

**BEFORE THE
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

In the Matter of the Philadelphia Water :
Department’s 2022 Special Rate Proceeding : For: FY 2023
:

ORDER DENYING HAVER MOTION TO REMOVE PUBLIC ADVOCATE

On January 21, 2022, the Philadelphia Water Department (PWD or the Department) filed an [Advance Notice](#)¹ with the Philadelphia City Council and the Philadelphia Water, Sewer and Storm Water Rate Board (Rate Board) of the initiation of a Special Rate Proceeding regarding the reconciliation and potential downward adjustment of water, sewer and stormwater incremental rates and charges (\$34.110 million) previously approved to take effect September 1, 2022 (FY 2023).

By [Rate Determination](#)² dated June 16, 2021, the Rate Board had approved a [Joint Petition for Partial Settlement](#)³ (Joint Settlement Petition) entered into by the Department and the Public Advocate which, inter alia, provided for PWD to initiate a special rate proceeding pursuant to Sections II.A.2 and II.D of the Rate Board’s [regulations](#),⁴ to determine whether certain conditions contained in the Settlement Petition had been satisfied so as to warrant downward adjustment of the approved FY 2023 rates. These conditions were (1) the amount of federal funding received in excess of \$2 million received by PWD between July 1, 2021, and December 31, 2021; and (2) the amount in the Rate Stabilization Fund at the end of FY 2021 above a “minimum threshold.” The minimum threshold expressly was not defined in the [Joint Settlement Petition](#) or the June 16, 2021 Rate Determination. The nature of the special rate proceeding was described in the Joint Settlement Petition as being analogous to the annual TAP-R reconciliation proceedings: “The Special Rate Reconciliation Proceeding is intended to be simple, limited to the

¹ <https://www.phila.gov/departments/water-sewer-storm-water-rate-board/rate-proceedings/2022-special-rate-proceeding/#advance-notice-of-filing>

² <https://www.phila.gov/media/20210618105014/2021-General-Rate-Determination-as-filed-with-Records-Dept-20210616.pdf>

³ <https://www.phila.gov/media/20210505154832/Joint-Petition-for-Partial-Settlement.pdf>

⁴ <https://www.phila.gov/media/20220204155914/WRBRegulationsAmended20210908reaffirmed20211013.pdf>

two adjustments defined in Paragraph 11.A.(2) (a), and analogous to the TAP-R Reconciliation Proceeding.” The Advance Notice contained statements and exhibits to support the Department’s position that neither of the specified conditions had been satisfied and therefore, no adjustment was warranted or proposed.

On February 16, 2022, Lance Haver, a participant, filed a [Motion to Remove for Cause the Acting Public Advocate](#)⁵ (Motion to Remove), alleging that the Public Advocate⁶ had not been properly appointed in this special rate proceeding and in addition should be removed because of its failure to properly perform its duties in the underlying general rate proceeding which was the subject of the Rate Board’s [June 16, 2021 Rate Determination](#).

An [Answer in Opposition](#)⁷ (with an accompanying Memorandum of Law) to the [Motion to Remove](#) was submitted by the Public Advocate on February 22, 2022. The [Answer](#) specifically denied the various averments contained in the [Motion to Remove](#). The Public Advocate’s position is summarized in the Memorandum at 1-2, where it is stated: “The Motion is rife with falsehoods and mischaracterizations. The Motion provides no basis for removal of counsel for the Public Advocate, and requests relief that the Hearing Officer has no ability to provide. More than half of the numbered paragraphs in the Motion include ad hominin attacks on counsel for the Public Advocate, and include accusations of incompetence, hubris, betrayal, arrogance, tyranny and corruption, which are improper and not founded in reality. The impropriety of these allegations only serves to underscore the Motion’s total lack of foundation in law and fact.”

THIS MOTION IS DENIED. Both of these issues, the appointment of the Public Advocate in the instant special rate proceeding and the adequacy of its performance with respect to the Joint Settlement Petition were thoroughly addressed by the Rate Board in its [June 16, 2021 Rate Determination](#), and will not be re-examined here.

⁵ <https://www.phila.gov/media/20220217171233/Motion-to-Remove-Public-Advocate.pdf>

⁶ Community Legal Services (CLS) serves as Public Advocate pursuant to contract.

⁷ <https://www.phila.gov/media/20220224112951/Answer-to-LH-Motion-to-Remove-PA.pdf>

The issue of having Community Legal Services⁸ continue to provide services as Public Advocate in this special rate proceeding pursuant to the contract it had entered into with the City of Philadelphia after a competitive, public request for proposals was discussed in the [June 16, 2021 Rate Determination](#) at 22, which specifically noted that unlike a general rate proceeding, appointment of a public advocate in a special rate proceeding such as this one is discretionary:

By approving the 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. . . It is the view of the Board that this provision in the Settlement ensures that the interests of PWD customers will be recognized from the commencement of any reconciliation proceeding and that a Public Advocate will be able to provide that service. Under the Board’s Regulations, the hiring of a Public Advocate is required in all General Rate Proceedings, but in TAP-R and Special Rate Proceedings, such a Board decision is discretionary. Compare Section IIB2 (“Public Advocate shall be appointed by the Board”) with Sections IIC2 (“Board shall have flexibility . . . to retain or consider appropriate alternatives to the appointment of a . . . Public Advocate”) and IID2 (“Board shall have further flexibility in Special Rate Proceedings within the general parameters of Sections II.C.2-3”). As stated by the Public Advocate in its Reply Exceptions (page 17): “[T]he 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, which is based upon his experience in multi-year rate proceedings in Rhode Island.”

Similarly, the Rate Board expressly considered and rejected Mr. Haver’s various contentions raised again here that the Public Advocate had failed to perform its duties in a competent manner: “[A]ny reasonable reading of the terms of the proposed partial settlement makes it clear that in fact the Public Advocate zealously – and successfully – advanced the interests

⁸ The Rate Board at its August 11, 2021, meeting authorized and directed the renewal of CLS’s contract to serve as Public Advocate through December 1, 2022. [Special-Meeting-Minutes-2021-08-11.pdf \(phila.gov\)](#)

of the small user customers in achieving a proposed partial settlement agreement that significantly reduces the amount of the overall rate increase with a modest increase in FY 2022. It also establishes an innovative mechanism that could potentially result in a decrease in the proposed increase in FY 2023 in the event certain federal funds are received by the Department or if the Department's reserve funds exceed a threshold balance and it includes substantial commitments to protect customers during the pandemic (and beyond)." [June 16, 2021 Rate Determination](#) at 22. The Rate board went on to find that "Mr. Haver's criticisms of how Community Legal Services has fulfilled its contractual responsibilities as Public Advocate are either misguided or unsupported by the record. In any event, they provide no reason for us to find that the process used to develop the Joint Petition for Partial Settlement was flawed or inadequate." [Id.](#) at 24.

I note that Mr. Haver took no appeal of any of these determinations. In addition to denial of the [Motion to Remove](#) on the ground that these issues were previously reviewed and decided in the 2021 proceeding, I note that they are outside the scope of this limited, special rate proceeding, which is not to reexamine the Joint Settlement Petition but to determine whether the FY 2023 Base Incremental Rates should be reduced as provided in the Settlement Agreement.

Finally, I agree with the Public Advocate that the [Motion to Remove](#) indeed contains improper ad hominem attacks, which will not be permitted. As I am denying the [Motion to Remove](#), I will not address this issue further, but in the future such material will be stricken from the record entirely and not considered.

THEREFORE, the Motion to Remove for Cause the Acting Public Advocate filed by participant Lance Haver will be denied.

Marlane R. Chestnut
Hearing Officer

February 25, 2022