

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
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**PHILADELPHIA WATER DEPARTMENT'S
MEMORANDUM IN OPPOSITION TO
LANCE HAVER'S MOTION FOR REMOVAL OF SCHEDULE ML-10**

I. INTRODUCTION

This memorandum is submitted on behalf of the Philadelphia Water Department (“Department” or “PWD”) in response to Lance Haver’s Motion (“Removal Motion”) requesting the exclusion from the record of (i) a memorandum, dated April 26, 2021, from the City Director of Finance to Melissa LaBuda regarding, among other things, the availability of American Rescue Plan Act (“ARPA”) funding for the Department (“Schedule ML-10” or the “Memorandum”); and (ii) related rebuttal testimony concerning the prospect of PWD receiving federal stimulus funding.

In the Removal Motion, Mr. Haver specifically requests, *inter alia*, that the Hearing Officer remove Schedule ML-10 from the record.¹ His request also encompasses the exclusion of testimony in PWD Rebuttal Statement 1 that refers to Schedule ML-10.²

¹ Mr. Haver previously requested a continuance of these proceedings, as described in the Section I.C (Order of Proceedings) of the Department’s Main Brief. That “Continuance Motion” was held in abeyance. Hearing Officer’s Determination Re: Haver Motion for Continuance, <https://www.phila.gov/media/20210325171439/Hearing-Officer-Decision-on-Haver-Motion.pdf>. Mr. Haver filed and later withdrew an appeal regarding the Continuance Motion. To the extent that Mr. Haver did not withdraw the Continuance Motion, the Continuance Motion is still pending with the Hearing Officer – as noted in Section IV.E.4 of the Department’s Brief.

² The Removal Motion fails to provide any citations in connection with PWD Rebuttal Statement 1.

The timing of the Removal Motion suggests that Mr. Haver is attempting to gain a tactical advantage. The Department's rebuttal testimony, which included Schedule ML-10, was posted on the Rate Board's website on April 7, 2021.³ The technical hearing was held on April 30, 2021. During the technical hearing, Mr. Haver did not conduct any cross-examination on Schedule ML-10. Instead, Mr. Haver waited until the eve of the day for the filing of Briefs to file the Removal Motion. As explained below, the Removal Motion should be denied and dismissed with prejudice.

II. ARGUMENT

A. Schedule ML-10 is Material and Relevant.

Mr. Haver's request to exclude Schedule ML-10 from the record should be denied, as this document addresses key issues in the rate proceeding, including among other things, the likelihood of PWD receiving ARPA and other federal stimulus funding.⁴

ARPA Funding Still Unknown

ARPA was introduced (February 24, 2021) and passed (March 11, 2021) during the pendency of this proceeding. As explained Section I.C (footnote 26) of the Department's Brief, ARPA provides funds for infrastructure improvements (Section 9901) and customer assistance (Section 2912).⁵

The bulk of ARPA funds will be used for infrastructure improvements. However, certain funds may be used for different purposes, such as for the provision of government services

³ PWD Rebuttal Statement 1 (Sections X and XI) at 37-42 and Schedule ML-10.

⁴ The Memorandum addresses the likelihood of PWD receiving ARPA and other federal stimulus funding through the City and also indicates that the allocation of pension fund responsibility to the Water Fund will be lower by roughly \$25 million annually, beginning in FY 2022. This is a significant part of the rate case (i.e., triggering materially lower revenue requirements in FY 2022 and 2023).

⁵ See also, Removal Motion at ¶ 2 and 4.

related to the COVID-19 public health emergency given the reduction in government revenues relative to the most recent full fiscal year of Philadelphia.⁶

The potential amounts of funding under ARPA and other federal legislation could not be treated as revenue by the Department for the Rate Period, since the rate filing predated the above federal legislation; and, to date, there is no reasonable estimate of the amount of funding available for PWD. To be sure, rate setting is prospective, but projections must be reasonable. As explained in the Department's Brief, it is not appropriate to make an upward adjustment to the Department's revenues based on the potential receipt of funds under ARPA or other federal legislation. We just do not know enough to make a reasonable projection, at present.⁷

The Removal Motion acknowledges that the availability of Federal stimulus funding for the Department under ARPA is speculative.⁸ The same was also true, earlier in the case, when Mr. Haver's Continuance Motion was filed. None the less, Mr. Haver pursues this Motion.

Schedule ML-10⁹

The Hearing Officer will recall that Mr. Haver and participants in the public input hearings questioned the amount of funds available to PWD (through City) under ARPA and other the federal legislation.¹⁰ To address these inquiries, the Department reached out to the City Administration. The City's response is contained in Schedule ML-10.¹¹ That schedule indicates,

⁶ Section 9901 at Section 603(c)(1)(C), regarding the "coronavirus local fiscal recovery fund."

⁷ See, PWD Brief at IV.B.3.

⁸ See, Removal Motion at ¶ 10.

⁹ Schedule ML-10 speaks for itself. *Cf.* paragraphs 9, 16-18. Any factual allegations in the Removal Motion contrary to and/or not corroborated by the Schedule ML-10 are specifically denied. No response is required to the legal interpretations and conclusions in Schedule ML-10.

¹⁰ Tr. (March 16, 2021) at 30-34; Tr. (March 18, 2021) at 28, 64-65, 66

¹¹ See, PWD Rebuttal Statement, Schedule ML-10 as explained in the rebuttal testimony at pages 37-42.

among other things, that that the City revised its allocation of fringe and pension costs to the Department. This revision is discussed in Section IV.B.1 of the Department’s Brief.

Schedule ML-10 also indicates that the Department should not expect to receive funds under ARPA through the City. Consistent with Schedule ML-10, the Mayor proposed a budget to City Council, on April 15, 2021, that did not allocate any funds under the federal legislation to the Department.¹² The Budget, as presented, indicates that the City anticipates receiving \$1.4 billion in FY 2021 and FY 2022 under ARPA.¹³ It further indicates that none of the ARPA funds are allocated to the Department, since those funds will be used to “fill shortfalls for City operations.”¹⁴

Allegations of Fraud

The Removal Motion does not explain the alleged “fraud” with any particularity. The Philadelphia budget process is prescribed by the Philadelphia Home Rule Charter (“Charter”).¹⁵ The Removal Motion makes conclusory statements regarding Philadelphia’s budget process.¹⁶ On its face, Schedule ML-10 does not purport to explain Philadelphia’s budget process. It simply explains “potential assistance and other action that the Administration plans to take” that will impact the rate case. One major “take-away” from Schedule ML-10 is that, at present, there is no

¹² <https://www.phila.gov/documents/mayor-kenneys-fiscal-year-2022-budget/>.

¹³ Slide 15 of the Budget Overview, which is found at <https://www.phila.gov/media/20210413201617/FY22-Operating-Budget-Overview-April-2021.pdf>. See also, Removal Motion at Paragraph 3.

¹⁴ Slide 15 of the Budget Overview, which is found at <https://www.phila.gov/media/20210413201617/FY22-Operating-Budget-Overview-April-2021.pdf>.

¹⁵ See, e.g., Section 2-202, Section 2-300 through 2-303, 4-101 and 8-100 through 8-103 of the Charter.

¹⁶ See, e.g., Removal Motion at ¶ 11, 18 and 19.

ARPA funding coming to PWD. That was the case on April 26, when the Memorandum was written; and it is still true today.

Nothing in Schedule ML-10 or the related rebuttal testimony is false. Mr. Haver asserts that Schedule ML-10 is a “false document” because (a) the City’s Director of Finance cannot unilaterally decide on how the City spends its resources, see, e.g., Removal Motion at ¶ 9, 17, 18; and (b) City Council will actually decide how funds under ARPA are allocated, see, e.g., Removal Motion at ¶ 9, 11, 17. The above arguments, however, do not render Schedule ML-10 either false or misleading. Schedule ML-10 describes the anticipated scope of relief to be provided under Section 9901 by the City to the Department. It is reliable information, as confirmed by the budget presented by the Mayor, that was reasonably known to the Department.

The Removal Motion is engaged in misdirection. The Removal Motion attempts to focus attention on the Philadelphia’s budget process, as opposed to the ratemaking requirements outlined in the Department’s Brief. The ratemaking requirements use projections for upcoming fiscal years, as opposed to budgets approved by City Council. There may be differences between the Department’s projections for the operating budget, the capital budget, the CIP or even the potential allocation of direct stimulus payments in FY 2022 with the actual operating budget, the capital budget, the CIP or the potential allocation of direct stimulus payments approved by City Council for FY 2022. Those differences do not (retroactively) render the Department’s projections false or misleading. The pending (future) approval by City Council and the pending (future) disbursement of funds by agencies does not mean that the Rate Board cannot review the projections presented in support of the Department’s proposed rates and charges.

Please note that even assuming *arguendo* that the statements in Schedule ML-10 prove to be incorrect with the passage of time, there is no jury of lay people who may otherwise need protection against misleading, confusing and irrelevant evidence. It bears emphasis that, as of this date, and as confirmed by the City’s Budget, Schedule ML-10 is factually correct. In any event, the Rate Board can weigh the evidence presented and decide the rate case and related revenue projections on their merits.

The Reconciliation Mechanism Addresses This Issue

The Partial Settlement directly addresses the issue of uncertainty surrounding ARPA funding in providing a mechanism to lower FY 2023 additional revenues, if federal stimulus funds are received directly by PWD that can be applied to reduce operating expenses (all as detailed in the Partial Settlement). Please note that the Removal Motion does not provide any basis for adjustments to, or the rejection of, the Partial Settlement. The Removal Motion merely speculates that City Council may pass a budget that allocates ARPA funds to the Department. The Removal Motion notes that “City Council has yet to pass a budget that may or may not allocate funds [under ARPA] to the Water Department.”¹⁷ The Motion also offers no reasonable certainty that the majority of City Council will vote to allocate said funds to PWD and that the Mayor would sign such legislation.

In this context, the Partial Settlement proposes a reconciliation mechanism to address the Department’s potential receipt of federal stimulus funding,¹⁸ despite the current absence of reasonable projections as to the amount of potential funding that may be received under federal

¹⁷ Removal Motion at ¶ 9.

¹⁸ See, Joint Petition at ¶ 11.A.2

legislation at some future time. The reconciliation mechanism will deal on a reasonable basis with the actual receipt of funds by PWD that can offset incremental additional revenues in FY 2023.¹⁹

In short, the Removal Motion is substantively baseless and runs counter to fairly addressing the issues presented. The Partial Settlement, which Mr. Haver derides, fairly deals with the uncertainty presented by ARPA (through the reconciliation mechanism) and offers modest rate relief to the Department. Schedule ML-10 documents critical components of the rate case (i.e., prospect of PWD receiving ARPA funding and the lower pension fund allocation) and is a material and relevant part of the evidence presented. This schedule and PWD Rebuttal Statement 1 (explaining the schedule and its import) should not be excluded from the record.

III. CONCLUSION

Based upon the foregoing, the Department submits that the Removal Motion should be denied and dismissed. The circumstances presented do not justify either the removal of Schedule ML-10 from the record or any other relief requested by the Removal Motion.

Respectfully submitted,

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¹⁹ Please note that the reconciliation mechanism does not address funds that may become available for infrastructure improvements which have long lead times and will not offset near term operating expenses.