

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

In the Matter of the Philadelphia Water Department’s 2022 Special Rate Proceeding :  
: Fiscal Year 2023  
:  
:

**ORDER GRANTING IN PART AND DENYING IN PART THE PUBLIC ADVOCATE’S  
MOTION TO STRIKE**

On January 21, 2022, the Philadelphia Water Department (PWD or the Department) filed an [Advance Notice](#)<sup>1</sup> 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 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), as provided by the [Rate Determination](#)<sup>2</sup> issued by the Rate Board on June 16, 2021.

In that [Rate Determination](#), the Rate Board discussed and approved without modification the [Joint Petition for Partial Settlement](#)<sup>3</sup> (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](#),<sup>4</sup> to determine whether certain conditions contained in the Settlement Petition had been satisfied so as to warrant downward adjustment of the rates and charges approved to take effect in FY 2023. 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](#).

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

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

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

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

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 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.

Prior to the filing of the Formal Notice with the City Records Office, on February 9, 2022, the Public Advocate filed a [Motion to Strike](#)<sup>5</sup> (Motion to Strike or Motion) portions of the Advance Notice, alleging that they improperly enlarge the scope of the proceeding by containing new financial assumptions regarding future revenue requirements.<sup>6</sup> A Memorandum of Law was included with the Motion. I informed the participants that responses to the Motion were due on or before February 18, 2022.

On February 18, 2022, PWD filed a [Memorandum in Opposition to the Motion to Strike of the Public Advocate](#)<sup>7</sup> (PWD Memorandum) requesting that the [Motion](#) be dismissed and denied. PWD asserted that the Motion should be dismissed as being both premature and procedurally improper, as the Advance Notice was provided as a “courtesy” and is subject to amendment or change when the Formal Notice is filed. It further alleged that the Motion to Strike was “misguided” and “would more appropriately be framed as a motion in limine” to clarify the use to which the financial statements, schedules and exhibits proffered by the parties could be put. PWD Memorandum at 6.

To support its position that the [Motion](#) should be denied on the merits, PWD explained that the objected to material is “central” to its case that no adjustment should be made to the FY 2023 base rate incremental increase as the result of PWD’s FY 2021 financial performance. It summarized this argument in its Memorandum at 2-3, and subsequent discussion

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<sup>5</sup> <https://www.phila.gov/media/20220215184351/Motion-to-Strike-Final-2022-02-09.pdf>

<sup>6</sup> The Public Advocate explained that it filed the instant Motion in advance of the filing of the Advance Notice to allow PWD an opportunity “conform its Formal Notice filing to the Hearing Officer’s ruling on this Motion.”

<sup>7</sup> <https://www.phila.gov/media/20220224112952/PWD-Response-to-PA-Motion-FINAL.pdf>

by describing how these statements, schedules and exhibits (1) explain and support PWD's minimum threshold recommendation concerning the Rate Stabilization Fund; (2) provide support for the Department's position that no adjustment to the FY 2023 approved rates is warranted; (3) describes the "financial implications of any significant reduction in FY 2023 approved rates" with regard to the credit rating agencies; and (4) the updated Financial Plan and Financial Plan Report provide "corroboration" for its position that no rate adjustment should be made.

While the [Motion to Strike](#) was pending, PWD on February 21, 2022, filed its [Formal Notice](#)<sup>8</sup> with the City's Department of Records, which included the statements and exhibits which had been provided in the [Advance Notice](#), updated primarily to incorporate changes associated with projected increases in TAP enrollment, as well as the inclusion of one month of additional data (December 2021).<sup>9</sup>

## DISCUSSION

As a preliminary matter, it is necessary to address the Department's contention that the instant [Motion](#) is premature or otherwise procedurally deficient. This argument is somewhat undercut by PWD's admission that in large part the objected to financial material was presented as part of its filing to "reflect PWD's assessment that (in what was anticipated to be an expedited proceeding) it needed to document its position early on, as there would be little time to bolster its position (after limited discovery) or respond to other participants through rebuttal testimony. . . Several issues addressed by PWD (cost pressures, PWD financial condition) anticipate adjustments which, if accepted, would place the Department in jeopardy of a credit rating downgrade. PWD has anticipated the Advocate's position in this regard and has offered its counter-arguments." [PWD Memorandum](#) at 7.

Both PWD and the Public Advocate are clearly acting in good faith by recognizing the expedited nature of this limited, special rate proceeding and attempting to address issues of concern as soon as possible so as to not unduly delay the schedule. The Public Advocate filed its

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<sup>8</sup> <https://www.phila.gov/media/20220225145807/PWD-FY2023-Special-Proceeding-Formal-Notice.pdf>

<sup>9</sup> As PWD and the Public Advocate had informed me that they were discussing resolution of the Motion; I delayed issuing this ruling until they notified me that they had been unable to reach agreement.

[Motion](#) prior to the submission of the Formal Notice in anticipation of a ruling that might require modification or adjustment of the Formal Notice. Similarly, PWD included with its [Advance Notice](#) material which would be of more relevance as rebuttal, in “anticipation of the Advocate’s position.”

As described above, one of the two issues that are the subject of this limited, special rate proceeding is whether the rate increase scheduled to take effect on September 1, 2022 (the FY 2023 Base Rate Incremental Increase) should be reduced as the result of PWD’s actual versus projected FY 2021 financial results (i.e., changes in performance) as set out in the [Joint Settlement Petition](#), paragraph II.A.(2)(a)(ii):

**(ii) Reconciliation Framework (Changes in FY 2021 Performance)**

Subject to Paragraph 11.A.(2)(a)(i) and this subparagraph (ii), the FY 2023 Base Rate Incremental Increase is subject to a reduction on a dollar-for-dollar basis via the Special Rate Reconciliation Proceeding and within the parameters described below.

- **Adjustment, Mechanics:** The Department shall file a reconciliation request for FY 2023, setting for the amount by which it requests the Rate Board reduce the FY 2023 Base Rate Incremental Increase to share with customers the benefit of FY 2021 amounts above a minimum threshold<sup>12</sup> in the Rate Stabilization Fund. The Department shall include the City’s annual financial report for such fiscal year and a statement explaining the basis for the Department’s requested reduction (which may be any amount, including zero, up to \$34.110 million).

- **Maximum Adjustment:** Reconciliation under this adjustment, separately or in combination with other adjustments, cannot lower the FY 2023 Base Rate Incremental Increase below zero dollars.

<sup>12</sup> The settling parties expressly agree that participants in the Special Rate Reconciliation Proceeding may propose different “minimum thresholds” and that a “minimum threshold” has not been established in connection with the Reconciliation Framework (Changes in FY 2021 Financial Performance) set forth in Paragraph II.A.(2)(a)(ii) above.

There can be no dispute that the scope of this limited proceeding is defined by the [Joint Settlement Petition](#), as displayed above. While it does not expressly define the conditions

under which reductions to the FY 2023 incremental base rates should be made, it makes clear that the basis for comparison is the Department's actual FY 2021 financial performance to those projections contained in the FY 2022-2023 general rate proceeding that produced the settlement adopted by the Rate Board in its June 16, 2021 [Rate Determination](#), as measured by the balance in the Rate Stabilization Fund.<sup>10</sup> In other words, the need for revenue and rate changes in FY 2023 has already been established in the general rate proceeding that resulted in the [Joint Settlement Petition](#) and is not at issue here. It is neither necessary nor appropriate for the Department to present new financial assumptions or revenue requirements, or a Financial Stability Plan beyond year-end FY 2021, beyond those already included in the record of the FY 2022-2023 general rate proceeding. What needed to be updated was the actual balance in the Rate Stabilization Fund, so as to permit comparison with the Fund balance requested by the Department in its general rate filing to determine whether adjustment to the already approved rates should be made.

In its consideration and approval of the Joint Settlement Petition, the Rate Board did not discuss this particular provision, or indicate its expectations as to determination of a minimum threshold for the Rate Stabilization Fund. Rather, the Rate Board relied on the express provision contained in the Joint Settlement Provision that the metric used to measure whether PWD's FY 2021 financial condition had improved so as to support a downward adjustment to the FY 2023 rates would be the balance in the Rate Stabilization Fund at the end of FY 2021. Although it characterizes this examination as "simplistic" in its [Memorandum](#) at 4, PWD in fact correctly describes the scope of this special rate proceeding as defined by the [Joint Settlement Agreement](#): ". . . comparison of projected RSF and Residual Fund balances with actual FY 2021 end of year balances."

The purpose of this proceeding is to examine the Department's actual FY 2021 financial performance and compare it to the projections that underlay the FY 2023 Base Rate Incremental Increase, as measured by the Rate Stabilization Fund balance. It is not to establish a new revenue requirement based on forecasted conditions and expectations.

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<sup>10</sup> In this Order, references to the Rate Stabilization Fund also include the Residual Fund.

Of course, fundamental fairness must allow the Department an opportunity to support its position that no rate reduction be made; indeed, that is explicitly recognized in the [Joint Settlement Petition](#). However, this opportunity is satisfied by reference both to the record of the underlying FY 2022-2023 general rate proceeding, as well as to the updated, actual FY 2021 performance. Again, the purpose of this limited, special rate proceeding is not to establish new rates or the appropriate revenue requirement for FY 2023 – it is to determine whether any actual, improved financial performance of the Department in Fiscal Year 2021, as reflected in the Rate Stabilization Fund balance, should result in some sharing with its ratepayers, and if so what the amount of that sharing should be.<sup>11</sup>

Although the Public Advocate in its [Motion](#) and accompanying Memorandum makes repeated comparisons to the annual TAP-R reconciliation proceedings, and this is explicitly referenced in the Joint Settlement Petition, PWD is correct to draw a distinction. The TAP-R annual reviews are in fact true reconciliations, in which a defined formula is applied to compare the actual TAP-R revenue experience to the projections used to establish those rates and charges in the prior period. Similarly, the other issue potentially addressed in this proceeding (the potential receipt by PWD of clearly defined federal funds in excess of \$2 million received between July 1, 2021, and December 31, 2021) also can be compared to a reconciliation of sorts, where there would be a dollar-for-dollar adjustment based on the receipt of those funds.

This provision, however, is not such a reconciliation. While it starts with a comparison as is the case with any type of reconciliation, the purpose is to determine whether already approved rates and charges for FY 2023 should be adjusted as the result of PWD’s FY 2021 financial performance as reflected in the Rate Stabilization Fund balance. As the department itself describes in its [Memorandum](#) at 5, “Please recall that such adjustment is to effect a ‘sharing’ of any excess benefits, if there is an out-performance by PWD compared to projections in the 2021 General Rate proceeding. The RSF balance is the indicator of such out-performance. Absent such

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<sup>11</sup> Of course, should PWD determine that circumstances have changed significantly from what was presented in the prior proceeding such that it requires revenue and rates higher than what was approved in that proceeding, then it has the option to file at any time for an adjustment to previously-approved rates.

out-performance (i.e., lackluster performance), there need be no adjustment (as there is nothing to share).” I agree.

I find that testimony and evidence concerning the Department’s anticipated financial needs and performance in FY 2022 and beyond is immaterial to the initial questions presented by this Special Rate Proceeding, whether (1) the Water Department received additional funding between July 1 and December 31, 2021 and (2) whether the Rate Stabilization Fund at the end of FY 2021 was greater than anticipated at the time of the amounts before the Rate Board when it made its [Rate Determination](#). Only if it is determined that the answer to question (2) is yes might it be appropriate for the Rate Board to consider the Department’s ongoing financial needs and performance in determining the amount, if any, of the rate increases already approved beginning September 1, 2022, should instead be reduced.

As I have stated, [the 2021 General Rate Determination](#) has already determined the Department’s appropriate revenue requirements through FY 2023. The Rate Board anticipated that this Special Rate Proceeding could adjust rates based only on the criteria set forth in the [Joint Settlement Petition](#), and would not reset them based on other new information.<sup>12</sup> While I generally agree with PWD’s assertion that updates to the Black and Veatch model may be necessary for the examination of the rates and charges that would need to be determined should the Rate Board order an adjustment be made to the FY 2023 rates, it is not clear what information would be needed to effectuate this.

With respect to the specific items are the subject of the [Motion](#), therefore: (1) The Public Advocate’s Motion to Strike [PWD St. No. 1](#)<sup>13</sup> (LaBuda), Q&A 25-27 and Schedule ML-2 is DENIED; (2) the Public Advocate’s Motion to Strike [PWD St. No. 2](#)<sup>14</sup> (Clupper & Nissen), Q&A 9 and Schedule FA-1 is GRANTED; (3) The Public Advocate’s Motion to Strike [PWD St.](#)

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<sup>12</sup> My resolution of this motion is not intended to foreclose the Rate Board’s ability to address fundamental issues such as newly anticipated inability to meet bond covenants and legislatively mandated sinking fund reserve requirements or major changes required in the Department’s Financial Stability Plan. See Philadelphia Code § 13-101(4).

<sup>13</sup> <https://www.phila.gov/media/20220124131428/PWD-Statement-No.-1-Direct-Testimony-and-Schedules-of-Melissa-La-Buda.pdf>

<sup>14</sup> <https://www.phila.gov/media/20220124131430/PWD-Statement-No.-2-Direct-Testimony-and-Schedules-of-Katherine-Clupper-and-Peter-Nissen.pdf>

[No. 3](#)<sup>15</sup> (Black and Veatch), Q&A 16, 18, 19, 20, 21, 22, 23, 24 and Schedule BV-4 is PARTIALLY GRANTED as discussed below.

I will direct the Advocate and PWD to jointly determine how best to implement this Order. That is, how to amend or strike (or provide a statement in limine agreeing on appropriate use of) the statements and exhibits contained in the [Formal Notice](#) to properly reflect the scope of this proceeding. In accordance with the ruling above, the record therefore should include (and be limited to) testimony and exhibits relating to PWD's FY 2021 financial performance, and whatever information is necessary for the Department to generate the rates and charges that may be directed by the Rate Board. Both the Department and the Public Advocate are, of course, free to present whatever testimony or exhibits they feels are necessary to support their respective positions as to this issue of possible downward adjustment, if any, of the FY 2023 Base Rate Incremental Increase as described in the [Joint Settlement Petition](#), within the scope of this proceeding.

THEREFORE, the [Motion to Strike of Public Advocate](#) is granted in part, denied in part.

Marlane R. Chestnut  
Hearing Officer

March 8, 2022

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<sup>15</sup> <https://www.phila.gov/media/20220124131431/PWD-Statement-No.-3-Direct-Testimony-and-Schedules-of-Black-and-Veatch.pdf>