BEFORE THE

PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD

Philadelphia Water Department Proposed	**:**	
Changes in Water, Wastewater and	**:**	**FY 2022-2023**
Stormwater Rates and Charges	**:**	

REPLY EXCEPTIONS OF THE PUBLIC ADVOCATE

May 28, 2021

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I. INTRODUCTION

On May 18, 2021, Hearing Officer Marlane Chestnut transmitted the Hearing Officer Report (Report) recommending approval of the Philadelphia Water Department (PWD) and Public Advocate Joint Petition for Partial Settlement in the above-captioned rate proceeding. In addition to the recommendation that the Board approve the proposed settlement, Hearing Officer Chestnut addressed two contested issues between the Public Advocate and PWD: (1) implementation of TAP arrearage forgiveness; and (2) cost recovery for TAP arrearage forgiveness.[1] The Report also addressed certain objections filed by Lance Haver and Michael Skiendzielewski.

Regarding the first of these two contested issues, the Public Advocate requested that the Board find that PWD has failed to provide arrearage forgiveness to TAP customers, impeding access to a service required by the Philadelphia Code that is inextricably linked to the payment of TAP rates approved by the Board. For relief, the Public Advocate submitted that: (a) the Board should require PWD to report monthly on the performance of its arrearage forgiveness policies and any obstacles prohibiting PWD from operating an arrearage forgiveness program that allows TAP customers to earn and realize arrearage forgiveness immediately with each monthly TAP payment; and (b) the Board should require PWD to report monthly on its efforts to reduce TAP denials and TAP churn, which limit the availability of pre-TAP arrearage forgiveness to low-income customers.[2]

Hearing Officer Chestnut agreed with the Public Advocate, and recommended "[t]hat the Rate Board require the Philadelphia Water Department to report monthly on the amount and type

[1] The Hearing Officer Report also addressed miscellaneous issues that were not contested by any party to the rate proceeding.
[2] PA Main Brief (MB) at 9.

of arrearage forgiveness that PWD is providing to TAP customers, the result of its efforts to determine what legal and/or operational barriers must be overcome to implement ratable forgiveness for each month the TAP participant pays the TAP bill; and the efforts PWD is taking to reduce TAP denials and TAP churn."[3] Neither PWD nor the Public Advocate took exception to these recommendations. Because no exception was taken, the Board should approve the Hearing Officer's recommendations regarding TAP arrearage forgiveness reporting.

Regarding the second contested issue addressed in the Report, the Public Advocate contended that PWD's proposal to modify the TAP-R rider to include a mechanism to recover from non-TAP customers a percentage of the amount of pre-TAP arrears forgiven beginning in FY 2023 would increase costs to non-TAP customers for forgiving debt, the uncollectibility of which is already factored into the base rates PWD proposes to charge. Accordingly, the Public Advocate submitted that PWD's proposal to modify the TAP-R rider should be rejected.

Hearing Officer Chestnut agreed with the Public Advocate and recommended that the Board reject PWD's proposal to recover costs associated with arrearage forgiveness through the TAP-R rider. In so doing, Hearing Officer Chestnut recognized, after careful review of PWD's and the Public Advocate's submissions, that PWD's claim that it would have no way to recover past due amounts associated with TAP customers was not persuasive, because "the revenue requirement associated with these customers are already reflected in the cost of service, and thus base rates."[4] Furthermore, Hearing Officer Chestnut correctly recognized that PWD "failed…to rebut the Public Advocate's showing that the collection factors used in this proceeding to project

[3] Report at 53-54.
[4] Report at 52.

anticipated revenue already take into account payments (and lack of payments) associated with accounts of both TAP and non-TAP customers."[5]

PWD submitted two exceptions to the Hearing Officer's recommendation regarding arrearage forgiveness cost recovery. The first exception contends that the Report errs in recommending rejection of PWD's proposal because (1) the Hearing Officer did not recognize PWD's "detailed analysis" underling its proposal, (2) PWD successfully rebutted the Public Advocate's contentions, and (3) pre-TAP arrears are not subject to collection activities. As explained below, PWD's first exception should be denied because PWD has failed to identify adequate supporting reasons for modification to the Hearing Officer's recommendation, nor has PWD identified the existence of an error, misstatement or false impression warranting deviation from the sound recommendation of the Hearing Officer, which is supported by the record of this proceeding.

PWD's second exception is that, by rejecting PWD's request to recover arrearage forgiveness through the TAP-R rider, the Board would slow progress toward improving TAP and expanding the availability of arrearage forgiveness to TAP participants. The contention that failure to approve cost recovery would slow progress in improving TAP operations is unsupported on the record and conflicts with PWD's acceptance of the Hearing Officer's recommendation regarding improving access to TAP arrearage forgiveness ("TAP AF" or "AF"). Furthermore, PWD's arguments that AF cost recovery is required to avoid revenue shortfall and its request that the Board take "administrative notice" of its need for AF cost recovery must be rejected. In addition, and in the alternative, PWD suggests that the Board defer consideration of AF cost recovery until the Special Rate Reconciliation Proceeding, intended to commence in

[5] Report at 52 (internal quotations omitted).

March 2022. PWD's alternative recommendation is presented for the first time in exceptions, and so is an undeveloped proposal. The Public Advocate submits that expansion of the Special Rate Reconciliation Proceeding is unwarranted, for several reasons, as set forth more fully herein.

Lance Haver and Michael Skiendzielewski filed exceptions to the Hearing Officer's recommendation that the Board approve the proposed partial settlement. For his part, Mr. Haver raises a host of spurious accusations concerning the settlement, the parties, and the process itself. Mr. Haver's exceptions are premised upon significant mischaracterization and misunderstanding both of the Public Advocate's role, the widely-followed practice of negotiating settlements generally (and, specifically, negotiation of settlements in Pennsylvania utility rate cases), and the explicit and documented factual bases supporting the settlement As explained below, Mr. Haver's exceptions should be denied.

Mr. Skiendzielewski raises exceptions regarding the Hearing Officer's granting of PWD objections to his discovery requests, reiterating his request for recusal of the Rate Board's counsel, and contesting whether PWD negotiated in good faith with him. The Public Advocate notes that none of these objections address the Hearing Officer's substantive recommendations concerning the proposed settlement or contested issues regarding TAP arrearage forgiveness. Accordingly, they do not form bases for the Board to depart from the Hearing Officer's recommendations in the Report.

II. THE BOARD SHOULD DENY PWD'S EXCEPTIONS AND ADOPT THE RECOMMENDATIONS OF THE HEARING OFFICER REGARDING TAP ARREARAGE FORGIVENESS RECOVERY.

As discussed above, PWD submits two exceptions to the Report's recommendation to reject PWD's proposal to recover arrearage forgiveness costs via the TAP-R rider. PWD does not except to the Report's recommendation that PWD be required to report monthly to the Board

regarding the performance of its arrearage forgiveness policies, any obstacles to providing arrearage forgiveness ratably with each monthly payment, and its efforts to reduce TAP denials and TAP churn.[6] Accordingly, PWD's two exceptions address only one of the Hearing Officer's recommendations. As explained below, the Hearing Officer's recommendation should be adopted and the Board should deny PWD's exceptions.

A. Reply to PWD Exception 1: The Hearing Officer Report Correctly Recommends Rejection of PWD's Arrearage Forgiveness Cost Recovery Proposal.

PWD propounds three bases for its exception, alleging that: (1) the Hearing Officer fails to recognize the details of its proposed AF cost recovery mechanism, (2) the Hearing Officer mistakenly concluded that PWD failed to rebut the Public Advocate's position that the AF cost recovery mechanism would overcharge PWD customers, and (3) the Hearing Officer Report inadequately considers that PWD does not attempt to collect pre-TAP arrears. As explained below, each of these contentions is incorrect and so PWD's exception should be denied.

1. The Hearing Officer Correctly Concluded that Arrearage Forgiveness Cost Recovery was Unwarranted in Light of PWD's use of Collection Factors in Projecting Revenues.

The Hearing Officer recognized that, as in the 2018 Rate Proceeding, the recovery of AF costs through the TAP-R "could risk a potential overstatement of the impact of arrearage forgiveness."[7] PWD's exception claims, contrary to the Hearing Officer's finding, that its AF cost recovery proposal responds to the issues raised in the 2018 Rate Proceeding. PWD claims that it took into account the implications of revenue projections and cost of service analysis when developing its proposed AF factor for the TAP-R.[8] Contrary to PWD's claims, the record is clear that PWD did not account for the potential double-recovery associated with setting base

[6] Report at 49, 53-54.
[7] Report at 52; 2018 Rate Determination at 80.
[8] PWD Exceptions at 6.

rates that explicitly factor in the uncollectibility of pre-TAP arrears while also seeking via the TAP-R rider to recover some portion of those uncollectible arrears.

Indeed, PWD's assertion is contradicted by its own filing. PWD Statement No. 7B, Schedule BV-S1, upon which PWD's exception is based, admits that pre-TAP arrears ***are included*** in the calculation of collection factors. As set forth therein:

> The current collection factor reports generated by Raftelis include billings associated with the current Pre-Program TAP Arrears. Per TAP policies, the Water Department is no longer pursuing collections on these outstanding bills (i.e., these arrears are "frozen" or "roped-off"). Therefore, it is reasonable to assume that the Water Department will not collect on any of these outstanding amounts. Moreover, it is also reasonable to assume that the Water Department will not recognize any further revenues from TAP customers to satisfy these outstanding arrears.[9]

As a result, the Hearing Officer correctly concluded that recovering AF through the TAP-R rider may overcharge non-TAP customers, as submitted by the Public Advocate. The Hearing Officer's recommendation should be approved by the Board, and PWD's exception should be denied, because the record unambiguously demonstrates that "the revenue requirement associated with [TAP] customers are already reflected in the cost of service, and thus base rates."[10]

2. PWD did not Successfully Rebut that Base Rates Compensate for Uncollectible pre-TAP Arrears.

PWD argues that the Hearing Officer mistakenly found that PWD had not rebutted "the Advocate's contentions with regard to over-recovery should the AF Factor be added to the TAP Rider formula."[11] PWD illogically suggests that its filing, including the design elements of AF

[9] PWD St. 7B, Sch. BV-S1 at 2.
[10] Report at 52.
[11] PWD Exceptions at 7.

cost recovery proposed at that time, constitute rebuttal to the Public Advocate's subsequent testimony and brief opposing modifications to the TAP-R rider.[12]

In substance, PWD asserts that examination of PWD's collection factors is a "red herring" in the context of calculating recovery of arrears because collection factors are "forward looking" and so not an appropriate tool to estimate recovery of pre-TAP arrears.[13] Contrary to PWD's exception, whether the TAP-R rider is an appropriate tool for this purpose is irrelevant. The only relevant issue is whether increasing the TAP-R to recover for AF would likely result in overcharging customers.

As is clear on the record, pre-TAP arrears are included in the denominator in the calculations utilized to determine collection factors, which factors apply to increase the base rates for non-TAP customers to compensate for delay or lack of payment.[14] As the Public Advocate explained, and the Hearing Officer agreed, PWD's projected revenues already "take into account payments (and lack of payments) associated with accounts of both TAP and non-TAP customers."[15]

In support of its exception, PWD relies solely on PWD Statement No. 7B, Schedule BV-S1, which, as described above,[16] explicitly acknowledges that Raftelis' calculated collection factors include pre-TAP arrears which are not subject to collection. As explained in the Public Advocate's Main Brief, citing the testimony of Public Advocate witness Colton:

> The result of the inclusion of pre-TAP billings is to reduce the collection factor, thereby forming the basis for higher rates to collect PWD's revenue requirement. Indeed, if PWD were to remove the pre-program arrearages from the base, its actual collections would be

[12] PWD Exceptions at 7 (citing PWD St. No 7B, Sch. BV-S1)
[13] Id.
[14] See, e.g., PA MB at 21 (citing Schedule RFC-6 to PWD St. No. 6); see also PWD St. 7B, Sch. BV-S1 at 2.
[15] Report at 52; PA MB at 21.
[16] See *supra* note 9.

a higher percentage of historical billings.[17]

PWD did not rebut this assertion in any way. Indeed, it cannot do so, because in order for AF recovery through the TAP-R rider to avoid excessive rates and charges, an adjustment would have to be made to increase the collection factor (lowering the revenue requirements for base rates) by removing pre-TAP arrears from the denominator in each of the three periods for which Raftelis calculated the percentage of billed revenues that would be collected.[18] PWD did not contest this conclusion (nor make this adjustment), so the Hearing Officer correctly determined it to be unrebutted.[19] Accordingly, the Board should deny PWD's exception.

3. The Hearing Officer Report Inherently Recognizes the Uncollectibility of pre-TAP Arrears.

PWD argues that without adding the AF factor to the TAP-R rider, it will have no vehicle to recover a reasonable portion of pre-TAP arrears, and that the Report fails to adequately address PWD's inability to collect pre-TAP arrears.[20] PWD submits that because pre-TAP arrears are not subject to collection efforts, the AF factor would create a way to reasonably recover some portion of the pre-TAP arrears that may be forgiven.[21] The Hearing Officer Report recognizes, and correctly rejects, the premise upon which PWD's exception is based. Indeed, the fact that PWD does not pursue collections on pre-TAP arrears warrants no further discussion in the Report because there is no question that the Philadelphia Code prohibits PWD from engaging in such activities.[22]

The Hearing Officer Report recognizes that the TAP-R is a straightforward mechanism "intended to ensure there is no substantial over-recovery or under-recovery" of revenues

[17] PA MB at 22.
[18] See, e.g., PA MB at 23.
[19] Report at 52.
[20] PWD Exceptions at 10.
[21] Id. at 10-11.
[22] Phila. Code at §§19-1605(3)(h), 1605(3)(m).

associated with TAP customer discounts.[23] The Report includes a lengthy passage from PWD's Main Brief describing the proposed AF factor, and how it seeks to determine the amount a TAP customer would have paid "had their arrears not been frozen."[24] Similarly, the Report includes a passage from the Public Advocate's brief explaining its opposition to PWD's proposed AF recovery factor.[25] Finally, the Report recommends rejecting PWD's proposal in order to avoid overcharging customers.[26] PWD appears to except on the basis that the Hearing Officer Report did not include extensive discussion regarding the fact that pre-TAP arrears are frozen and not subject to collections, but instead relied upon the quoted sections from PWD and the Public Advocate's briefs.[27]

PWD's exception should be denied. The Hearing Officer Report directly addressed (and incorporated verbatim) the specific positions of the parties and did not omit any considerations necessary to conclude that PWD's AF cost recovery proposal should be rejected. It is unnecessary for the Report to contain extensive discussion regarding uncollectibility of pre-TAP arrears because PWD's inability to pursue collections of those sums is not in dispute and is, in fact, inherent to the operation of TAP. The Hearing Officer correctly concluded that adding AF cost recovery to the TAP-R rider presented a risk of overcharging PWD's customers. The Board should adopt the Hearing Officer's recommendation.

B. Reply to PWD Exception 2: Rejecting the Proposed Arrearage Forgiveness Factor Should not Impede Progress in Improving TAP.

PWD asserts that, based upon provisions in the Joint Settlement committing to improve TAP outreach efforts and recertification policies (among other things), denying its proposed AF

[23] Report at 50.
[24] Id. at 51.
[25] Id. at 51.
[26] Id. at 52.
[27] PWD Exceptions at 10.

cost recovery mechanism would create a disincentive to improving the arrearage forgiveness program.[28] PWD expresses its belief that without AF cost recovery the Board will create a revenue shortfall which places PWD on an unsustainable path.[29] Finally, PWD requests that the Board take "administrative notice of the Philadelphia Gas Works…arrearage forgiveness policy" for the proposition that PWD will not be made whole absent a surcharge mechanism associated with AF.[30]

As a threshold matter, none of PWD's assertions are supported on the record. PWD has not taken exception to the Hearing Officer's recommendation that it provide monthly reporting regarding its efforts to improve access to arrearage forgiveness for TAP customers. PWD needs no incentive to comply with a Board order approving that recommendation and PWD must certainly be held to account for any failure to do so. PWD's reasoning that the Report's findings "offer a disincentive for AF program enhancement"[31] fails to consider that PWD can propose a different way of recovering AF costs in the future that avoids overcharging customers.

PWD's prediction of a "reckoning in [its] future" if the Board denies its AF cost recovery mechanism constitutes pure hyperbole.[32] PWD estimated the total amount of arrearage subject to forgiveness to be $39 million as of June 30, 2020.[33] In the exceedingly unlikely event that all $39 million in arrearages were to be forgiven and subject to reconciliation in FY 2023 (the only year at issue), PWD's AF factor would produce a maximum of approximately $3.5 million,[34] amounting to less than one half of one percent of the total service revenues anticipated by the

[28] PWD Exceptions at 11-12.
[29] Id. at 12.
[30] Id. at 12-13.
[31] Id. at 5.
[32] Id. at 12.
[33] PWD St. 7B, Sch. BV-S1 at 1.
[34] Id. at 8 (formula).

settlement rates for that year.[35] Finally, PWD's request for the Board to take administrative notice (or official notice) of PGW's arrearage forgiveness policy and cost recovery is inappropriate. PWD had adequate opportunity during the proceeding to explain the extent to which PGW's policies may be informative, but it did not do so. Administrative notice is inappropriate because PGW's arrearage forgiveness recovery mechanism (and the extent to which it accounts for base rate recovery to avoid overcharging customers) is not commonly known, obvious or notorious, nor is it reflected in the reports or records of the Board.[36]

In the alternative, PWD submits that the Board could defer its decision regarding PWD's AF cost recovery proposal until the Special Rate Reconciliation Proceeding expected to commence in March 2022.[37] This is a new, undeveloped proposal, which is problematic for several reasons. First, the purpose of the Special Rate Reconciliation Proceeding is *to reduce* customer rates and charges in FY 2023 to account for federal stimulus funds and PWD financial performance. PWD's proposal conflicts with the purpose of the Special Rate Reconciliation Proceeding, because approval of PWD's modifications to the TAP-R rider would *increase* customer rates and charges. Second, the basis for denying PWD's proposal is that TAP AF cost recovery could overcharge customers because payment and non-payment patterns, which explicitly factor in pre-TAP arrears, are already utilized in the cost of service study to increase rates and charges via the collection factors discussed above. Within the construct of the black

[35] Joint Petition, Appendix 1. PWD projects $743,022,000 in total service revenues in FY 2023, subject to reconciliation. $3,500,000 / $743,022,000 = 0.0047.

[36] Right to know evidence—Official notice, 36 Standard Pennsylvania Practice 2d § 166:206 ("'Official notice' is the administrative counterpart of judicial notice and is the most significant exception to the principle that agency decisions of an adjudicatory nature be based exclusively on evidence contained in the formal record. The doctrine of official notice allows an agency to take notice not only of facts that are commonly known, obvious, or notorious to the average person but also of facts that are obvious and notorious to an expert in the agency's field, as well as of facts contained in reports and records on file with the agency although they are not part of the hearing record.") (internal citations omitted).

[37] PWD Exceptions at 13.

box settlement, it does not appear to be possible for the Board to adjust the collection factors for FY 2023 as would be necessary to implement AF cost recovery in a non-duplicative manner. Finally, if the Board were to defer its decision on PWD's AF cost recovery proposal to the Special Rate Reconciliation Proceeding, that proceeding would be more complicated and require additional resources. As but one example, the Public Advocate has typically utilized the consulting services of one witness, Mr. Morgan, for past reconciliation proceedings. With regard to AF cost recovery, the Public Advocate would require the services of an additional witness, Mr. Colton, who testified on that subject in this rate proceeding.

For all of the foregoing reasons, PWD's exception should be denied and the Board should approve the Hearing Officer's recommendation to reject PWD's proposed modification to the TAP-R rider at this time.

III. THE BOARD SHOULD DENY MR. HAVER'S EXCEPTIONS.

The gravamen of Mr. Haver's multiple exceptions, addressed more fully below, is that the proposed settlement is insufficient and the process by which it was reached was flawed because the Public Advocate did not adopt Mr. Haver's desired approach to the conduct of this proceeding. In sum, Mr. Haver believes that the Public Advocate should have elicited public input in the context of confidential settlement negotiations. As a general matter, Mr. Haver is wrong and his exceptions should be denied. Throughout this proceeding, the Public Advocate has zealously represented the interests of PWD's small user customers (residential customers and "mom and pop" shops). The settlement agreement substantially reduces PWD's requested rate increase, enhances customer service, and establishes an innovative mechanism to ensure that PWD pursues stimulus funding and shares the benefits of financial outperformance with its customers. The Public Advocate faithfully executed its duties to educate and inform PWD customers and to secure their participation and input in the rate proceeding.

Mr. Haver's exceptions are inaccurate and if uncorrected will mislead PWD customers as to the nature of this proceeding and its resolution. His rhetoric borders on defamation and demagogy and the Board should rebuke him in its Rate Determination.

To start, Mr. Haver appears to mistake the Public Advocate's role in this rate proceeding with the role Community Legal Services (CLS) attorneys serve on behalf of intervenors *in other utility proceedings.* For more than 45 years, CLS has dedicated attorney staff to the representation of low-income Philadelphians, and groups of which they are members, in utility rate and regulatory proceedings. Through these efforts, CLS's Energy Unit has developed multi-faceted strategies to benefit low-income Philadelphians, providing free legal representation aimed at improving customer service, increasing the availability of and affordability of customer assistance programs, and seeking to ensure universal access to essential utility service. CLS has, on countless occasions, represented customers and groups as intervenors in utility rate increase proceedings, utility universal service proceedings, default service proceedings, and myriad other proceedings.

Among the recent examples of CLS's successful representation of these clients are the following:

- A 2015 Commonwealth Court decision[38] reversing the PUC's interpretation of the Electricity Generation Customer Choice and Competition Act and affirming that the PUC has the authority to protect low-income customer assistance program participants from excessive charges imposed by electricity generation suppliers. This decision paved the way for ongoing implementation of such protections statewide.

- Entry of a PUC order[39] after three years of litigation that required PECO to preserve consumer termination notice and medical certification protections (among other protections) in connection with an advance payment pilot program (pre-paid electricity), that ultimately resulted in PECO abandoning its proposal.

[38] CAUSE-PA v. Pa. PUC, 120 A.3d 1087 (Pa. Commw. Ct. 2015).
[39] PECO Energy Company's Pilot Plan for Advance Payment Program, Docket No. P-2016-2573023, Opinion and Order (December 19, 2019).

- The PUC's adoption of a revised CAP Policy Statement,[40] which reduced the energy burden targets (the amount of household income, on a percentage basis that low-income customers should expect to pay for heat and electricity) from as high as 17% to between 6% and 10%. The PUC's Order specifically cited to comments submitted by the low-income advocates (represented by CLS and the Pennsylvania Utility Law Project) in approving a 6% combined energy burden for the lowest income CAP customers.[41]

- Entry of a PUC order approving PGW's petition to implement the foregoing reduced energy burdens,[42] in a contested proceeding which is now on appeal in the Commonwealth Court.[43]

In each of the proceedings described above, and in countless others, CLS lawyers advocated for low-income customers and/or groups in a representative capacity. Pursuant to Pennsylvania Rule of Professional Conduct 1.2(a), in those types of proceedings, CLS lawyers must abide by clients' decisions regarding whether or not to settle a matter, and thus cannot finalize a settlement agreement without approval.

In addition to the nearly half-century of CLS practice experience involving individual and client groups, CLS has performed services as Public Advocate for approximately three decades. However, these services are different in many respects, most notably because as Public Advocate, CLS does not represent a client. As explained in the Public Advocate's Answer to Mr. Haver's May 3, 2021 Motion to Compel (such motion was denied by the Hearing Officer on May 5, 2021), CLS serves pursuant to a contract with the Rate Board describing the services the Public Advocate provides (including outreach and information to encourage participation in public input hearings) in order to advance the collective interests of small user customers of PWD as a group.[44] CLS's contract to provide services as Public Advocate is a General

[40] 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code § 69.261–69.267, Docket No. M-2019-3012599, Final Policy Statement and Order (September 19, 2019).
[41] Id. at 30-31.
[42] PGW Petition for Expedited Review, Docket No. P-2020-3018867, Opinion and Order (March 26, 2020)
[43] See, e.g., Pa. Commw. Ct. Docket Nos. 421 CD 2020, 422 CD 2020.
[44] PA Answer to Haver Motion, ¶¶2, 11 (filed May 4, 2021).

Consulting Services contract, which does not entail the provision of legal services in a representative capacity to any individual or group, and so does not implicate a legal or ethical obligation to seek approval of the proposed settlement.

The foregoing explanation should not be taken to diminish or understate CLS's accomplishments in serving as Public Advocate. Rather, CLS has zealously advocated for the interests of small users in rate proceedings before the Board since 2016, and for the interests of residential customers in rate proceedings before the Philadelphia Water Commissioner for many years prior thereto. Among recent accomplishments, the Public Advocate and PWD successfully negotiated a settlement in the 2012 Rate Proceeding,[45] approved by then Water Commissioner Neukrug, which shortened the rate period from nearly four years to approximately two-and-a-half years and in turn saved PWD customers nearly $100 million. In the 2016 Rate Proceeding, based on positions taken by the Public Advocate, the Board approved adjustments to PWD's revenue requirements that saved customers approximately $16.5 million in FY 2017 and 2018. In addition, in the 2016 Rate Proceeding, the Board approved the implementation of the Tiered Assistance Program as a "percentage of income payment program" – the first of its kind for a water utility in the United States – adopting the positions of the Public Advocate.

As set forth more fully in the paragraphs below, responding to Mr. Haver's numbered exceptions,[46] the Public Advocate has faithfully, ethically, and responsibly executed its services in this case, as shown by the significant and beneficial terms of the proposed settlement itself. Moreover, although unrecognized by Mr. Haver, the Public Advocate is currently opposing

[45] Prior to this 2021 Rate Proceeding, the 2012 Rate Proceeding is the only known general rate increase proceeding in which the Public Advocate and PWD have been able to reach a substantial settlement. At no point in the settlement negotiations in that proceeding did the Public Advocate seek "input and guidance from Community and Civic Groups" as Mr. Haver contends. Haver Exceptions at p. 5.

[46] Mr. Haver's exceptions begin at numbered paragraph 2 and include two paragraphs numbered 4. As a result, the first three of the Public Advocate's Replies to Haver Exceptions correspond to paragraphs numbered 2, 3 and 4 of Mr. Haver's exceptions.

PWD's proposal to increase rates by millions of dollars through the TAP-R surcharge, as discussed more fully above. That Mr. Haver fails to take notice of the Advocate's opposition to PWD's proposal, while simultaneously contending that the settlement gives PWD "every penny" of its rate request, is remarkable.

A. Reply to Haver Exception 1: The Settlement Does Not Have the Appearance of a Quid Pro Quo.

Mr. Haver contends that the proposed settlement would authorize an inappropriate PWD rate increase while guaranteeing "continual employment" for the Public Advocate.[47] Accordingly, Mr. Haver submits that the settlement aims to accomplish undisclosed goals rather than the negotiated and appropriate compromise described in the Joint Petition.[48] Mr. Haver frames these undisclosed goals as "a quid pro quo agreement where in exchange for future work the entity paid by the Water Department to represent the Public has agreed to use the Public's money to guarantee the PWD a large rate increase." Haver Exceptions at p. 6.

Mr. Haver cites no evidence in support of his contention, which is simply the product of supposition and innuendo. Mr. Haver disregards the extensive savings in expense to all PWD customers associated with avoiding protracted litigation. He further disregards the economic impact of the negotiated rate increase, which amounts to between 16% and 40% of PWD's initial request for rate relief. Mr. Haver's aspersions lack logical cohesion. It is nonsensical to contend that the Public Advocate is motivated by a guarantee of future work when the Advocate's actions in this proceeding result in less current work. Finally, to the extent Mr. Haver has concerns about why the Public Advocate should participate in a future Special Rate Reconciliation

[47] The CLS attorneys serving as Public Advocate are members of the Philadelphia Legal Services Union, NOLSW Local 2320, and the terms of their employment and compensation are governed by a negotiated collective bargaining agreement, which does not take into consideration the Public Advocate contract.
[48] Joint Petition at ¶13.

Proceeding, he had ample opportunity to educate himself on the subject. He did not do so. Specifically, the Public Advocate notes that its involvement in the Special Rate Reconciliation Proceeding is in the public interest to ensure that PWD's proposals, and any action the Board takes on them, are subject to rigorous, on-the-record review. The Public Advocate is uniquely situated to conduct that review, since the genesis of the proposal for a FY 2023 rate reconciliation is Mr. Morgan's testimony,[49] which is based upon his experience in multi-year rate proceedings in Rhode Island.[50] Due to Mr. Morgan's experience, and the concerted efforts to develop a reconciliation framework in this proceeding, PWD agreed that the Public Advocate's future participation was necessary and in the public interest.

Mr. Haver's exception is not supported by the record, nor grounded in reality. There is no quid pro quo; rather there is an agreement that enables the Public Advocate to continue to advance the interests of the small user customers in just and reasonable rates, established on a reasonably scientific basis, via a future Special Rate Reconciliation Proceeding which could save customers up to $34 million. Mr. Haver's exception should be denied.

B. Reply to Haver Exception 2: Record Evidence Supports the Settlement Provisions Requiring PWD to Utilize Best Efforts to Obtain Stimulus Funds.

Mr. Haver excepts to the Report based upon his view that the settlement does not require PWD to seek stimulus funds that could benefit ratepayers. He erroneously contends that the settlement only requires PWD to "make good faith efforts."[51] The settlement requires PWD to utilize its "best efforts" to obtain stimulus funding to benefit customers and the enterprise.[52] This is an onerous contractual performance standard, above "commercially reasonable efforts" and

[49] PA St. 1 at 8:20-9:4.
[50] See, e.g., PWD-PA-II-2.
[51] Haver Exception at p. 7.
[52] Joint Petition at ¶ 11.A.2(a)(i).

"reasonable efforts," and requires PWD to take all actions that can be taken to pursue stimulus funding (short of harming the enterprise, of course).[53]

Mr. Haver's exception also poses a number of questions (the discovery phase of this proceeding concluded weeks ago) and submits that a "cultural" problem at PWD will prevent PWD from attaining stimulus funds.[54] Mr. Haver offers no support for this contention. In fact, PWD witnesses testified convincingly as to the ongoing and "tireless" efforts PWD undertakes to pursue federal funding.[55]

For these reasons, the settlement provision requiring PWD to utilize its best efforts to obtain stimulus funding is a meaningful and mutually beneficial term of the settlement, rather than a basis for an exception.

C. Reply to Haver Exception 3: The Settlement is Not the Product of a Faulty Process.

Mr. Haver contends that the Public Advocate did not take certain steps he submits would be taken by the Commonwealth Office of Consumer Advocate (OCA) in negotiating a settlement in a rate proceeding.[56] Mr. Haver cites to statements of Acting Consumer Advocate Tanya McCloskey about the operations of the OCA generally and misconstrues those statements as constituting steps the OCA takes in the context of rate proceedings.[57] The Public Advocate submits that it has performed more than adequate direct and indirect outreach, as evidenced by

[53] See, e.g., Kenneth Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 Bus. Law 677 (2019).
[54] Haver Exception at p. 7.
[55] April 30, 2021 Tr. at 75-77.
[56] Mr. Haver appears to express a preference for independent governmental appointment of utility consumer advocates rather than the Board's retention of a Public Advocate via a consulting contract. Mr. Haver's preference is irrelevant and does not establish any procedural flaw in the process employed in this rate proceeding. Moreover, it should be noted that legislative appointment is not always efficient. As an example, the Public Advocate notes that Tanya McCloskey ("acting" consumer advocate for the OCA) has served in that role without Pennsylvania Senate confirmation since 2012.
[57] See Haver Exceptions at p. 8-9 ("***In addition to our litigation activities***, the OCA helps educate customers on matters involving their utility services….) (emphasis added).

the materials it has disseminated and the extensive list of direct pre-public input hearing contacts.[58]

Mr. Haver submits, without any support, that the OCA would have conducted outreach to civic and community groups, contacted individuals who testified at public input hearings, and/or conducted a "round table" discussion to obtain input prior to entering into a proposed settlement.[59] Mr. Haver provides no evidence or support for the suggestion that OCA engages in such efforts and, in fact, OCA does not do so. In PGW's most recent base rate increase proceeding, public hearings were held on June 2, 2020 and June 3, 2020.[60] OCA and others successfully negotiated a partial settlement, filing a Joint Petition on August 26, 2020.[61] The OCA did not elicit input from members of the public, civic or community groups in its negotiations, nor to the Public Advocate's knowledge, did OCA or any participant endeavor to disseminate information publicly about that Joint Petition prior to its approval by the PUC.

Mr. Haver fails to recognize that the Public Advocate utilized multiple social media platforms (Facebook, Twitter and CLS website) to disseminate the settlement term sheet immediately after it was finalized. Likewise, PWD distributed the term sheet directly via email to its customers. Contrary to Mr. Haver's contention, the details of the proposed settlement were not only accessible on the Rate Board's website, but were actively distributed via multiple platforms. Nevertheless, not one civic or community group contacted the Public Advocate or filed any written comments in support or opposition to the proposed settlement.

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[58] See PA Answer to Haver Motion to Compel, Appendix I.
[59] Haver Exceptions at p. 9.
[60] See, e.g., https://www.pgworks.com/customer-care/base-rate.
[61] Pa. PUC v. PGW, Docket No. R-2020-3017206, Joint Petition for Partial Settlement, August 26, 2020, available at https://www.puc.pa.gov/pcdocs/1674964.pdf.

Finally, Mr. Haver contends that the Board failed to provide an "open and transparent process for public input and comment."[62] The contrary is true. As articulated in the Report, the Board held four public input hearings on PWD's proposal and elicited relevant and meaningful testimony.[63] In addition, the Board received more than 100 comments from interested stakeholders, and extended the duration for written public input after the proposed settlement terms were established. The Board more than adequately fulfilled its obligations regarding public input and comment.

D. Reply to Haver Exception 4: The Board Conducted Public Hearings as Required by the Philadelphia Code.

Mr. Haver appears to contend that the Board failed to satisfy its obligations because it did not convene an additional round of hearings in order to get public input regarding the proposed settlement. This appears to be a short-hand regurgitation of Mr. Haver's Settlement Objections, which relied upon a case challenging an increase in real estate transfer taxes, which is not applicable here.[64] The Public Advocate incorporates, in response, the argument set forth in its Main Brief regarding this proposition and asserts that Mr. Haver's exception should be denied.[65]

E. Reply to Haver Exception 5: The Hearing Officer Made Determinations Based on the Record and did not Prejudge the Case.

Mr. Haver takes issue with statements made during hearings, which he alleges to have been detrimental and/or improper.[66] The statements Mr. Haver identifies do not affect any of the rulings made in this proceeding, and appear to be non-controversial statements based on the Hearing Officer's extensive experience in utility rate proceedings. In any event, Mr. Haver has

[62] Haver Exceptions at 10.
[63] Report at 22-24.
[64] Haver Objections at ¶8 (citing City of Philadelphia v. Weiner, 550 A.2d 274 (Pa. Commw. Ct. 1988).)
[65] PA MB at 27-28.
[66] Haver Exceptions at p. 11.

made no showing that either statement was actually, or even potentially, prejudicial. His exception should be denied.

F. Reply to Haver Exception 6: The Special Rate Reconciliation Framework is an Important and Beneficial Term of the Settlement.

Mr. Haver contends that the Hearing Officer failed to identify the range of stimulus fund revenues that will potentially result in a reduction in the FY 2023 rate increase.[67] Mr. Haver did not raise a concern regarding the definition of stimulus funds utilized in the settlement prior to filing his exceptions. He now submits that the "true up" is unenforceable. Mr. Haver is incorrect.

Mr. Haver appears to believe that because City Council does not have line-item authority over the Water Department's operating budget, that even if federal stimulus funds are received, they will not be counted. To the contrary, the provisions of the Joint Petition do not turn on how stimulus funds may be reflected in PWD's operating budget, but require adjustments based upon whether stimulus funds are received or, in the case of a City Council budget appropriation, allocated to PWD in the FY 2022 budget. If stimulus funds are allocated or received between July 1, 2021 and December 31, 2021, they will be included in the "true up" to the extent they exceed the applicable threshold.[68]

Mr. Haver criticizes the definition of stimulus funding, contending that it is overly narrow. However, as the Public Advocate explained, this construct was designed taking into account the time during which stimulus funds could be received in order to be factored into the reconciliation process itself. Accordingly, the Public Advocate incorporates the explanation of

[67] Haver Exceptions at p. 11-12.
[68] Joint Petition at ¶ 11.A.2(a)(i).

the Special Rate Reconciliation Proceeding framework set forth in its Main Brief in response to Mr. Haver's exception.[69]

Perhaps most significantly, Mr. Haver completely disregards that the Special Rate Reconciliation Proceeding will reconcile FY 2023 rates based on PWD's actual financial performance in FY 2021, without any threshold limitations, and based purely on the extent to which PWD may outperform projections.[70] Importantly, this very broad adjustment will allow the Board to provide additional rate relief to PWD customers in FY 2023 based on improved collections, additional stimulus dollars received by PWD customers, unexpected operating efficiencies and savings, or other factors. The Public Advocate submits that the Special Rate Reconciliation Proceeding is a central and meaningful term of the proposed settlement, because it allows the Board to rebalance the interests of customers and PWD in light of potential stimulus impacts and financial performance. Mr. Haver's exception should be denied.

G. Reply to Haver Exception 7: The Hearing Officer did not Engage in any Attacks on any Participant, and the Hearing Officer Report Evidences no Biases.

Mr. Haver contends that the Hearing Officer's recognition of his status as an individual intervenor, representing solely his own interests and not speaking on behalf of "the public," constitutes a "straw man" argument.[71] He submits that, as a result, the Hearing Officer has expressed bias against him.

Mr. Haver attempted repeatedly to place himself in the position of representing broader interests than his own.[72] As discussed more fully above, Mr. Haver's critique reflects his significant misunderstanding of the Public Advocate's role as a statutory party negotiating in

[69] PA MB at 26-27.
[70] Joint Petition at ¶ 11.A.2(a)(ii).
[71] Haver Exception at p. 12.
[72] See April 30, 2021 Tr. at 12 (claiming PWD and the Public Advocate have "gone behind the public's back and reached a secret agreement."); 16 (objecting that the Public Advocate would not consult with community groups in advance of settlement); see also Haver Objections at ¶20-21 (same).

behalf of the interests of the small user customers as a group. Moreover, the Hearing Officer correctly recognized that even if additional public participation were feasible, it would not result in renegotiation of the proposed settlement agreement among the participants. Mr. Haver's proposal to obtain further input prior to reaching the agreements reflected in the settlement term sheet was therefore "inappropriate."[73]

The Hearing Officer exhibited extraordinary patience with Mr. Haver despite his repeated personal attacks histrionics throughout this rate proceeding. As is clear on the record, Mr. Haver protested the proposed settlement on the basis that the undefined "public" had not been consulted. The merits of those claims are his, and his alone, to pursue. That is not a "straw man" argument, but rather the real consequence of Mr. Haver's choice to intervene as an active participant in this rate proceeding. His failure to convince the Hearing Officer of the feasibility and relevance of subjecting the proposed settlement to public hearing in order to pursue his obvious goal of undermining the agreements reached is not a valid basis for an exception. The Hearing Officer properly considered, and rejected, Mr. Haver's submissions.[74]

H. Reply to Haver Exception 8: The Hearing Officer did not err in Dispensing with Mr. Haver's Laundry List of Objections to the Proposed Settlement.

Mr. Haver submits that the Hearing Officer erred in rejecting multiple allegations he made regarding the proposed settlement and overlooked other reasons not to approve it. The Public Advocate addresses each substantive allegation succinctly, as follows:

- Mr. Haver contends that the Hearing Officer failed to find that projections in PWD's Five Year Plan have been proven incorrect.[75] PWD testified that projections in the Five Year Plan were "accurate for Five Year Plan purposes," and Mr. Haver was unable to prove otherwise.[76] Accordingly, the Hearing Officer is correct in finding that Mr. Haver failed

[73] April 30, 2011 Tr. at 32.
[74] Report at 28-29.
[75] Haver Exceptions at p. 13.
[76] April 30, 2021 Tr. at 140.

to demonstrate these projections were faulty.[77] Moreover, as was established during the April 30, 2021 Technical Hearing, PWD's Five Year Plan projections do not stand alone as the basis of PWD's projected revenue requirements.[78] As a result, Mr. Haver has not established the relevance of any purported discrepancies between the Five Year Plan and the rate increase requested.

- Mr. Haver contends that the proposed settlement does not include adequate commitments regarding TAP outreach and enrollment.[79] Remarkably, Mr. Haver never proposed any specific improvement in these areas. Nonetheless, the Joint Petition sets forth PWD's commitment to improving TAP operations, negotiated for by the Public Advocate and recognized in PWD's exceptions.[80]

- Mr. Haver contends that PWD's acceptance of the proposed settlement rates are not, in fact, the result of compromise and concession.[81] Mr. Haver provides no support for this assertion, submitting that the fact that PWD agreed to settlement must mean that it got the rate increase it wanted. Again, Mr. Haver fails to observe that PWD will only receive between 16% and 40% of its original request, and has agreed to a special rate reconciliation proceeding that will determine precisely how much PWD will receive over the two year period. This demonstrates the actual and significant compromise embodied in the proposed settlement.

- Finally, Mr. Haver excepts to the Hearing Officer's rejection of his proposed changes to PWD's operations.[82] Mr. Haver failed to adequately establish the basis for, and cost of, the proposals he advanced (without evidentiary support) in his written objections to the proposed settlement.[83] The Hearing Officer correctly concluded that "the fact that these suggestions were not included provides no reason to object to the proposed settlement."[84]

IV. MR. SKIENDZIELEWSKI'S EXCEPTIONS SHOULD NOT AFFECT THE BOARD'S REVIEW AND ADOPTION OF THE HEARING OFFICER'S RECOMMENDATIONS.

Mr. Skiendzielewski submits three exceptions pertaining to issues that have not formed the basis for an adjustment in proposed rates, nor affected the proposed settlement terms or contested issues between PWD and the Public Advocate. As a result, the Board need not resolve Mr. Skiendzielewski's exceptions in order to evaluate and approve the Hearing Officer's

[77] Report at 30.
[78] April 30, 2021 Tr. at 74, 136, 139, 141, 168-169.
[79] Haver Exceptions at p. 14.
[80] See PWD Exceptions at 11.
[81] Haver Exceptions at p. 14.
[82] Haver Exception at 15-16.
[83] HO Report at 30.
[84] Id.

recommendations on the proposed settlement and TAP arrearage forgiveness matters as set forth in the Report.

Mr. Skiendzielewski's first exception reiterates his request for 12 years of records regarding PWD's HELP loan program. PWD previously objected to these requests and filed a Motion in Limine to preclude consideration of Mr. Skiendzielewski's contention of financial impropriety associated with such HELP loans. The Hearing Officer granted PWD's objections and Motion in Limine by order dated April 16, 2021. Mr. Skiendzielewski's second exception reiterates his request for recusal of counsel for the Rate Board. The Hearing Officer denied Mr. Skiendzielewski's request by order dated May 11, 2021. Finally, Mr. Skiendzielewski seeks the Board's mandate that PWD return to negotiations with him to resolve issues he has raised. As the Report describes, it is not entirely clear what transpired in the course of negotiations between PWD and Mr. Skiendzielewski and PWD, but it is clear that he has not raised a cognizable objection to the proposed partial settlement.[85]

The Public Advocate submits that, regardless of how the Board resolves Mr. Skiendzielewski's exceptions, the Board should adopt Hearing Officer's recommendations regarding the Joint Petition and TAP arrearage forgiveness as set forth in the Report.

[85] Report at 31-32.

V. CONCLUSION

For all the reasons set forth herein, the Public Advocate submits that exceptions to the Report should be denied and the Hearing Officer's recommendations approved by the Board.

Respectfully Submitted,

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