statutes.")

<sup>15</sup> Phila. Code §13-101(8).



requires giving effect to the legislature’s intent, reflected in all of the law’s provisions.<sup>16</sup> If the 120-day deadline imposed an absolute obligation on the Board, City Council’s express authorization of temporary emergency rates would be rendered surplusage.

Furthermore, state and federal case law supports the conclusion that the 120-day period cannot constitute a mandatory deadline. For example, the protest of a franchise application under the Board of Vehicles Act, which also requires a decision to be rendered within 120 days (unless extension is agreed to), has been held to be mandatory since the failure to render a timely decision constitutes a deemed grant of such franchise. Such a deemed grant is appealable. See, e.g., Ford Motor Co. v. Bd. Of Vehicle Mfrs., Dealers and Salespersons, 528 A.2d 1002 (Pa. Cmwlth. 1987). Notably, the Ford Motor Co. case distinguished Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), a Supreme Court case which reversed and remanded the Illinois Supreme Court’s determination that an administrative agency’s failure to conduct a required hearing on an employment discrimination claim within a mandated 120-day period deprived the agency of jurisdiction. The Logan Court specifically held that an employee is entitled to have the administrative agency consider the merits of his charge, notwithstanding the expiration of the statutorily-mandated review period, because to hold otherwise would deprive the employee of access to the appropriate review process.

Viewed together, these cases establish that a party entitled to a review process is entitled to such review notwithstanding the lapse of a deadline for agency action, unless the underlying statute provides that the agency’s failure to act results in a final determination. But that is not the case here. The failure of the Board to act within 120-days results only in the temporary authorization of emergency rates and charges subject to further review by the Board.

Finally, PWD will likely assert that, even if the Board has reservations about proceeding according to the schedule that has been established, the uncertainty associated with PWD’s revenue requirements projections does not render it “unable to act” on the proposed rates.<sup>17</sup> Adopting this view would place the Board in the position of ruling on PWD’s proposed rates with the absolute knowledge and understanding that not only are they incorrect (by its own Commissioner’s admission), but that information required to evaluate them has not been made available. This circumstance is significantly different from that faced in the 2018 Rate Proceeding, when the Board felt confident that all necessary information was on the record to enable it to fill gaps in the Hearing Officer’s Report.<sup>18</sup> The Board is only able to act when it is capable of determining just and reasonable rates on the basis of a complete and meaningful record, established in an open and transparent manner consistent with law. Were the Board to

---

<sup>16</sup> 1 Pa. C.S. § 1921(a).

<sup>17</sup> See Phila. Code § 13-101(8).

<sup>18</sup> See Phila. Water, Sewer and Storm Water Rate Board Special Meeting Notes, 6/25/2018, at 2. The Public Advocate does not in any way concede that the Board’s 2018 action was lawful; such action remains the subject of appeal in Public Advocate v. Phila. Water, Sewer and Storm Water Rate Board, Docket No. 1070 CD 2019 (Pa. Commw. Ct.).



act on the basis of the record of this proceeding, the Public Advocate submits that it would have no choice but to reject PWD's proposed rate increase.

Failing to provide the parties an opportunity to evaluate the circumstances surrounding the Finance Director's March 26, 2021 letter would impermissibly prejudice the parties by limiting their ability to fully participate in the technical review process. Technical hearings should be held in abeyance until PWD's actual revenue requirements can be reasonably ascertained. Correspondingly, failing to fully evaluate these circumstances threatens the openness and transparency with which the Board is required to act. For all of the foregoing reasons, the Public Advocate submits that the April 5 Filing raises a material question, necessitating interlocutory review by the Board, and requiring modification to the procedural schedule so as to grant additional time for the parties to evaluate PWD's potential need, if any, for additional rate relief.<sup>19</sup> As described above, should the Board fail to authorize such additional time, the Public Advocate submits that the Board cannot approve or modify PWD's rate request, but must instead reject it.

Sincerely,

A handwritten signature in black ink, appearing to read 'RWB', with a long horizontal flourish extending to the right.

Robert W. Ballenger  
*For the Public Advocate*

cc. Service list

---

<sup>19</sup> Such extension of time may provide the parties additional opportunities to explore settlement alternatives in this proceeding as well.