

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

Re: Philadelphia Water Department Proposed Charges in Rates and Charges	2022 TAP-R Adjustment Proceeding
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**MAIN BRIEF OF LANCE
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I. INTRODUCTION

Lance Haver submits this brief in opposition to the proposed “settlement” regarding “the annual reconciliation adjustment to the Tiered Assistance Program” (TAP) . The proposed settlement if accepted will allow the Water Department and its enablers to violate Section 8-600 of the Philadelphia Home Rule Charter, allow for the Public to be shut out of these public proceedings, allow a hearing examiner to fail to disclose any and all possible conflict of interests and/or file financial disclosure forms so the Public can see any and all financial interests the hearing examiner has in the proceedings, allow a person appointed with a no bid contract to refuse to create a public advisory committee to guide the positions of the public advocate, refuse to disclose any and all conflict of interests of his person and the management team of his law firm; and fail to submit any and all financial disclosure forms that would allow the Public to see any and all financial interests the recipient of the no bid contract and his law firm have with banks and suppliers of the Philadelphia Water Department.

It is never in the Public Interest for a settlement to violate the Philadelphia Home Rule Charter and act as a deterrent to public participation, as the very basis of our constitutional government is that consent to govern comes from the governed, not by agreements between two parties which failed to engage the Public or expend even a modicum of resources to do so.

Nor is it in the Public Interest to tax, as this “sur charge” does, as it is a fee charged by a department of the City of Philadelphia, that must be paid, even if one has no water usage. This tax, under this agreement, would be placed on a basic

necessity of life to pay for a program that helps low income Philadelphians. No matter how superlative the program, it does not, and cannot be confused with how the program is paid for. The idea of charging a tax on food to pay for SNAP benefits is appalling. The fact that someone who represents the Public would agree to such outrageous public policy is shocking, but that is exactly what PWD and the “public advocate” are attempting to do through this settlement, place a tax on water to pay for a low income plan.

A. Failure to Provide Adequate Notice

The public notice for these proceedings, that can be found on the Web Page of Philadelphia Water Rate Board states:

2022 Annual Rate Adjustment

*On January 21, 2022, the Philadelphia Water Department filed **Advance Notice** of the Department's proposed changes to its Tiered Assistance Program Rate Rider Surcharge rates (TAP-R), proposed to become effective September 1, 2022.*

Under the Section 8-600 of the Philadelphia Home Rule Charter states what steps the PWD, as a department of the City, must take to make any and all public statements “ promote access to City Services, compliance with City Law and ease of contact with, and participation with, government in the City for the people with limited English proficiency (“language access plans”) .

..

§ 8-600. Language Access Plans. 173



(1) Every office, department, board and commission, including but not limited to the Council and the former county offices and bodies, ("all agencies") shall:

(a) prepare a plan to promote access to City services, compliance with City law and ease of contact with, and participation within, government in the City for people with limited English proficiency ("language access plans") in accordance with any generally applicable language access policy established by the Mayor;

(b) implement such plan;

The wording used to inform the public of these proceedings is not in plain English. It fails to state in plain English that the proposal is to raise rates on paying water consumers to cover the cost of a low-income plan. There is nothing on the record to show, support or even suggest that either signatory of this proposed settlement went through the legally required process outline in Section 8-600 of Philadelphia’s Home Rule Charter.

The wording of the notice also violates at least the intent if not the letter of Pennsylvania’s “Plain Language Consumer Contract Act” which in section 5 (a) states:

Section 5. Test of readability.

(a) General rule.--All consumer contracts executed after the effective date of this act shall be written, organized and designed so that they are easy to read and understand.

Because the notice was defective and the Public not adequately informed according to current law, the settlement agreement must be rejected.

B. Ineffective Assistance of Counsel.

A bedrock demand of our judicial system, regardless if it be criminal, civil or administrative, is that represented parties have the right to effective Counsel. In these proceedings, the public was not represented at all, let alone effectively. From the very start of the proceeding the person who received the no bid contract to represent the public failed to do so. It should have been the Public Advocate that demanded a plain language notice of these proceedings so that those covered under by Section 8-600 of the Philadelphia Home Rule Charter could be informed of these proceedings. The person given the no bid contract to represent the public had an absolute responsibility to have the public participate in the deciding the positions the public advocate would take, in these and all proceedings in which the public is supposed to be represented. That did not happen.

There is nothing on the record that shows that the person receiving the no bid contract reached out to a single RCO, civic, religious or advocacy organization to seek input. The fact that no member of the Public participated in the public hearing underscores the failure of the public advocate to inform, involve and activate the public. The very nature of the no bid contract, intensifies the need for checks and balances.

In this case, there are no checks and balances of the power of the public advocate to deem whatever views he has, the public's views. Unlike elected officials who

face re elections, or advocates who are hired via a hearing process in a public setting, the person who received the no bid contract was not hired through a public process, answers to no voters or elected official and has no client to direct his position. He has been free to and has acted like Louis 14th, claiming that he is the public, knowing what positions to take, without establishing any feedback loop, without seeking, or accepting any input from the public. It must be clear, that the lack of public participation in these proceedings is a direct reflection of how little the public was engaged in the proceeding, how little outreach was done and how the very entity that was supposed to involve the public, did not do what was necessary to get the public involved.

The public advocate position is to serve the public, not to be the public. If the current awardee of the no bid contract doesn't understand the difference, it does not make the representation effective. In some ways the failure to understand the difference, makes the representation worse.

When counsel is ineffective, she/he should be deemed ineffective and an adjudicator should follow black letter law and declare the lack of representation a fatal flaw

C. Failure To Disclose Financial Conflicts

In addition the person who received the no bid contract has not filed a financial disclosure form, which even if not required could be done to assure the public that he has no financial conflict of interests; nor has his law firm, whose management team has a financial conflict of interest with water rate payers, filed conflict of

interest statements and asked for those conflicts to be waived. Because the no bid contract was given without a public vetting of the recipient, without a public hearing to allow the public to state its preferences, or any public process whatsoever, the need for financial disclosure forms and conflict of interests statements are increased. Without any public vetting, without the ability of those who pay the fees and are supposed to be represented to make themselves heard, the financial disclosures are critical. State Public Advocates, even after a public vetting must file financial disclosure forms, why should a City Public Advocate who has never been vetted by the public be held to a lower standard?

Legal Standards

One of the strengths of reaching a settlement as opposed to accepting a court ruling is that settlements can include terms that a court may have been unable to award. The Judge, administrative or other, does not have to weigh the value of a settlement on what an adjudicator could or even might award. The standard, in accepting settlements is much more profound: Is the settlement in the public interest.

In reviewing this proposed settlement, the answer is decidedly no. Accepting this settlement would accept a process that on its face violates the laws of the City of Philadelphia, by ignoring section 8-600 which sets out a process to ensure that all Philadelphia public notices are written to be understood by those with limited English proficiency. The legislative history of section 8-600 will show that it was passed to ensure that the public has the greatest opportunity to participate in its own government.

The failure of the PWD and the Public Advocate to follow 8-600 is compounded by the entity that received the no bid contract's ineffective representation. There is nothing on the record even suggesting the entity consulted with consumers, community groups, advocates or anyone for that matter. The fact that the entity was awarded a no bid contract, without any public vetting, hearing or process further compounds the injury should the settlement be accepted.

Accepting the settlement would accept ignoring and violating the Philadelphia Home Rule Charter, ignoring the ineffectiveness of counsel, ignoring the lack of checks and balances on the public advocate, ignoring the decision by the public advocate to not engage the public and/or the inability of the public advocate to engage the public as demonstrated by the fact that not one member of the public, who was not already participating in these proceedings appeared at the public hearing, that there was not an advisory group established to provide advice guidance as to the positions the public advocate should take, would establish an entity that neither seeks guidance in ascertaining the public position nor has any checks on the power to represent the public.

And as bad as this is, ignoring the law, acting without the consent of the rate payers, without seeking guidance, without engaging the public, it is made worse by the failure of the entity that received the no bid contract to file a financial disclosure form to let the public know of his financial conflicts of interests, a conflict of interest statement from the entity's law firm, whose management team has a real financial conflict of interest which it is refusing to disclose.

Argument

[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . “

To tax Philadelphians, even if you call it a “sur charge” as a result of a hearing that failed to provide legal notice, that saddled the public with ineffective counsel, that did not allow the public to provide guidance to the counsel it was given, is to eliminate the ability of the public to consent to be governed.

It is, in the words of the founding parents, “Taxation Without Representation”. It was wrong then, as it was wrong to deny some people the right to participate in their own government, and it is wrong now. The public has the right to participate as outline in our Home Rule Charter and the Pennsylvania and United State Constitutions. Denying the public, the right to participate, to have the legal counsel appointed to represent us deny us the right to participate in our own case, is to repudiate the founding principles of our City, Commonwealth and Country.

Public Interest demands you stand for the rule of law, for effective representation and the right of all to participate in our own government and reject the settlement.

Conclusion

Any other decision than to reject the settlement, makes a mockery of Philadelphia's Home Rule Charter and the United States Supreme Court's black letter law decisions that for counsel to be considered counsel it must work with and represent the client.

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