

**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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**REPLY EXCEPTIONS
SUBMITTED ON BEHALF OF THE
PHILADELPHIA WATER DEPARTMENT**

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I. INTRODUCTION

The Philadelphia Water Department (“PWD” or “Department”) files these Reply Exceptions to respond to several issues raised by Lance Haver and Michael Skiendzielewski in their respective Exceptions¹ to the Hearing Officer’s Report, dated May 18, 2021 (the “Report”), rendered by Hearing Officer Marlane R. Chestnut (the “Hearing Officer”) in the above proceeding before the Philadelphia Water, Sewer and Storm Water Rate Board (“Rate Board”).

The Department submits that the Haver Exceptions and Skiendzielewski Exceptions should be denied for the reasons explained below. Contrary to both Exceptions, the Department supports the Report’s recommendation to approve the Partial Settlement.² In the Report, the Hearing Officer properly recommends that the Rate Board approve the Partial Settlement.³ The Department fully endorses the Report in this regard.

The Haver Exceptions should be denied for numerous reasons. In his Exceptions, Mr. Haver urges the rejection of the Partial Settlement (criticizing how it was negotiated, its specific terms and conditions, and perceived deficiencies of the settlement given the circumstances presented). The Department submits that Mr. Haver, in most instances, summarizes his prior arguments and ignores the evidence presented by the Department and credited by the Hearing Officer. The Department submits that a full and fair review of the Partial Settlement and the

¹ The above Exceptions are sometimes separately referred to as the “Haver Exceptions” and the “Skiendzielewski Exceptions.”

² Amendments were made to the Department’s proposals to acknowledge the terms agreed-upon in the Joint Petition for Partial Settlement (“Joint Petition” or “Partial Settlement”) between the Department and the Public Advocate (“Public Advocate” or “PA”). *See* <https://www.phila.gov/media/20210505154832/Joint-Petition-for-Partial-Settlement.pdf>.

³ Report at 5, 53.

record will demonstrate the lack of merit of Mr. Haver's Exceptions. The detailed discussion that follows also offers a litany of reasons to deny his Exceptions.

Mr. Skiendzielewski also files Exceptions challenging the Report and has generally opposed the proposed settlement. In his Exceptions, he specifically urges the Board to overturn the decision of the Hearing Officer denying his (i) Homeowner's Emergency Loan Program ("HELP") records discovery requests; and (ii) recusal request with regard to the Rate Board's counsel. He further argues that PWD should be directed to re-enter settlement negotiations with him.

Mr. Skiendzielewski's Exceptions should be denied. The Hearing Officer correctly sustained the Department's objections to discovery from Mr. Skiendzielewski (seeking 12 years of documents relating to the operation of the HELP loan program). The Hearing Officer also correctly acted to limit the scope of technical hearing testimony from Mr. Skiendzielewski.⁴ The ruling as to the Department's Motion in Limine (addressing both of the above issues) was properly granted by the Hearing Officer on April 16, 2021. The Hearing Officer's determination regarding allegations of financial impropriety was correct given the Board's limited jurisdiction (no authority to investigate, administer or enforce public integrity laws or ethical codes). Finally, the Hearing Officer's ruling that settlement negotiations are confidential renders moot all claims raised by Mr. Skiendzielewski in this context (including reopening such negotiations).

The discussion below addresses the Exceptions of Messrs. Haver and Skiendzielewski, in turn.

⁴ Prior to the start of the technical hearings, the Department filed a motion seeking to preclude Mr. Skiendzielewski from testifying at the technical hearings on (i) allegations of "financial impropriety" in the operation, management and disposition of the HELP Loan program, (ii) allegations of misconduct by Counsel for the "Water Revenue Board" and (iii) allegations related to the 2017 investigation by Mr. Cantu-Hertzler.

II. REPLIES TO THE EXCEPTIONS RAISED BY MR. HAVER

The Partial Settlement should not be disturbed as requested by Mr. Haver. The Partial Settlement provides benefits that could not have been achieved outside the context of settlement, since the Rate Board lacks jurisdiction to direct how the Department provides service. In his Exceptions,⁵ Mr. Haver merely emphasizes his prior arguments in this proceeding and ignores the evidence presented by the Department and credited by the Hearing Officer. As such, Mr. Haver's plea that the Partial Settlement be disturbed should be disregarded.

A. The Partial Settlement is in the Public Interest and Should Not Be Disturbed, as Requested by Lance Haver

After examination of PWD's rate case filing, including substantial discovery, four public input hearings, a technical hearing and numerous public comments, the Department and the Public Advocate reached an agreement on almost all of the issues raised, as reflected in the Joint Petition for Partial Settlement submitted on May 5, 2021 ("Joint Petition"). As explained in PWD's Statement in Support of the Joint Petition, the Partial Settlement properly balances (i) the interests of ratepayers in the unprecedented circumstances created by the COVID-19 pandemic and (ii) PWD objectives to maintain its financial health while continuing to modernize utility infrastructure and make necessary improvements to enhance the safety, reliability and efficiency of its system.⁶

⁵ Mr. Haver's Exceptions are divided into nine sections: Section 1 (introduction), Section 2 (quid pro quo), Section 3 (stimulus dollars), Section 4 (faulty process), Section 5 (public hearings), Section 6 (Hearing Officer bias), Section 7 (Reconciliation), Section 8 (strawman), and Section 9 (projections). Sections were renumbered to reflect the existence of two sections with the number 4. Beyond the Sections, there are 20 concluding paragraphs.

⁶ PWD Statement of Support for Joint Petition at 2 (May 5, 2021).

In his Exceptions, Mr. Haver complains of the Partial Settlement, arguing that it provides PWD with additional revenues without requiring it to seek and receive any money from the federal stimulus funding. The Hearing Officer addressed Mr. Haver’s complaints in response to his May 10, 2021 Objections to Both the Process and Terms of the Settlement. The Hearing Officer properly determined that his Objections do not provide a basis for rejecting the Partial Settlement. The Hearing Officer also appropriately found that the “record fully supports the adoption by the Rate Board of the rates and charges proposed in the Proposed Partial Settlement Petition.”⁷

Mr. Haver has maintained throughout the rate process via various filings and correspondence, that this proceeding should be postponed until it is known how much money will be allocated to the Department under the American Rescue Plan Act of 2021 (“ARPA”) and how those funds can be utilized.⁸ Mr. Haver irrationally maintains his position even though the correspondence from the City established that PWD will not receive any of the anticipated federal funds.⁹ As such, Mr. Haver’s plea that the Partial Settlement be disturbed should be disregarded. As explained below, the Partial Settlement represents a reasonable resolution of the issues presented in this rate proceeding.

⁷ Report at 3-4.

⁸ Haver Motion for Continuance dated March 15, 2021 (<https://www.phila.gov/media/20210318160110/Lance-Haver-PWD-Continuance-Motion-1st.pdf>), which was held in abeyance by Hearing Officer (<https://www.phila.gov/media/20210325171439/Hearing-Officer-Decision-on-Haver-Motion.pdf>); Direct Testimony of Lance Haver (Haver St. 1) (March 22, 2021); Direct Appeal to the Rate Board dated April 5, 2021 (<https://www.phila.gov/media/20210409165058/Appeal-to-Rate-Board.pdf>).

⁹ PWD Rebuttal Statement 1 (Schedule ML-10).

1. Transparent Process.

Mr. Haver complains that the rate process was not transparent (flawed) and did not allow sufficient public input consistent with the requirements of the Rate Ordinance (defined below).¹⁰ This is a key component of his criticism of the Partial Settlement. Mr. Haver is mistaken.

The Haver Exceptions complain that there should have been more opportunity for input on the Partial Settlement.¹¹ The Department’s Brief¹² explains that all participants – whether active or inactive – had the opportunity to provide whatever comments or evidence they wished on the Partial Settlement. In fact, Mr. Haver filed an objection to the Partial Settlement.¹³ The Exceptions, however, appear to raise issues on behalf of the greater “public.” Mr. Haver as a *pro se* participant is not in the position to raise arguments concerning others.¹⁴ That being said, all customers and affected parties (including non-participants in the hearings) had the opportunity to comment on the Partial Settlement, since (a) the Hearing Officer made the terms of the Partial Settlement publicly available (via the Rate Board’s website) on April 29, 2021 as PWD Hearing

¹⁰ Haver Exceptions at Conclusion ¶¶ 3-6. Mr. Haver’s Exceptions simply repeat the argument that the required public hearing was not held. Haver Exceptions at Conclusion ¶ 6 and Section 5.L. The issue was raised in Haver Direct Testimony at ¶¶ 12, 14-16, 18. However, Mr. Haver did not submit a brief on that or any other issue. The issue of the legal sufficiency of the public hearings was addressed in Section IV.E.5 of the Department’s Brief.

¹¹ Haver Exceptions at Section 1 (introduction) and Section 4.E.(b), 4.E.(c), 4.G, 4.H, 4.J, 4.K, Haver Exceptions at Conclusion ¶¶ 3, 4, and 5.

¹² Department Brief, Section IV.B.2.c at 34-36.

¹³ <https://www.phila.gov/media/20210510161803/oppose-the-settlement.pdf>.

¹⁴ Pro se participants are acting on their own behalf (and as their own attorney). It is well-settled that, with a few exceptions, non-attorneys may not represent others before the Pennsylvania courts and most administrative agencies. *See, e.g., In re Tax Claim Bureau*, 84 A.3d 337 (Pa.Cmwlt. 2013).

Exhibit No. 2;¹⁵ and (b) it was made clear any and all comments and statements of support/opposition to the Partial Settlement would be received through May 11, 2021.¹⁶

Moreover, as stated in the Department's Brief, the instant proceeding was filed pursuant to the Rate Ordinance and the Rate Board's Regulations.¹⁷ It was a comprehensive, inclusive and fair process from the date of its filing until today. The proceeding was undertaken to review the Department's proposed changes in rates and charges. The Board appointed Marlane R. Chestnut, Esquire to preside over the rate hearings and to prepare a report. The Rate Board also appointed Community Legal Services to serve as Public Advocate in the proceeding. Information exchange (discovery)¹⁸ started on January 8, 2021, with "advance discovery" requests from the Public Advocate, and continued through April 9, 2021.¹⁹ In that time period, the Department received and responded to more than 525 formal and informal discovery requests from the other active participants.

Prior to the public input hearings (on March 15, 2021), Mr. Haver filed a Motion for Continuance requesting that the Rate Board delay the 2021 Rate Proceeding pending determinations regarding the distribution of funds under the Consolidated Appropriations Act of

¹⁵ Department Brief at 35.

¹⁶ Department Brief at 35. *See* Further Scheduling Order, <https://www.phila.gov/media/20210504170435/further-procedural-order-April-30-2021.pdf>.

¹⁷ The Rate Ordinance is codified at Philadelphia Code, Section 13-101; Rate Board Regulations, § II(1-5).

¹⁸ *See*, Rate Board Hearing Regulations at §7(b). Information exchange is sometimes referred to as "discovery."

¹⁹ Under the schedule, the last day to send discovery requests to another participant was April 9, 2021.

2021²⁰ (“CARES Act”), enacted on December 27, 2020, and the ARPA,²¹ enacted on March 11, 2021. The Department filed an Answer²² to the Continuance Motion on March 18, 2021. The Hearing Officer, on March 21, 2021, indicated that she would hold the Motion in abeyance.²³ Mr. Haver appealed that ruling to the Rate Board on April 5, 2021.²⁴ On April 9, 2021, the Department responded to Mr. Haver’s appeal.²⁵ The Rate Board heard argument on Mr. Haver’s appeal on April 14, 2021. At that time, Mr. Haver withdrew his appeal regarding the Continuance Motion.

Thereafter, the Hearing Officer convened a total of four public input hearings. An afternoon hearing and evening hearing were separately held on both March 16 and 18, 2021. Approximately 103 members of the public provided written comments or public input testimony.²⁶ The majority of the customers who commented expressed concerns regarding the affordability of water service. A summary of that testimony was attached as Appendix C to the Brief.²⁷ Mr. Haver argues that these hearings were not valid or “real,” but in point of fact, the

²⁰ 116 P.L. 260; 134 Stat. 1182. Section 501 of the CARES Act allocates \$638 million to the U.S. Department of Health and Human Services (HHS) to carry out a Low-Income Household Drinking Water and Wastewater Emergency Assistance Program. *See, e.g.*, 15 USC § 9058a.

²¹ Public Law No: 117-2. Section 9901 of the ARPA, *inter alia*, provides funds to certain governmental entities that may be used, among other things, to make necessary investments in water, sewer, or broadband infrastructure. Section 2912 of ARPA allocates \$500 million to the U.S. Department of Health and Human Services to assist low-income households that pay a high proportion of household income for drinking water and wastewater services. The funds under Section 2912 of ARPA are in addition to the funds under Section 501 of the CARES Act.

²² <https://www.phila.gov/media/20210319161321/RESPONSE-TO-MOTION-FOR-CONTINUANCE.pdf>.

²³ Hearing Officer’s Determination Re: Haver Motion for Continuance, <https://www.phila.gov/media/20210325171439/Hearing-Officer-Decision-on-Haver-Motion.pdf>.

²⁴ <https://www.phila.gov/media/20210409165058/Appeal-to-Rate-Board.pdf>.

²⁵ <https://www.phila.gov/media/20210414161418/PWD-2021-ANSWER-TO-HAVER-APPEAL-FINAL.pdf>.

²⁶ Seventy-one members of the public submitted written comments before the Technical Hearing. Those written comments are posted on the Rate Board’s website. Thirty-two members of the public provided public input testimony. The transcripts are posted on the Rate Board’s website.

²⁷ *See*, Report at 10, fn 41.

participants were heard and have memorialized their support or opposition to the original rate request. This was one impetus for settlement negotiations to reduce the rate increase from \$141 million to \$57 million (in addition to the proposed reconciliation mechanism to potentially reduce incremental additional revenues in FY 2023, under certain conditions, by an amount not to exceed \$34 million).

Prior to the start of the technical hearings, the Department and the Public Advocate reached a settlement. The terms of the Partial Settlement were presented in PWD Hearing Exhibit 2²⁸ and the Joint Petition.²⁹ The Joint Petition, together with the written Statements in Support thereto, amplify and demonstrate that the Partial Settlement is reasonable and should be adopted. Statements in Support of the Partial Settlement were separately filed by the Department³⁰ and the Public Advocate on May 5, 2021. PLUG and PECO stated their non-opposition to the Partial Settlement. Written opposition to the Partial Settlement was due by May 11, 2021.³¹ The public received notice of the Partial Settlement through its posting at the Rate Board website. In addition, the Public Advocate posted a notice of the proposed settlement at its website and further communicated the terms and conditions of the same through its social media contacts. PWD likewise posted the Partial Settlement and a plain-English explanation of its terms and conditions at its website and requested public comment via its email and social media

²⁸ <https://www.phila.gov/media/20210430162106/Settlement-Term-Sheet.pdf>.

²⁹ <https://www.phila.gov/media/20210505154832/Joint-Petition-for-Partial-Settlement.pdf>.

³⁰ <https://www.phila.gov/media/20210505154836/PWD-Statement-in-Support-of-Joint-Petition-for-Partial-Settlement.pdf>.

³¹ <https://www.phila.gov/media/20210504170435/further-procedural-order-April-30-2021.pdf>.

contacts.³² Please note that the Partial Settlement did not include the resolution of issues raised by the active *pro se* individuals,³³ Mr. Haver and Mr. Skiendzielewski were not signatories to the Joint Petition. They are the only participants to voice opposition to the proposed settlement.

2. *Status Quo* is Unsustainable.

Mr. Haver's Exceptions repeat his position that the *status quo* (existing rates) can be maintained.³⁴ This position is premised upon his belief that (a) rate relief is not needed, since prior projections have not always been exact; and (b) the Department can make withdrawals from the cash balances during the Rate Period without consequences. Reliance on those premises alone, however, ignores reality.³⁵ For example, Mr. Haver's position ignores that the Department's recent experience provided in Exhibit ML-2 which demonstrates that recent history contradicts his position.

³² The Department communicated the negotiation of the Partial Settlement in a variety of ways using its website, social media, email, SMS text message alerts and print media (Inquirer article on May 3, 2021). A partial listing of such communications is provided below:

- **Website:** PWD posted announcement to Phila.gov/water homepage What's New section and PWD Rates page
- **Alert delivered to 17,600 email/SMS subscribers*** <https://phillyh2o.info/2021-rates-proposal>
**Subscribers included Alerts and Notification as well as Customer Assistance and PWD Partners, which includes 150+ local community organizations*
- **@PhillyH2O Twitter, May 5, 2021 (9566 followers)** <https://twitter.com/PhillyH2O/status/1389970288209797120>
- **PWD LinkedIn, May 5 2021 (4,914 followers)** <https://www.linkedin.com/feed/update/urn:li:activity:6795737613383864320/>
- **PWD Facebook May 5, 2021 (3467 followers)** <https://www.facebook.com/PhillyH2O/photos/a.545632442129696/6179939435365607/?type=3>
- **@PhillyH2O Instagram, May 5, 2021 (Approx. 3,240 followers)** <https://www.instagram.com/p/CO#0QpUgbhC/>

³³ Other than general opposition to rate increases, the five inactive (*pro se*) individuals did not raise any specific issues (or complaints) on their own behalf.

³⁴ Haver Exceptions at Conclusion ¶ 12 and Sections 1 and 9.

³⁵ The projections relied upon by Mr. Haver are not used for ratemaking purposes, as explained in the Department's Brief at 46-48.

The Department needs higher rates (increased revenues) so that it will have additional cash-in-hand to pay its bills when they are due and to maintain efficient access to the capital markets at reasonable cost.³⁶ The record demonstrates that the Department needs additional revenues to address unavoidable increases in operating costs in several areas and to continue to achieve the financial metrics necessary to maintain its current favorable bond rating and to continue infrastructure improvements.³⁷ Continuing at its current level of rates is unsustainable.³⁸ The Department explained that, without sufficient rate relief, the Department will be at or just above minimum financial metrics in FY 2022 and will not satisfy the 90% Test in FY 2023.³⁹

Mr. Haver offers the *status quo* assuming that federal stimulus monies are on the way. The fact of the matter is that he has no confirmation that this is (or will be) true. The Partial Settlement was negotiated to provide for the possibility of receipt of such funding (as defined in its terms and conditions) while addressing the Department's immediate need for rate relief. Given the reconciliation mechanism included in the terms of settlement, both the utility and its ratepayers are reasonably protected.⁴⁰

3. Terms and Conditions of Partial Settlement.

Mr. Haver's Exceptions are critical of the terms and conditions negotiated by PWD and the Public Advocate.⁴¹ He first complains that the Hearing Officer should never accept settlement

³⁶ PWD Statement 2 at 11-12.

³⁷ PWD Statement 2 at 3-5, 12, 26.

³⁸ PWD Statement 2 at 8-9.

³⁹ PWD Statement 2 at 4, 19.

⁴⁰ See discussion, *infra*. See also Department Brief at 28-49,60-62; Joint Petition at ¶ 11.a.2; PWD Statement in Support at § II.C; PWD Statement in Support, Appendix A; Joint Petition at Appendix 2.

⁴¹ Haver Exceptions at Conclusion ¶ 8-10, 18.

terms that do not require PWD to seek and receive federal stimulus money. He further carps that no terms should be accepted that are not enforceable (best efforts are insufficient). PWD submits that Mr. Haver's complaints are misplaced.⁴²

The Partial Settlement, in this proceeding, is a "black box" settlement. This means that the Partial Settlement does not reflect a specific resolution of every element of the Department's projected revenues and expenses, rather it represents the Joint Petitioners' agreed upon final revenue requirement or additional revenues based on their respective analyses of the various revenue and expense proposals in this proceeding.

The Partial Settlement is a compromise of the Department's proposed revenue requirements for the Rate Period that would have otherwise been litigated. Only the Public Advocate proposed adjustments to the Department's projections for the Rate Period. Specifically, the Public Advocate proposed five upward adjustments to the Department's revenues for the Rate Period. Those proposed revenue adjustments recommended increasing the Department's revenues by \$42.834 million in FY 2022 and by \$35.005 million in FY 2023.⁴³ The Public Advocate also proposed five downward adjustments to the Department's expenses for the Rate Period. Those proposed expense adjustments recommended decreasing the Department's expenses by \$13.739 million in FY 2022 and by \$27.194 million in FY 2023.⁴⁴ The Department contested all of the Public Advocate's adjustments. The Partial Settlement, if approved, will permit the Joint Petitioners to avoid the time and expense associated with litigation over the above-described individual adjustments.

⁴² Haver Exceptions at Conclusion ¶ 8-10, 18.

⁴³ See, Schedule LKM-6.

⁴⁴ See, Schedule LKM-6.

Approval of the Partial Settlement is supported by the record. The Rate Board may approve, modify, or reject the proposed rates and charges.⁴⁵ The Department submits that the rate increases proposed in the Partial Settlement are supported by the record and are eminently reasonable, since they are within the range of proposed additional revenues in the record.

The terms of the Partial Settlement also acknowledge that the Department will take additional measures to mitigate the economic burden on ratepayers, while still affording the Department sufficient revenue necessary to maintain safe and reliable service. It bears emphasis that many of the agreements negotiated by the Joint Petitioners (customer service issues) could not have been successfully litigated in this forum. Also, notably the financial metrics produced by the Partial Settlement rate levels are below the Department's goals but are sufficient to meet the minimum requirements.⁴⁶ Given that the Public Advocate essentially recommended that the Department be granted no rate relief, the Partial Settlement clearly represents a reasonable compromise of the various positions of the active participants. Moreover, the Department believes that, in view of the unprecedented nature of the current circumstances, agreeing to a modest rate increase (especially after withdrawing its prior rate proceeding) was the most reasonable course at the present time.

4. Deception; Missing Terms.

Mr. Haver's Exceptions make an unjustified effort to undermine the Partial Settlement by generically referring to fraud and deception.⁴⁷ Those allegations were made in Mr. Haver's

⁴⁵ See, Philadelphia Code §§13-101(3) and 13-101(4)(b)(iii).

⁴⁶ See, Partial Settlement at Appendix 1.

⁴⁷ Haver Exceptions at Conclusion ¶ 7.

Motion for the Removal (“Removal Motion”) of the Memorandum from the City’s Director of Finance (Schedule ML-10).⁴⁸ The Hearing Officer correctly denied that Removal Motion.⁴⁹ In that motion, Mr. Haver alleges the Schedule ML-10 constitutes a fraud or deception. Nothing in the Removal Motion or Mr. Haver’s Exceptions shows how Schedule ML-10 is either false or misleading. This schedule describes the anticipated scope of relief to be provided under Section 9901 by the City to the Department, as explained in the Department’s Answer to his “Removal Motion.” It is reliable information, as confirmed by the budget presented by the Mayor, that was reasonably known to the Department. Please note that this information is still true and correct as of this writing.

Mr. Haver also maligns the proposed settlement because he senses that something is missing.⁵⁰ The key ingredient that is missing is certainty. However, that is why the Partial Settlement and its reconciliation mechanism are exactly what is needed in the circumstances presented.

5. Reconciliation Process.

Mr. Haver’s Exceptions are also critical of the categories of federal stimulus funding identified to reduce certain additional revenues in FY 2023 (assuming receipt), as defined in the Partial Settlement. He believes that such funding is too narrowly defined and subject only to best

⁴⁸ Haver Exceptions at Conclusion ¶ 13, 15 and Section 7.B.

⁴⁹ <https://www.phila.gov/media/20210513174112/Order-Haver-motion-to-strike-may-14-final-Copy.pdf>.

⁵⁰ Haver Exceptions at Conclusion ¶ 16. *See also* Haver Exceptions at Section 1 (introduction), 9.D and Conclusion ¶ 17, 18, 19.

efforts.⁵¹ He is mistaken. The agreed-upon FY 2023 approved rate increase includes incremental additional revenues of \$34.110 million (“FY 2023 Base Rate Incremental Increase”). The FY 2023 Base Rate Incremental Increase is subject to two potential adjustments related to (i) Federal Stimulus Funding; and (ii) Changes in FY 2021 Financial Performance, as described below. The above adjustments will be addressed in a Special Rate Reconciliation Proceeding for FY 2023.

The Special Rate Reconciliation Proceeding is intended to be simple, limited to the two adjustments defined in Paragraph 11.A.(2) (a) of the Joint Petition, and analogous to the TAP-R Reconciliation Proceeding. By approving the Partial Settlement, the Rate Board is agreeing (in advance) to the use of the Special Rate Reconciliation Proceeding. Both the Department and the Public Advocate will be deemed to be Participants in the Special Rate Reconciliation Proceeding without notification to the Rate Board.

Please note that the Department will initiate the Special Rate Reconciliation Proceeding. Any adjustment or reconciliation will be implemented effective September 1, 2022. It is anticipated that the Department will commence the above proceeding by filing an Advance Notice on or before March 1, 2022. In any event, the Public Advocate and other stakeholders shall be afforded a reasonable period of time to review and conduct discovery in order to evaluate the Department’s reconciliation adjustments and may submit testimony and briefs supporting the Department’s requested reduction or a different reduction to the FY 2023 Base Rate Incremental Increase. This is an imminently reasonable resolution of the issues presented in

⁵¹ Mr. Haver criticizes the Partial Settlement, as written, because it lacks an explicit mandate to obtain stimulus funds. Haver Exceptions at Section 3 and Conclusion ¶¶ 8, 9, 10, 11, 16 and 18. Mr. Haver offers no language regarding the recommended mandate, and does not explain how the mandate would be enforced by the Rate Board. The Rate Board lacks jurisdiction to direct how the Department provides service, as explained in Section III.A.1 of the Department’s Brief at 12-13.

this rate proceeding (e.g., potential receipt of federal stimulus monies and/or over-performance of FY 2021 projections).

6. Customer Service Agreements.

Mr. Haver is critical of the Partial Settlement because he does not believe it does enough to strengthen TAP (outreach, recertification). Mr. Haver is again mistaken. Certain terms in the Partial Settlement directly benefit TAP participants. Those settlement terms reasonably correspond to specific, on-the-record litigation positions taken by the Public Advocate (via the direct testimony of Mr. Colton).⁵² As explained in the Partial Settlement, the Department waived program recertification during the pandemic to TAP participants which policy is to continue for the near term.⁵³ To improve outreach for TAP, PWD will also evaluate new approaches to inform PWD customers of this program and other assistance programs that PWD offers.⁵⁴ That being said, these benefits could not have been achieved outside the context of settlement, since the Rate Board lacks jurisdiction to direct how the Department provides service.

The Partial Settlement also benefits residential customers generally. That is, the Department voluntarily extended a freeze on shutoffs for residential customers, protecting those account holders from losing water services until April 2022. As explained in the Partial Settlement, the Department agreed to review and evaluate the need to extend the current moratorium to protect public health and safety during the pandemic.⁵⁵ The Department will also provide more flexible terms for payment arrangements to help PWD customers bring their

⁵² See, PWD Statement in Support at § II.D; Public Advocate Statement in Support at § III.C.4.

⁵³ Joint Petition at ¶ 11.D.1.(a).

⁵⁴ Joint Petition at ¶ 11.D.1.(a).

⁵⁵ Joint Petition at ¶ 11.D.3.

accounts current.⁵⁶ In addition, the Department will be reviewing business practices, website disclosures, and governing regulations to address certain tenant issues raised in this proceeding and will be considering changes in its language access plan, in coordination with the City's Office of Immigrant Affairs.⁵⁷

B. Other Criticisms of the Rate Process Are Without Record Support.

1. Outreach of the Public Advocate.

Mr. Haver is also critical of the Public Advocate. Specifically, Mr. Haver suggests that the Public Advocate should have conducted more outreach to solicit comments and opinions on the Partial Settlement.⁵⁸ He proffers that the Public Advocate did not seek or allow the public to have any input into its decisions and/or positions in the rate case.⁵⁹ The Public Advocate denied such criticisms and suggestions in the Public Advocate's Answer in Opposition to Mr. Haver's Motion to Compel.⁶⁰

2. Quid Pro Quo.

Mr. Haver contends that the Partial Settlement contains an implicit *quid pro quo*.⁶¹ Specifically, Mr. Haver argues that the Partial Settlement guarantees that the Rate Board will

⁵⁶ Joint Petition at ¶ 11.D.4.(a).

⁵⁷ See, Joint Petition at ¶ 11.D.2, 11.D.4(d).

⁵⁸ Haver Exceptions at Section 4 and Conclusion ¶ 1, 2, 3, 4, 5, 20.

⁵⁹ *Id.* See also Haver's Motion to Compel. <https://www.phila.gov/media/20210505154833/Motion-to-Compel-the-Public-Advocate-to-Put-on-the.pdf>.

⁶⁰ <https://www.phila.gov/media/20210505154834/PA-Answer-to-LH-Motion-to-Compel.pdf>.

⁶¹ The phrase *quid pro quo* is defined as "what for what" or "something for something" and signifies a bargained-for-exchange.

continue to use Community Legal Services (“CLS”) to act as Public Advocate.⁶² Mr. Haver is wrong, since nothing in the Partial Settlement guarantees that the Rate Board will use CLS to act as Public Advocate. The position of Public Advocate is a temporary position filled by the Rate Board⁶³ when the Department proposes a rate change.⁶⁴ Mr. Haver’s Exceptions acknowledge that the Rate Board issues requests for competitive proposals and hires a person (or entity) as the Public Advocate.⁶⁵ The Partial Settlement provides, *inter alia*, that Public Advocate will be deemed to be a Participant in the Special Rate Reconciliation Proceeding - if approved by the Rate Board.⁶⁶ That provision merely provides for participation by the Public Advocate. It does not create an expectation or a bargained-for-exchange regarding the Rate Board’s use of CLS as the Public Advocate.

⁶² See, e.g., Haver Exceptions at Section 2 and Conclusion ¶ 7, 20.

⁶³ The Exceptions suggests that the *quid pro quo* exists between the Public Advocate and the Department, since the Department provides funding for the Rate Board. See, e.g., Haver Exceptions at Section 2 and at Conclusion ¶ 7. The suggestion is fatally flawed, since it is up to the Rate Board (and not the Department) to hire and compensate the Public Advocate. See Rate Board Regulations at II.B.2. The suggestion also fails to recognize that regulated public utilities pay “assessments” to fund the Commission, Office of Consumer Advocate (OCA) and Office of Small Business Advocate (OSBA). See, 66 Pa.C.S. § 510, 71 P.S. § 309-4 and 73 P.S. § 399.46.

⁶⁴ Rate Board Regulations at II.B.2.(a). The Public Advocate shall be paid reasonable compensation as negotiated with the Board, pursuant to the formal City contract. Rate Board Regulations at II.B.2.(b).

⁶⁵ See Haver Exceptions at Section 4.A.

⁶⁶ Haver Exceptions at Section 2.A.

3. Bifurcation.

Mr. Haver suggests that the participation of the Public Advocate in the instant proceeding is improper due to a lack of “bifurcation.”⁶⁷ That suggestion is wrong. The ratemaking process is legislative (regulatory) in nature. The Department’s rates and charges are “fixed” by the Rate Board. The procedures for fixing and regulating water and sewer rates are not an adjudication under Pennsylvania’s Administrative Agency Law, according to *Public Advocate v. Brunwasser*.⁶⁸ That being said, the Public Advocate’s role is separated from the roles of the Hearing Officer and the Rate Board.

Additionally, it should be noted that Mr. Haver’s characterization of the Public Advocate as “trial staff” for the Rate Board⁶⁹ is inconsistent with the Rate Board’s regulations and reality. The Public Advocate was appointed to represent the interests of Small User Customers pursuant to a formal City contract. Small User Customers consist of all residential and small business customers of the Department within the City of Philadelphia, typically with 5/8 inch meters. The Advocate does not serve as the prosecutory arm of the Rate Board, since the Rate Board is not

⁶⁷ Haver Exceptions at Section 1 (introduction) ad Conclusion ¶ 2. The discussion on “bifurcation” appears to be based on *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992) wherein the Pennsylvania Supreme Court concluded that the State Board of Medicine violated a physician’s due process rights where the board commingled prosecutorial and adjudicative functions by having members of the board who had participated in the prosecutorial stage of the proceedings, also participate in adjudicating the case against the physician. The courts have held, in cases interpreting the *Lyness* decision, that the board may satisfy the *Lyness* requirement of a separation of prosecutorial and adjudicative functions in a board by having members of the board who did not participate in the prosecutorial stage of the proceedings, render the final adjudication in the case. *See, e.g., Cooper v. State Board of Medicine*, 623 A.2d 433 (Pa.Cmwlth.1993).

⁶⁸ 22 A.3d 261 (Pa.Cmwlth. 2011) (“*Brunwasser*”). Only the ultimate decision maker in the rate process has changed—from the Water Commissioner (before January 20, 2014) to the Rate Board (on and after the aforesaid date). The nature of the ratemaking action has not changed: it is still regulatory (legislative). That being said, it should be noted that this point is under review before the Commonwealth Court at 1070 CD 2019.

⁶⁹ Haver Exceptions at Sections 1 and 4.B and Conclusion ¶ 20.

explicitly empowered to determine whether the Department has fulfilled its obligations under a previous rate proceeding.⁷⁰

4. Additional Conditions.

Mr. Haver denounces the Partial Settlement because, in his view, it does not do enough to increase enrollment in customer assistance⁷¹ programs and achieve operational improvements.⁷² Such contentions overlook the limits of the Rate Board’s jurisdiction and are not supported by the record.

Customer service issues generally and TAP outreach have been previously addressed in Section II.A.6. However, it should be noted that Mr. Haver focuses on the number of participants in TAP in making this specific criticism. That focus does not tell the entire story. A simple comparison of customers enrolled in TAP with the number of customers enrolled in Philadelphia Gas Works’ Customer Responsibility Program (“CRP”) does not compare like things or “apples to apples.” The TAP ordinance requires the Department to enroll customers in programs other than TAP if the other programs offer a more affordable bill, as explained in the Department’s Brief. If another program (such as the Senior Citizen Discount) offers a more affordable bill, that customer is counted as being enrolled in the Senior Citizen Discount program and is not counted in TAP enrollment, even if the customer is otherwise eligible for enrollment in TAP.

⁷⁰ 2016 Determination at 44 (Appendix B, Question 1).

⁷¹ Haver Exceptions at Section 1 (introduction), 9.D and Conclusion ¶¶ 16, 17.

⁷² Haver Exceptions at Conclusion ¶¶ 16, 19.

Mr. Haver also seeks to have the Department implement certain operational changes. The Exceptions provide a “laundry” list of changes (ideas) that Mr. Haver would like the Department to implement. He did not offer any testimony on those proposed operational changes, since his testimony was limited to a legal issue. He merely asked questions regarding such changes during his cross-examination of witnesses at the technical hearing. He ignores the reality that (a) many efficiency improvements would require investments up front, which would increase the revenue requirement for the rate period; and (b) PWD is competitive relative to its peers.⁷³ PWD’s reasonable comparison relative to the typical bills of their peers indicates that there are not significant inefficiencies to correct within PWD operations.

5. Unfounded Criticisms of Hearing Officer.

Mr. Haver’s Exceptions are unfairly critical of the Hearing Officer.⁷⁴ The record shows that the Hearing Officer was fair and impartial. It does not show that the Hearing Officer prejudged any issue or was incapable of presiding impartially.⁷⁵

As an example, the Hearing Officer noted, as Mr. Haver raised broad arguments and challenges to the Partial Settlement and the role of the Public Advocate, that he was an individual and did represent the interests of the “public.”⁷⁶ Mr. Haver may take umbrage to such a

⁷³ Peer utilities were compared in detail as part of Schedule ML-6. That information was summarized in Schedule ML-2, which indicates that even with original proposed increase in rates and charges, the Department’s rates compare favorably to other large urban water and wastewater systems. *See*, Schedule ML-2 at 30.

⁷⁴ Haver Exceptions at Sections 6 and 8.

⁷⁵ The standards for recusal are well established. It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. *Rizzo v. Haines*, 555 A.2d 58, 72 (Pa. 1989); *Commonwealth v. Miller*, 664 A.2d 1310 (Pa. 1995). As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. *See, e.g., Goodheart v. Casey*, 565 A.2d 757 (Pa. 1989).

⁷⁶ Haver Exceptions at Section 8.

statement, but it was and is absolutely true. That observation does not expose the Hearing Officer's biases, contrary to Mr. Haver's Exceptions.

III. REPLIES TO THE EXCEPTIONS RAISED BY MR. SKIENDZIELEWSKI

A. The Hearing Officer Correctly Ruled on PWD's Motion in Limine and Objections to Discovery that Addressed Issues Improperly Raised by Michael Skiendzielewski.

Mr. Skiendzielewski takes Exception to the Hearing Officer's ruling denying his HELP Loan discovery requests (spanning 12 years). The Hearing Officer properly addressed PWD's objections to the above discovery requests and its Motion in Limine to exclude various issues improperly raised by Mr. Skiendzielewski in this forum.⁷⁷ The issues improperly raised by Mr. Skiendzielewski included (i) allegations of "financial impropriety" in the operation, management and disposition of PWD's HELP, (ii) allegations of misconduct by Counsel for "Water Revenue Board", and (iii) allegations related to the 2017 investigation by Mr. Cantu-Hertzler.⁷⁸ The Hearing Officer properly found that "[t]he Rate Board does not have the authority to investigate, administer or enforce public integrity laws or ethical codes."⁷⁹ In evaluating the issues raised by Mr. Skiendzielewski, the Hearing Officer aptly found that discovery on alleged misconduct in connection with administration of the HELP loan program is excluded from the scope of this rate proceeding.⁸⁰

By way of background, PWD received various discovery requests from Mr. Skiendzielewski on April 5, 2021, relating to PWD's HELP Loan Program. PWD objected to

⁷⁷ Order Granting PWD Motion in Limine: Skiendzielewski (April 16, 2021).

⁷⁸ PWD Motion to Limit or Exclude Certain Portions of the Testimony of Michael Skiendzielewski at 1.

⁷⁹ Report at 13.

⁸⁰ Report at 13.

those requests on April 8, 2021, as the requests were overly-broad and unduly burdensome, some of the requests had a 12-year look-back period, and the information requested is not relevant to PWD's proposed changes in rates and charges. Moreover, the requests were not timed by Mr. Skiendzielewski to permit him to submit direct testimony in support of his position, but were timed to be made prior to the start of the technical hearing. Mr. Skiendzielewski made similar discovery requests in PWD's 2018 General Rate Proceeding, which were stricken by the Hearing Officer in response to PWD Objections (dated February 27, 2018) filed in that case. Yet, Mr. Skiendzielewski attempted (yet again) to re-litigate the issue before the Rate Board.⁸¹ Given the lack of relevancy of the requests to the proposed rates and charges in PWD's rate filing, the 12-year look-back period for many of the discovery requests, and the fact that the same issues were raised by Mr. Skiendzielewski in the 2018 rate proceeding, the Hearing Officer properly determined that the issues are not to be addressed by the Rate Board in this proceeding.

Mr. Skiendzielewski also takes exception to the Hearing Officer's ruling excluding certain issues tied to (i) alleged improprieties in the operation of the HELP loan program before the Tax Review Board and (ii) disputes related to his obligation to fully pay the loan he received through the HELP loan program. Mr. Skiendzielewski brought this matter before the Tax Review Board and it was fully litigated and decided in PWD's favor.⁸² The Board should be aware that PWD customers are responsible for repairing the pipes and fixtures that carry water from the City's water mains to their home and that carry wastewater from their home to the City's wastewater main in the street. PWD's HELP loan funding offers zero-interest loans for repairs to

⁸¹ See PWD Objections to Mr. Skiendzielewski's Interrogatories and Requests for Production of Documents (Set A) (April 8, 2021).

⁸² See PWD Objections to Mr. Skiendzielewski's Interrogatories and Requests for Production of Documents (Set A) (April 8, 2021).

customer-owned water service lines and customer-owned sewer lines.⁸³ Customers have 60 months to pay off the loan, which remains interest-free unless they fail to make payments on time.

The Hearing Officer's determination to exclude from this proceeding discovery and testimony intended to address allegations of misconduct in connection with administration of the HELP loan program was fully supported and should be upheld. Accordingly, the Hearing Officer's Order Granting PWD's Motion in Limine addressing issues raised by Mr. Skiendzielewski should not be disturbed.

B. The Hearing Officer Properly Denied Mr. Skiendzielewski's Request for Recusal of Counsel to the Water Rate Board.

In exceptions, Mr. Skiendzielewski challenges the Hearing Officer's denial of his requested recusal of counsel to the Rate Board. As explained herein, the Hearing Officer properly denied the request for recusal of counsel.

In correspondence to the Hearing Officer dated May 10, 2021, Mr. Skiendzielewski requested recusal of counsel to the Rate Board "due to the relevant decision-making, conflicts." In his request, he claimed that the Board "has a basic and primary professional responsibility to ensure and safeguard the processes, reports and deliberations that occur and are produced from such deleterious effects such as conflicts of interest, unprofessional conduct, unethical decision making, etc. as evidenced on the record by counsel to the [Water Rate Board]."⁸⁴ In an attempt to support his claim, Mr. Skiendzielewski attached to his request a May 18, 2017 letter from this counsel.

⁸³ <https://www.phila.gov/programs/homeowners-emergency-loan-program-help/>.

⁸⁴ <https://www.phila.gov/media/20210513174112/Order-Haver-motion-to-strike-may-14-final-Copy.pdf>.

Despite Mr. Skiendzielewski's contention, which is unfounded, the May 18, 2017 letter does not support his position. In fact, the letter supports denial of his request for recusal.⁸⁵

On May 11, 2021, the Hearing Officer properly denied Mr. Skiendzielewski's request, citing his failure to "present any credible evidence to support his request" and that the letter reflects the "professionalism and integrity of the involved individual."⁸⁶ As the letter makes clear, the involved individual was tasked by the Mayor of the City of Philadelphia to respond to Mr. Skiendzielewski's "abusive and disruptive" behavior in repeatedly contacting City officials. As indicated in the Hearing Officer's Report, Mr. Skiendzielewski has demonstrated "abusive and disruptive" behavior in this proceeding and the Hearing Officer issued an Order in Limine (April 16, 2021) to exclude from this proceeding allegations of misconduct by counsel for the Rate Board.⁸⁷

The Hearing Officer's proper determination on the request for recusal and the scope of the proceeding (excluding allegations of misconduct by counsel for the Rate Board) should be upheld. As reflected in the Report and the Order in Limine (April 16, 2021), the Rate Board does not have the authority to investigate, administer or enforce public integrity laws or ethical codes.⁸⁸ As the Rate Board does not have the authority to investigate, administer or enforce public integrity laws or ethical codes, and Mr. Skiendzielewski's request for recusal does **not** relate to granting or denying PWD's proposed rate increase, his request should be denied. As

⁸⁵ Order Denying Request for Recusal: Skiendzielewski at 1 (May 11, 2021).

⁸⁶ Order Denying Request for Recusal: Skiendzielewski at 1 (May 11, 2021).

⁸⁷ Order Granting PWD Motion in Limine: Skiendzielewski at 2-3.

⁸⁸ Report at 13; Order Granting PWD Motion in Limine: Skiendzielewski at 2; PWD Motion in Limine to Limit or Exclude Certain Portions of the Testimony of Michael Skiendzielewski at 3. *See also*, 2016 Rate Determination at 39 and Appendix B.

such PWD respectfully requests that the Rate Board deny Mr. Skiendzielewski's exception and uphold the Hearing Officer's proper denial of his request for recusal of counsel for the Rate Board.

C. The Hearing Officer Properly Concluded that Settlement Negotiations Are Confidential.

In exceptions, Mr. Skiendzielewski finally claims that settlement negotiations are not confidential. Moreover, he requests that the Department return to settlement negotiation — presumably to reach a different outcome. Such negotiations with Mr. Skiendzielewski ended without agreement. Mr. Skiendzielewski seeks to overturn the long-standing principle that settlement negotiations are privileged, confidential and inadmissible into evidence. The Hearing Officer's Report correctly adopted PWD's position that settlement negotiations are privileged, confidential and inadmissible into evidence.⁸⁹ Mr. Skiendzielewski asserts that Hearing Officer erred in this regard because the legal citation relied upon in the Report does not apply to the settlement discussions in this proceeding. However, the authority cited in PWD's Brief is explicit: "Settlement negotiations are privileged, confidential and inadmissible into evidence. The law is clear that an unaccepted offer to compromise or settle cannot be introduced into evidence."⁹⁰

Mr. Skiendzielewski elected to proceed *pro se* in this proceeding. The Hearing Officer is not required and is not to assume the role of an advocate on behalf of Mr. Skiendzielewski.⁹¹ The Hearing Officer "need not advise an uncounseled claimant on specific evidentiary questions or

⁸⁹ Report at 32; citing PWD Brief at 67, fn 224.

⁹⁰ See, e.g., *Redevelopment Authority of City of Philadelphia v. Pelullo*, 409 A.2d 122, 125 (Pa.Cmwlth. 1979).

⁹¹ See, e.g., *McFadden v. Unemployment Comp. Bd. of Review*, 806 A.2d 955, 958 (Pa.Cmwlth. 2002). *Vann v. Unemployment Compensation Board of Review*, 494 A.2d 1081, 1085-86 (Pa. 1985); *Hackler v. Unemployment Compensation Board of Review*, 24 A.3d 1112, 1115-16 (Pa.Cmwlth. 2011).

points of law.”⁹² Nor does she need show any greater deference to an uncounseled claimant than that afforded a claimant with an attorney.⁹³

Ironically, in challenging the long-standing principle that settlement negotiations are confidential, Mr. Skiendzielewski fails to cite to legal authority to support his position. That is because there is none. In short, Mr. Skiendzielewski has not convincingly argued his position. Mr. Skiendzielewski introduced no evidence to support his position, nor did he develop an argument to support his contention. As Mr. Skiendzielewski did not present evidence, legal authority or a legal argument to support his contention that settlement negotiations are non-confidential, his exception should be rejected.

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⁹² *Brennan v. Unemployment Comp. Bd. of Review*, 487 A.2d 73, 77 (Pa.Cmwlth. 1985) (citation omitted).

⁹³ *Id.*

IV. CONCLUSION

For the reasons set forth in the record, its Brief, and these Reply Exceptions, the Department respectfully requests that the Rate Board deny each of the Exceptions filed by Lance Haver and Michael Skiendzielewski.

Respectfully submitted,

/s/ Andre C. Dasent

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