

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

<b>Re: Philadelphia Water Proposed Changes in</b>	)	
<b>Rates and Charges</b>	)	<b>2022 Annual TAP-R Reconciliation</b>
	)	<b>Proceeding</b>
	)	

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**REPLY TO LANCE HAVER'S  
MAIN BRIEF IN OPPOSITION TO PROPOSED SETTLEMENT**

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May 4, 2022

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## **I. Introduction**

The Philadelphia Water Department (PWD) filed its Advance Notice commencing this Tiered Assistance Program Rate Rider Surcharge rate (TAP-R) reconciliation proceeding on January 21, 2022. PWD filed its Formal Notice on February 25, 2022, requesting that (1) the Water TAP-R rate increase from \$0.69/MCF (\$0.000092 per gallon) to \$1.23/MCF (\$0.00016 per gallon) and (2) the Sewer TAP-R rate increase from \$1.09/MCF (\$0.000146 per gallon) to \$1.95/MCF (\$0.000261 per gallon). The Public Advocate filed the Direct Testimony of Lafayette K. Morgan, Jr., recommending instead that the Water TAP-R rate be set at \$0.98/MCF (\$0.000131 per gallon) and the Sewer TAP-R rate be set at \$1.55/MCF (\$0.000207).

During this proceeding, PWD, the Public Advocate and the Philadelphia Large Users Group (PLUG) participated in discovery. As stated above, the Public Advocate filed testimony regarding its position. PWD subsequently filed rebuttal testimony. PWD and the Public Advocate engaged in on-the-record examination and cross-examination on March 31, 2022. PLUG indicated it did not have cross-examination for PWD or Public Advocate witnesses in advance of the March 31, 2022 hearing. Lance Haver, *pro se*, did not file testimony or engage in discovery, but conducted cross-examination of PWD and Public Advocate witnesses at the hearing. Michael Skiendzielewski, *pro se*, did not file testimony, engage in discovery, or participate in technical hearings.

On April 22, 2022, PWD and the Public Advocate submitted a Joint Petition for Settlement (Settlement) in this TAP-R reconciliation proceeding. As proposed in the Settlement, the Public Advocate and PWD recommend that the Water TAP-R rate be set at \$1.03/MCF (\$0.000138 per gallon) and the Sewer TAP-R rate be set at \$1.63/MCF (\$0.000218 per gallon). Also on April 22, 2022, PWD submitted its Main Brief in support of the Settlement and in

response to certain assertions made publicly by *pro se* participants. PLUG submitted its Main Brief on April 22, 2022, supporting the proposed Settlement and identifying considerations for future proceedings regarding TAP. The Public Advocate, at that time, filed a letter indicating it would not submit a brief (since the Settlement addressed the concerns of all parties who filed testimony in this proceeding), but requesting the ability to respond to any other party briefs or opposition to the Settlement.<sup>1</sup>

On April 28, 2022, Lance Haver (Haver) filed his Main Brief, which lacks merit and presents no substantive argument for or against the amount of the TAP-R surcharge set forth in the Settlement. As discussed below, Haver's Main Brief instead presents unfounded and unpersuasive arguments against the continued existence of the TAP-R surcharge, providing his layperson analysis of the public hearing notice for this proceeding under the City Charter, and repeating and/or recasting various misleading and incorrect claims he has previously made regarding the Public Advocate, the services Community Legal Services (CLS) provides as a legal services organization, and the management of CLS. For the reasons set forth in the paragraphs that follow, the Hearing Officer and the Board should reject Haver's recommendations and approve the Settlement.

## **II. The TAP-R is the Appropriate Cost Recovery Mechanism for TAP.**

This is the fourth consecutive annual TAP-R reconciliation proceeding and the fourth consecutive TAP-R proposed settlement. TAP-R is a rate for service provided in PWD's Board-approved tariff, which is adjusted annually to ensure that customers do not overpay or underpay for the cost of discounts provided to TAP participants in any year. In his Main Brief, Haver

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<sup>1</sup> Public Advocate's Letter in Lieu of Brief, available at: <https://www.phila.gov/media/20220428173951/ltr-in-lieu-of-brief-2022-04-28.pdf>.

continues to mischaracterize the TAP-R as a tax on water. Haver's contention has been directly addressed,<sup>2</sup> yet he persists in his false characterizations. Haver also erroneously submits that the TAP-R, which is a volumetric charge, "must be paid, even if one has no water usage."<sup>3</sup> By definition, a customer with no usage does not pay volumetric charges, like the TAP-R surcharge.

As the Public Advocate previously explained to Haver at the public input hearing in this proceeding, the TAP-R and its annual reconciliation procedure were successfully implemented after the 2018 Rate Proceeding. PWD and the Public Advocate agreed upon the majority of the TAP-R's components after finding that the amount included in base rates (in excess of \$16 million for FY 2018) to support TAP discounts was more than 400% of the actual discounts provided to TAP participants.<sup>4</sup> TAP-R is a more accurate and effective method of rate recovery for TAP than base rate recovery.<sup>5</sup>

Ultimately, this proceeding does not consider the merits of the TAP-R. The TAP-R is set forth in the Board-approved tariff for the Water Department. It is a predetermined formula, and this matter simply reconciles actual experience and projected discounts for the coming rate period.<sup>6</sup> There is no basis in this proceeding for any reconsideration of the appropriateness of the TAP-R. Even if this were an appropriate proceeding for such a consideration, Haver has failed to present any feasible alternative method for such cost recovery. His position is untenable and must be rejected.

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<sup>2</sup> March 31, 2022 Hrg. Tr. at 20-23.

<sup>3</sup> Haver Brief at 1.

<sup>4</sup> See 2018 Rate Proceeding, PA Statement 3, Direct Testimony of Roger D. Colton at 45, available at: <https://www.phila.gov/media/20180423162934/PAS3ColtonFinal.pdf> ("In FY2018, PWD included \$16.3 million in projected TAP costs in rates. (PA-V-49). In reality, PWD expects to incur only \$3.9 million in TAP costs during FY2018. (PA-V-50).").

<sup>5</sup> See, e.g., March 31, 2022 TAP-R Hrg. Tr. at 20-21.

<sup>6</sup> See, e.g., March 31, 2022 TAP-R Hrg. Tr. at 203-204.

### **III. Haver's Contention that Public Notice was Inadequate is Unsupported.**

Haver contends that the Board, or alternatively PWD, has violated Section 8-600 of the City's Home Rule Charter governing Language Access Plans and/or the State's Plain Language Consumer Contract Act.<sup>7</sup> Although Haver is not an attorney,<sup>8</sup> he has participated in this proceeding on behalf of himself, and is able to express his views about the proposed Settlement. Nonetheless, he has failed to provide any relevant reasoning or support for his allegations that there have been procedural violations in providing public notice. Furthermore, Haver's arguments regarding inadequate notice do not constitute a basis for the Board to reject the Settlement.

Regarding Section 8-600 of the Charter, Haver readily acknowledges that the provision applies to language access plans, which are plans "to 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." Haver assumes, incorrectly, that the publication of notice for a public hearing stems from the Charter's language access plan obligations. To the contrary, however, the Board's obligation to provide public notice does not originate from Section 8-600 of the Charter. Instead, as provided in the Board's regulations, the Board has committed to provide public notice by advertising in accordance with Section 8-407 of the Charter and Section 21-1703 of the Philadelphia Code.<sup>9</sup> Haver has failed to demonstrate a violation of the Board's applicable regulations concerning public notice.

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<sup>7</sup> Haver appears to suggest the Public Advocate has also violated Section 8-600 of the Charter. See Haver Brief at 7. Section 8-600 of the Charter does not apply to private persons or non-City organizations, like CLS.

<sup>8</sup> The Board need not consider Haver's lay understanding of the bases for approving a proposed settlement. The filed Joint Petition for Settlement sets forth all applicable considerations for the Board. The Board should approve the Settlement.

<sup>9</sup> Board Reg. §II.A.2(d)

Likewise, Haver assumes, but does not substantiate, that the State’s “Plain Language Consumer Contract Act” is applicable to the Board’s provision of public notice pursuant to its regulations. Haver has not identified a “consumer contract” within the meaning of that statute, and there is no such contract at issue in this TAP-R proceeding. Indeed, this proceeding in no way involves a written agreement between a consumer and a party regarding borrowing money, engaging in a transaction for real or personal property, or obtaining credit.<sup>10</sup>

Finally, even if there were some legitimate basis to be concerned about the adequacy of the Board’s public notice practices, that does not constitute a sufficient reason to reject the Settlement. While public input is important and valuable, the Settlement is not an agreement between members of the public and PWD. The Settlement is a proposal from active participants, the Public Advocate and PWD, and is supported by PLUG.<sup>11</sup> The Ordinance establishing the Board recognizes the fundamental difference between public input and the rights of active participants, who are the only parties able to appeal a rate determination, including a determination approving the Settlement.<sup>12</sup>

#### **IV. Haver’s Ineffective Assistance of Counsel Argument is Unfounded.**

The Board’s contract for Public Advocate services is a general consulting contract.<sup>13</sup> The Board’s Request for Proposals provides that: *The Public Advocate will not act as a lawyer in the course of this contract, and thus need not be a lawyer or law firm, though lawyers’ skillsets may*

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<sup>10</sup> See 73 P.S. §2203 (definition of “consumer contract”).

<sup>11</sup> See PLUG Main Brief at 3.

<sup>12</sup> Compare Phila. Code §13-101(3)(e) (requiring processes and procedures for public input and comment) with Phila. Code §13-101(9) (“Any party to the proceedings of the Board affected by the Rate Report may appeal to the Court of Common Pleas in Philadelphia.”)

<sup>13</sup> The Public Advocate and others have repeatedly and consistently explained that Haver’s allegations regarding a “no bid contract” are false. The contract for Public Advocate services was publicly bid via the Board’s Request for Proposals. It was lawfully entered into pursuant to the City’s procurement rules and renewed pursuant to its terms.

*be useful to the work.*<sup>14</sup> This provision makes clear that, although CLS staff are attorneys, they are not acting in a representative capacity with respect to the services provided as Public Advocate. Accordingly, as stated in Exhibit PA-1 to the Public Advocate contract, “[t]he project requests a qualified contractor to serve as Public Advocate in behalf of all small user customers of PWD concerning the review and determination by the Board of appropriate rates and charges in the forthcoming PWD rate proceeding.” Neither Haver nor any other member of the public is a client of CLS in its capacity as Public Advocate, and so they cannot argue that the attorneys serving as Public Advocate have provided them ineffective assistance.<sup>15</sup>

Haver also complains that public participation in TAP-R hearings has not been robust. However, this is not surprising. Although the Public Advocate conducted extensive outreach in connection with the Special Rate Proceeding, and follow up outreach in connection with this TAP-R proceeding,<sup>16</sup> it remains true that the TAP-R reconciliation proceeding is not a base rate proceeding, and does not entail the extensive level of review or examination required for base rate proceedings. Indeed, the history of TAP-R proceedings demonstrates this reality: other than statements by active participants, no public input has been received in a TAP-R proceeding over the past four years, a fact likely attributable to the technical and formulaic nature of the TAP-R reconciliation adjustment.

Ultimately, Haver’s contention is contrary to the facts. Attorneys serving as Public Advocate have fully, effectively, and zealously represented the interests of the small user customers at all times. This is readily apparent based on the discovery performed, the testimony

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<sup>14</sup> See Request for Proposals for a Rate Proceeding Public Advocate, Contract Opportunity: 21191003133729, at Scope of Work, Section II.C.3.

<sup>15</sup> Analogously, no consumer of utility services would have the basis to submit that the Office of Consumer Advocate (OCA) provided ineffective assistance in a Pennsylvania Public Utility Commission (PUC) proceeding. OCA does not, by intervening in rate proceedings to represent the interests of residential customers, enter an attorney-client relationship with those customers.

<sup>16</sup> See PA Post-TAP-R Hearing Exhibit.

submitted, and the successfully negotiated Settlement, which significantly reduces the TAP-R rates and is supported by the Public Advocate, PWD, and PLUG.

**V. Attorneys Serving as Public Advocate Have no Financial Information to Disclose and Possess no Conflicts of Interest.**

Haver complains that attorneys serving as Public Advocate have not filed Statements of Financial Interest under the City’s ethics rules. However, CLS attorneys serving as Public Advocate submit that they are not within the positions for which such disclosures are required. Likewise, CLS attorneys serving as Public Advocate submit that they do not fall in any of the categories of individuals required to file a Statement of Financial Interest by the State Ethics Commission.<sup>17</sup> Nonetheless, as has been publicly explained, CLS attorneys do not possess direct financial interests in the outcome of these proceedings, except to the extent they are customers and users of the City’s water system.<sup>18</sup>

Haver also falsely asserts that the “management team” of CLS has a financial conflict of interest with water ratepayers. Here again, Haver incorrectly presumes that supposed interests of CLS Board Members somehow impact the performance of CLS attorneys, failing to recognize that CLS is not managed by its Board, but by its internal management team, all of whom are full time CLS employees. Even if it were true that CLS Board Members possessed some financial interests that could conflict with the interests of PWD customers, which we do not believe to be the case, Board Members play no role whatsoever in directing the work of CLS lawyers serving as Public Advocate.<sup>19</sup>

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<sup>17</sup> As explained at the Board’s April 13 Meeting, Counsel for the Board has filed a request to the City’s Board of Ethics to determine whether any or all of the Board’s professional services contractors should be filing financial disclosure statements. April 13, 2022 Board Mtg., audio available at: <https://www.phila.gov/media/20220421172026/WRB-Monthly-Meeting-recording-April-2022.mp3>.

<sup>18</sup> Id.

<sup>19</sup> Id.



**VI. Conclusion**

Haver's Main Brief is without merit. Instead, it merely continues his pattern of mischaracterizing the facts and stating opinions rooted in unfounded suspicions and false insinuations. The Board should approve the Settlement.

Respectfully submitted,

/s/ Robert W. Ballenger

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