



April 8, 2022

Via Email

Mr. Sonny Popowsky, Chairman
Philadelphia Water, Sewer and Storm Water Rate Board
1515 Arch St. 17th Floor
Philadelphia, PA 19102-1595

Dear Chairman Popowsky,

Please accept this correspondence in lieu of a motion to quash the March 22, 2022 submission by Lance Haver (Applicant) presented as a “Direct Appeal” from the Hearing Officer’s February 25, 2022 Order Denying Haver Motion to Remove Public Advocate. The Philadelphia Water, Sewer and Storm Water Rate Board (Board) should either conclude that there is no basis for a “Direct Appeal” or dismiss the submission on the merits.

As a threshold matter, Applicant cites no regulation, law or other source authorizing a “Direct Appeal.” Pursuant to the Board’s Regulations, the Hearing Officer is vested with the “power and authority to ... [c]onduct and preside over all public hearings and technical review hearings [and] [m]ake all procedural rulings necessary to conduct a fair, impartial and expeditious hearing process.” Reg. § II.B.1(b)(3)-(4). Although these provisions are explicitly applicable to General Rate Proceedings, the fact that the Board’s regulations provide further flexibility in Special Rate Proceedings, such as this one, does not appear to expand the procedural rights of participants. In any event, the Board’s Regulations do not provide any mechanism for appealing a Hearing Officer ruling. Accordingly, the Hearing Officer’s denial of the Motion to Remove does not appear to be subject to appeal to the Board.

Notably, in the past, the Board has ruled on motions, including a request to pursue interlocutory relief, that were presented to it directly. Applicant’s submission is not presented as a motion, but could be viewed as analogous to a request for interlocutory relief from a Commonwealth agency. In Pennsylvania Public Utility Commission (PUC) proceedings, to be timely, such a petition must be filed within 15 days¹ and concisely identify (in no more than three pages) the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.² Likewise, the General Rules of Administrative Practice and Procedure (General Rules) applicable to formal proceedings before Commonwealth agencies authorize interlocutory review only in “extraordinary circumstances where prompt decision by the agency head is necessary to prevent detriment to the public interest.”³

¹ 52 Pa. Code §5.572(c).

² 52 Pa. Code §5.302(a). No oral argument occurs in the context of PUC interlocutory relief. 52 Pa. Code §5.303.

³ 1 Pa. Code §35.190.



Neither the PUC's regulations nor the General Rules are directly applicable to this proceeding, although the Board might look to them for guidance as to how it should consider Applicant's submission. With that in mind, the Public Advocate submits that Applicant's delay in filing, waiting 25 days to submit the "Direct Appeal," undercuts any arguments that its submission requires prompt attention by the Board. Additionally, Applicant has not articulated compelling reasons or extraordinary circumstances for Board action. Finally, granting Applicant's submission would not expedite the conduct of this proceeding and would contravene the public interest by disrupting the ongoing work of the Public Advocate in behalf of residential and small business customers as a group.

Because Applicant is *pro se* in this proceeding, the Board may be inclined to consider the merits of the submission. In that event, the Public Advocate maintains that the submission is lacking in merit, presented as a continuation of Applicant's unwarranted and *ad hominem* attacks, and contains multiple, false statements presented "under penalty" of law.⁴

The crux of Applicant's submission is that one of the CLS attorneys serving as Public Advocate was not specifically appointed for this proceeding. Crucially, Applicant fails to acknowledge that this Special Rate Proceeding is not a General Rate Proceeding under the Board's Regulations, but is a creative and ancillary proceeding, designed to be complementary to the 2021 General Rate Proceeding, setting rates and charges for FY 2022 and 2023. The only potential rate changes are downward, based upon updates to the record that existed at the time of the Board's 2021 Rate Determination. This Special Rate Proceeding is confined to consideration of whether the Board's previously approved rate increase for FY 2023 should be reduced, based on an extension and supplement to the record of the 2021 General Rate Proceeding.

Nonetheless, from its erroneous starting point, Applicant submits that either: (1) the Public Advocate has not been properly appointed; or (2) the extension of the Public Advocate's contract constitutes a "quid pro quo" arrangement guaranteeing a specific attorney continued employment and compensation. The Public Advocate has already responded to Applicant's "quid pro quo" assertion in Reply Exceptions in the 2021 General Rate Proceeding.⁵ The Board has also ruled on it in the 2021 Rate Determination.⁶ In this Special Rate Proceeding, the Hearing Officer denied Applicant's Motion to Remove Public Advocate, in which Applicant again contended there was a "quid pro quo." The Hearing Officer declined to re-examine those assertions in this proceeding.⁷ Applicant now renews for the third time his claim, asserting that a CLS attorney acting as Public Advocate must be removed.⁸ This claim is unsupported.

⁴ See 18 Pa. C.S. §4904.

⁵ May 28, 2021 Reply Exceptions at 16-17, available at: <https://www.phila.gov/media/20210602104612/PA-Reply-Exceptions-FINAL.pdf>

⁶ June 16, 2021 Rate Determination at 21-23, available at <https://www.phila.gov/media/20210618105014/2021-General-Rate-Determination-as-filed-with-Records-Dept-20210616.pdf>

⁷ Order Denying Haver Motion to Remove Public Advocate at 2, available at <https://www.phila.gov/media/20220225145815/2022-TAP-R-LH-motion-final.pdf>.

⁸ At the March 23, 2022 Public Input Hearing, Applicant stated that "[i]n [e]xchange for agreeing to the rate increase, the 'public advocate' was able to get his law firm a no bid contract to participate in this rate increase case." As explained herein, this assertion is false.



CLS was appointed to serve as Public Advocate pursuant to a contract with the Board that was entered into via a public procurement process, in which any interested and qualified individuals or organizations were free to apply. This contract was entered into on February 4, 2020 for services commencing on December 2, 2019 and ending on December 1, 2020. Pursuant to Section 2.2 of the City of Philadelphia Professional Services Contract General Provisions for General Consultant Services (revised June 2018), expressly incorporated into the contract, the contract's duration may be extended for up to three (3) successive one (1) year terms. Although the Board was not required to extend the contract, and could have sought bids for the Public Advocate's services, it was not required by law to do so. Indeed, Applicant fails to recognize that the contract's term has been validly extended in accordance with its terms and applicable law. There is no factual support for Applicant's assertion that the Public Advocate's appointment, or the service of any CLS attorney in connection with that appointment, is improper.

Furthermore, as explained in the Public Advocate's Reply Exceptions in the 2021 General Rate Proceeding, CLS attorneys serving as Public Advocate do not receive any additional compensation or different employment terms as a result of that service nor is their employment contingent on obtaining a particular contract or funding.⁹ Applicant's claims regarding the guarantee of employment and compensation for CLS attorneys are demonstrably false. There is no "quid pro quo" nor has there been any wrongdoing by CLS, its Board of Directors, or PWD in connection with the 2021 Rate Proceeding or this Special Rate Proceeding. The Settlement produced \$84 Million in rate relief for PWD's customers, with a possibility for further relief in this proceeding. The Public Advocate entered the Settlement with absolute loyalty to the public trust, producing extraordinary benefits for the small user customers.

Applicant's repeated claims of wrongdoing and escalating *ad hominem* attacks on individual attorneys are without merit.

For all of the foregoing reasons, the Public Advocate asserts there is no legal basis for Applicant's "Direct Appeal," and, in the alternative, it is without merit and should be dismissed.

Sincerely,

Robert W. Ballenger, Esq.
Kintéshia S. Scott, Esq.
For the Public Advocate

⁹ The attorneys serving as Public Advocate are members of the Philadelphia Legal Services Union, NOLSW Local 2320. The terms of their employment and compensation are *exclusively* governed by a negotiated collective bargaining agreement, without regard to the Public Advocate contract.