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

MAIN BRIEF OF THE
PHILADELPHIA WATER DEPARTMENT

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I. INTRODUCTION

A. THE DEPARTMENT'S PROPOSALS

The Philadelphia Water Department ("PWD" or "Department") submits this Brief in support of its proposals in the Formal Notice for the 2022 Special Rate Proceeding. The Department proposes that no adjustments be made to water, sewer and stormwater rates and charges approved to take effect on September 1, 2022, i.e., for Fiscal Year 2023 (FY 2023), by the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board" or "Board") in the 2021 General Rate Proceeding. That proceeding included, *inter alia*, approval of incremental additional revenues of $34.110 million for FY 2023 ("FY 2023 Base Rate Incremental Increase" or "FY 2023 approved rate increase").

Pursuant to the Department's proposals in this proceeding, the approved FY 2023 Incremental Base Rate Increase will be unchanged. The Department's proposals are summarized in the table below.

Table 1: The Department's Proposals		
Line	**Description of Adjustments**	**Amounts**
1	**Approved FY 2023 Incremental Base Rate Increase**	**$34.110 million**
	Federal Stimulus Funding	
2	Amount Received	$0.00
3	Threshold	$2.000 million
4	Adjustment Amount	$0.00

	FY 2021 Financial Performance	
5	FY 2021 Year-End RSF Balance	$124.66 million
6	Minimum Threshold	$135.00 million
7	Available Balance over Threshold	$0.00
8	Amount Shared	$0.00
9	Adjustment Amount	$0.00
10	**Final FY 2023 Incremental Base Rate Increase (after Adjustments)**	**$34.110 million**

B. BACKGROUND

This proceeding is convened pursuant to the Board's Rate Determination, dated June 16, 2021 ("2021 Rate Determination")[1] and the Joint Petition for Partial Settlement[2] ("2021 Settlement") in the 2021 General Rate Proceeding.[3] The 2021 Settlement and the 2021 Rate Determination, provide that the Department will initiate a special rate proceeding to propose a reconciliation of (or adjustment to) approved rates and charges to become effective in FY 2023 under certain limited circumstances, based on two potential adjustments.

The first potential adjustment is related to PWD's direct receipt of certain Federal Stimulus Funding during the period July 1, 2021 through December 31, 2021 (the "Federal Stimulus Adjustment"). No adjustment for Federal Stimulus Funding is required, if the Stimulus Funding received by PWD during the Receipt Period is less than $2 million (threshold bucket). This adjustment is shown on lines 2 to 4 of Table 1 (above).

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

2 https://www.phila.gov/media/20210505154832/Joint-Petetion-for-Partial-Settlement.pdf.

3 https://www.phila.gov/departments/water-sewer-storm-water-rate-board/rate-proceedings/2021-rate-proceeding/.

The second potential adjustment is related to the Department's FY 2021 financial performance, i.e., over-performance[4] as measured against a minimum threshold ("Minimum Threshold") that was not defined in Settlement negotiations (the "FY 2021 Financial Performance Adjustment"). The appropriate Minimum Threshold must be established in this proceeding. The resulting available balance measured against the aforesaid threshold is the calculated amount eligible for "sharing." Please note that no level of "sharing" was agreed to in the 2021 Settlement. This issue (sharing) must also be established in this proceeding. The financial performance adjustment is shown on lines 5 to 9 of Table 1 (above).

Both potential adjustments are subject to the "Maximum Adjustment" which requires that, either separately or in the aggregate, such adjustments cannot lower the FY 2023 Incremental Base Rate Increase below zero dollars. The aforesaid increase is shown on line 1 of Table 1 (above).

C. ORDER OF PROCEEDINGS

On January 21, 2022, the Department filed its Advance Notice[5] of the initiation of this Special Rate Proceeding regarding the potential downward adjustment of water, sewer and stormwater rates and charges previously approved to take effect September 1, 2022. Formal Notice[6] of the proposed reconciliation adjustments was filed with the Department of Records on February 25, 2022. Both Notices contained supporting statements (PWD Statements 1-3),[7]

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4 The terms "over-performance" and "out-performance" are used interchangeably in this brief.

5 https://www.phila.gov/media/20220124131421/Notification-of-Rate-Filing-2022-01-21.pdf.

6 https://www.phila.gov/media/20220225145807/PWD-FY2023-Special-Proceeding-Formal-Notice.pdf.

7 The direct testimony of the Department included PA Statement 1 (Melissa La Buda, PWD Chief Financial Officer); PA Statement 2 (Katherine Clupper and Peter Nissen, PWD Financial Advisers); and PWD Statement 3 (Black & Veatch, PWD Rate Consultants).

schedules and exhibits, as required by the regulations (Sections II.A.2 and II.D) promulgated by the Rate Board.

The general public was notified through information made available on the Rate Board's website[8] and legal notices related to the Advance and Formal Notices that were timely published in three local newspapers. In addition to the above, participants in PWD's 2021 General Rate Proceeding were notified by e-mail of the instant proceeding and were provided an opportunity to participate by notifying the Hearing Officer on or before March 4, 2022. A pre-hearing conference was held on March 9, 2022.

As confirmed at the pre-hearing conference, the participants in this proceeding represented by counsel, included the Department, the Public Advocate (Community Legal Services) selected by the Rate Board to represent the concerns of residential consumers and other small users, the Water Revenue Bureau ("WRB") and the Philadelphia Large Users Group ("PLUG" or "Large Users Group").[9] Two individual customers, Lance Haver and Michael Skiendzielewski, also provided notice of participation in this proceeding.[10]

The Public Advocate ("Advocate" or "PA") submitted written discovery requests by e-mail on February 1, 2022, February 17, 2022, March 11, 2022 as to which PWD responded on February 15, 2022 and March 23, 2022. The Department submitted written discovery requests by email on April 9, 2022 to which the Advocate responded on April 18, 2022. The Department submitted written discovery requests by email on April 9, 2022 to which Mr. Haver responded on

8 https://www.phila.gov/departments/water-sewer-storm-water-rate-board/rate-proceedings/2022-annual-rate-adjustment/.

9 The Philadelphia Large Users Group is an *ad hoc* group of large volume customers receiving water, sewer, and storm water service from the Department under the Industrial and Hospital/University Rate Schedules.

10 All entities and individuals identified above are referred to herein as Participants in this proceeding.

April 19, 2022. No other participant engaged in discovery. Copies of the discovery requests and the responses thereto were posted on the Rate Board's website.

The schedule[11] for the proceeding provided that written testimony in response to the Department's proposals, if any, would be submitted by April 5, 2022. On that date, the Public Advocate filed testimony (PA Statement 1)[12] stating its disagreements with the Department's proposals. In PA Statement 1, the Advocate recommended a downward adjustment of $6.60 million to the FY 2023 Incremental Base Rate Increase. No other participant submitted written testimony. The Department submitted rebuttal testimony (PWD Rebuttal Statement 1[13] and PWD Rebuttal Statement 2[14]) on April 19, 2022. No other participant submitted written rebuttal testimony.

Upon proper notice being provided, public input hearings to allow PWD customers the opportunity to express their concerns or opinions concerning the Department's proposals were held at 1 P.M. and 6 P.M. on March 23, 2022. A technical review hearing was held on April 26, 2022. Due to the on-going COVID-19 pandemic and subsequent emergency measures imposed by both the city and state, these hearings were conducted remotely via Zoom online and telephonically.

At the public input hearing, Glen Abrams, PWD Deputy Commissioner for Communications and Engagement made a presentation[15] regarding the Department's proposals.

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11 https://www.phila.gov/media/20220309172332/Spec-Rate-PHC-Order-mar-9-2022.pdf.

12 https://www.phila.gov/media/20220406194710/PA-LKM-Testimony.pdf.

13 https://www.phila.gov/media/20220427155656/2022-special-PWD-rebuttal-statement-1-as-amended-by-errata.pdf as amended by an errata https://www.phila.gov/media/20220427155655/2022-special-errata-to-PWD-rebuttal-statement-1.pdf.

14 https://www.phila.gov/media/20220422152713/2022-pwd-rebuttal-black-and-veatch.pdf.

15 https://www.phila.gov/media/20220323113316/Special-Rate-Proceeding-2022-Public-Presentation.pdf.

Six persons, including Lance Haver, separately presented their respective comments and concerns. While other customers expressed interest in attending the public input hearing, they did not choose to participate.

The Department, the Advocate, WRB, PLUG and Mr. Haver attended the technical hearing. During this hearing, two witness panels were presented by the Department. First, the Financial Panel was presented consisting of Melissa La Buda, Katherine Clupper and Peter Nissen. Second, a panel from Black & Veatch Management Consulting LLC ("Black & Veatch") was presented. Both panels were separately cross-examined by the Public Advocate and by Mr. Haver. In addition, the Public Advocate presented its witness, Lafayette Morgan, who was cross-examined by the Department and by Mr. Haver. Responses to transcript requests made by Mr. Haver at the technical hearing were provided by the Department on May 2, 2022.

II. LEGAL STANDARDS

The Department's rates and charges must be fair and reasonable and consistent with the Philadelphia Home Rule Charter ("Charter"),[16] the Rate Ordinance,[17] the 1989 General Ordinance[18] and Rate Board regulations.[19] The applicable governing legal standards were

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[16] Sections 5-800 and 5-801 of the Charter.

[17] Philadelphia Code Section 13-101 (Fixing and Regulating Rates and Charges). Section 13-101 is referred to as the "Rate Ordinance" in this brief.

[18] Restated General Water and Wastewater Revenue Bond Ordinance of 1989, approved June 24, 1993, as amended from time to time including by the Twentieth Supplemental Ordinance, approved by the Mayor on April 18, 2018.

[19] Rate Board Regulations; Water Department Regulation 206.0 (Income-Based Water Rate Assistance Program); Water Department Rates and Charges, 10.0 (Provisions for recovery of the Tiered Assistance Program (TAP) costs).

discussed more fully in the Department's Brief in the 2021 General Rate Proceeding[20] which is incorporated herein by reference.

Before changing the Department's rates and charges, the Rate Board must assess the impact of such changes upon the Department's financial condition. The rates and charges fixed by the Board must, *inter alia*, maintain the utility's financial stability (taking into consideration the Department's Financial Stability Plan). Financial stability includes (but is not limited to) considerations regarding the Department's (Water Fund) "credit ratings, planned and actual debt service coverage, capital and operating reserves and utility service benchmarks."[21] To maintain financial stability, the rates and charges include, *inter alia*, amounts to meet operating expenses, debt service and such amounts "as shall be required to comply with any rate covenant and sinking fund reserve requirements."[22] Rates and charges shall also include "a reasonable sum to cover unforeseeable or unusual expenses …"[23]

Stated otherwise, in setting or changing rates and charges, the Rate Board must take into account the Department's financial stability to ensure that PWD will be able to (a) pay operating expenses, debt service, (b) comply with its rate covenant and sinking fund reserve requirements, (c) maintain reserves during the rate period and (d) avoid a downgrade or negative action by the rating agencies.

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20 https://www.phila.gov/media/20210513093206/Brief-May-11-2021.pdf.

21 Philadelphia Code Section 13-101(a).

22 Philadelphia Code Section 13-101(4)(a). *See also* Philadelphia Code Section 13-101(4)(b).

23 Philadelphia Code Section 13-101(4)(b). *See also* Philadelphia Code Section 13-101(1)(c) (reserves should be able to "stabilize rates for 3, 4 and 5 year periods).

III. ARGUMENT

The first potential adjustment, which is not contested by the Department or the Public Advocate, is discussed in this Section III at subpart A. Regarding the second potential adjustment, the disagreements between the Department and the Public Advocate are discussed in subparts B and C. Other issues raised by the *pro se* participants are discussed in subpart D.

A. NO DOWNWARD ADJUSTMENT IS WARRANTED FOR FEDERAL STIMULUS FUNDING

For the first potential adjustment, the Department's proposal is a reduction of "zero" dollars based on the Federal Stimulus Funding. This proposal is shown on lines 2 to 4 of Table 1. The Public Advocate agrees with the Department that no reduction in FY 2023 approved rates and charges is warranted with respect to the "receipt" of federal stimulus funds, per the terms of the 2021 Settlement.[24] No other participant submitted written direct or rebuttal testimony as to this potential adjustment.

B. NO DOWNWARD ADJUSTMENT IS WARRANTED FOR FY 2021 FINANCIAL PERFORMANCE

Regarding the second potential adjustment, the Department requests that no adjustment be made to the FY 2023 Incremental Base Rate Increase based on FY 2021 financial performance. The Public Advocate disagrees. The Advocate requests a downward adjustment of $6.6 million. No other participant submitted written direct or rebuttal testimony on this potential adjustment.

[24] PA Statement 1 at 19.

The proposals of the Department and the Public Advocate are set forth in Table 2. This table depicts the proposals of PWD and the Advocate comparing (1) the starting point; (2) the Minimum Threshold; (3) the calculation of the available balance above the Minimum Threshold; and (4) the sharing proposals for both of the above participants.

Table 2: Financial Performance Adjustment
Comparison of Proposals by the Department and the Public Advocate

		Department	Public Advocate	
Line No.	**Description**	**"Main" Proposal**	**"Alternative" Proposal**	**"Main" Proposal**
	FY 2021 Financial Performance			
1	FY 2021 Year-End RSF Balance	$124.660 million	$124.660 million	$124.660 million
2	Minimum Threshold	$135.0 million	$113.988 million	$113.988 million
3	Available Balance Above Minimum Threshold	$0	$10.70 million	$10.70 Million
4	Amount to be Shared	$0	$5.35 million (50% of Line 3)	$6.60 million (61.7% of Line 3)
5	Total Adjustments	$0.00	($5.35 million)	($6.60 million)
6	**Final FY 2023 Incremental Base Rate Increase**	$34.110 million	$28.760 million	$27.510 million

1. **<u>The Starting Point</u>.**

The starting point (Table 2, line 1) is the same for the Department's and the Public Advocate's proposals: $124.660 million. That amount is based on the ending balance of the Rate

Stabilization Fund ("RSF") for FY 2021 which is the same as the starting balance of the RSF for FY 2022.

2. <u>**Proposals for the Minimum Threshold**</u>.

The Minimum Threshold proposals of PWD and the Advocate are very different (Table 2, line 2). This is the core area of the disagreement in this proceeding, since the Minimum Threshold was <u>not</u> defined in the 2021 Settlement. Regarding the aforesaid thresholds, the Department has proposed an amount of $135 million[25] and the Public Advocate has proposed $113.988 million. Each of these proposals is discussed below.

Using $135 million as the Minimum Threshold: The Department proposes a Minimum Threshold of $135 million for purposes of this potential adjustment. The aforesaid amount is the same as the target level for the Rate Stabilization Fund established in the Rate Board's 2018 Determination.[26] That amount is also consistent with the Department's goal to maintain liquidity by managing to a $135 million RSF balance (over time) and a $15 million Residual Fund balance.[27] The fact that the RSF balance has been well below $135 million in the recent past (together with PWD's continued reliance on the RSF to fund operations) confirms that the Department is in a financial "hole." If the Rate Board directs action that would increase the size of the gap (or hole) between RSF balance and the targeted balance of $135 million, the Rate Board would be knowingly placing the Department in greater financial difficulty.[28] The

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25 Please also note that PWD addresses rating agency concerns in its testimony and states that S&P has warned that depleting RSF levels below $120 million could cause a rating downgrade. See discussion, *infra*.

26 *See*, 2018 Determination at 37-38. https://www.phila.gov/media/20180713144736/2018-RATE-DETERMINATION-TIMESTAMPED.pdf

27 *See*, PWD Schedule ML-2 (Financial Plan) at 18 (cash balances).

28 The RSF is the Department's source of liquidity. Dwindling reserves (liquidity) has been noted as a source of concern by all rating agencies. See, PWD Statement 1, Schedule ML-3.

ratepayers will be called upon to address the Department's financial difficulties (fill the financial hole) in FY 2024 and beyond. Please note that, in the alternative, PWD also maintains that because it only marginally meets the S&P RSF metric ($120 million),[29] no adjustment is warranted using this metric as well.[30]

Using $120 million as the Minimum Threshold: It should also be noted that S&P identified $120 million as the lowest level at which the RSF can be maintained without risking a rating downgrade ("S&P RSF metric").[31] Specifically, S&P indicated in its September 2021 rating report, that higher-than-planned use of liquidity could cause S&P to lower its credit rating for the Department.[32] Notably, PA witness Lafayette Morgan, acknowledged that S&P identified a "balance of concern" in connection with the level of RSF reserves (given that an RSF balance below $120 million could lead to a negative rating action).[33] At the technical hearing, Mr. Morgan stated that "I am not recommending that [PWD] deplete the [RSF] reserves below [$]120 million."[34] Mr. Morgan, however, did not temper or adjust the Public Advocate's proposed rate reduction to keep RSF levels above that "balance of concern," as noted below. This is a major issue for PWD, since all rating agencies have indicated their concerns that PWD financial reserves are dwindling.[35]

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[29] The S&P RSF metric is defined below.

[30] PWD Rebuttal Statement 1 at 4, 6.

[31] *See*, PWD Rebuttal Statement 1 at 19.

[32] PWD Rebuttal Statement 1 at 16; Schedule ML-3 (Rating Agency Reports), S&P Report (September 17, 2021) at 3. S&P has clearly indicated that depleting the RSF reserves below $120 million will likely result in a downgrade for the Department.

[33] PA Statement 1 at 15.

[34] Tr. 156.

[35] PWD Statement 1 at 16-18.

Using $113.988 million as the Minimum Threshold: The Public Advocate's proposal is based on Table C-1 appended to the 2021 Rate Determination ("2021 Table C-1"). The aforesaid table reflects the 2021 Settlement, as approved in the 2021 Rate Determination. Mr. Morgan states that the rates and charges for FY 2022 and FY 2023 were established based on the projections in the 2021 Table C-1; and that the projected RSF balance shown in this Table (i.e., FY 2022 beginning balance) should be used as the Minimum Threshold for purposes of the FY 2021 financial performance adjustment in this proceeding.[36]

PWD submits that the 2021 projections are <u>not</u> the appropriate starting place (for purposes of this adjustment), since they do not reflect current financial conditions facing the Department.[37] Specifically, the projections in the 2021 Table C-1 do not satisfy S&P's "balance of concern" for the Rate Stabilization Fund ($120 million).[38] Stated differently, the aforesaid table shows more than a $27 million gap between the projected FY 2023 end of year balance of $92.3 million (line 41) and the S&P metric. So, utilization of 2021 projections for purposes of this adjustment would place the Department below the RSF balance that is likely to trigger a downgrade or negative action by one or more of the rating agencies. Also, please note as

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36 PA Statement 1 at 15.

37 Also, it bears emphasis that the 2021 Settlement is a "black box" settlement, and its terms clearly state that the "parties do not specifically identify adjustments to projected revenues and expenses." PWD Rebuttal Statement 2 at 10; PWD Hearing Exhibit 2 (Q/A 15). A black box settlement is a settlement in which the components and the derivation of the settlement amount are not disclosed. *See*, PWD Hearing Exhibit 2 (Q/A 16, 23a). In the 2021 Settlement, only the additional revenues to be generated in FY 2022 and FY 2023, as shown on 2021 Table C-1, were agreed to — the other projections were not accepted by either party. *See*, PWD Hearing Exhibit 2 (Q/A 16); Tr. 82-83, 85-86, 107.

B&V questioned Mr. Morgan's use of the 2021 Table C-1 as a reasonable basis for the Advocate's proposed minimum threshold. PWD Rebuttal Statement 2 at 10-13. In light of the black box settlement it is inappropriate to use the 2021 Table C-1 for other purposes than to show agreed upon additional revenues generated for FY 2022 and FY 2023. As stated above, a more objective metric is appropriately utilized to establish a minimum threshold for purposes of this proceeding.

38 Please recall that the S&P rating report identifying the "threshold of concern" ($120 million) issued in September 2021 (after the 2021 Rate Determination). See, PWD Statement 1, Schedule ML-3.

explained below, that only the additional revenues to be generated in FY 2022 and FY 2023 (shown in 2021 Table C-1) were agreed to as a part of the 2021 Settlement.

3. Calculation of the Available Balance Above Minimum Threshold.

The available balance (Table 2, line 3) is the calculated difference between the starting point (line 1) and the Minimum Threshold (line 2). There is no disagreement on the actual calculations here. The disagreement is in connection with the appropriate Minimum Threshold to be used in the calculation that determines the available balance for sharing (line 4).

4. Sharing Proposals.

The different sharing proposals of the Department and the Public Advocate are shown on line 4 in Table 2 above. Regarding sharing, the Department has one proposal (zero dollars or no downward adjustment) and the Public Advocate has two proposals: an "asymmetric" proposal with a split of 61.7% of the available balance in favor of customers; or, in the alternative, an "even split" (50% each) of the available balance. Each sharing proposal is discussed below:

The Department's Sharing Proposal: Even if the available balance (Table 2, line 3) is above zero, the Department maintains that there should not be any sharing, i.e., zero reduction to the FY 2023 Base Rate Incremental Increase, given its current financial difficulties. The Department has the following key concerns with sharing:

First, the Department is concerned that sharing will reduce the Department's financial flexibility (liquidity position), which is already facing constraints in FY 2023. Notably, the full amount of the available balance (Table 2, line 3) may not be enough to cover cost pressures and other challenges in FY 2023 arising from escalating regulatory requirements and dramatically increasing costs.[39] That is, the Department's (partial) list of costs pressures and challenges shows an impact of $19.20 million in FY 2022 and/or $23.21 million in FY 2023.[40] In addition, the Rate Board's determination in the related TAP-R proceeding could place pressure upon the Department's financial reserves to cover about $3 million in lost revenues related to additional TAP participants (if TAP-R settlement is rejected).[41] Further, please recognize that the full amount of the available balance (Table 2, line 3), without consideration of the aforesaid cost pressures and challenges, would barely be enough to cover unforeseeable or unusual expenses, such as those that could be caused by a future storm event. By way of illustration, the remnants of Hurricane Ida (during FY 2022) caused the incurrence of $10.0 million in additional expenditures.[42]

Second, the Department is concerned that the starting balance (Table 2, line 1) of $124.66 million is too close to the S&P RSF metric ($120 million) to justify sharing at any level. Any regulatory action that would reduce the Rate Stabilization Fund to at, or near, the above-described downgrade trigger of $120 million, would further constrain the Department's financial flexibility (as compared to utilizing the targeted balance of $135 million in the RSF).

Third, the Department believes that ratepayers are poorly served by rates that "yo-yo," i.e., go up and down or down and up in short periods of time. The Department's position is that rate reductions for FY 2023 will be reversed by a rate increase later (for FY 2024 and beyond).[43]

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39 The Department is observing inflationary increases at a four decade high. See, PWD Statement 3 (Schedule BV-5).

40 PWD Statement 1 at 18-22.

41 2022 PWD TAP Rebuttal Statement 1 at 8-9.

42 Schedule ML-2; PA Statement 1 at 13.

43 PWD Statement 1 at 17-18, 19, 20-21.

Using a lower Minimum Threshold, such as proposed by the Advocate, for reconciliation purposes would predictively lead to a spike in rates, since a rate increase would be required beginning in future years (FY 2024 and beyond) to eliminate the reliance on the RSF to meet its annual revenue requirements and raise additional revenues to bring the RSF back to the target/ goal of $135 million. For example, using the lower amount of $113 million in the RSF as the Minimum Threshold for reconciliation purposes means that ratepayers would then need to pay up to $22 million in additional billings due to increased rates in FY 2024 and beyond to raise the Rate Stabilization Fund back to $135 million. In addition to the above "yo-yo" effect that would confuse and irritate customers and confuse the rating agencies, PWD is also concerned that a reduction in approved FY 2023 rates would negatively impact the Department's Financial Plan metrics for the near and longer term.

Please note that the above key concerns are <u>not</u> mitigated or eliminated by the testimony of Lafayette Morgan proffered on behalf of the Public Advocate. That testimony assumes PWD financial "over-performance" in FY 2021 when only lackluster performance was demonstrated. It also implies that the Department will not be facing financial and cost pressures detailed in the Department's direct testimony.[44]

The Department disagrees with Mr. Morgan's unsupported assertion that PWD financial "over-performance" is shown FY 2021. The actual FY 2021 RSF ending balance is the only measure of FY 2021 financial performance defined in the 2021 Settlement and the 2021 Rate Determination. As documented in this record, the end-of-year RSF balance for FY 2021 was $124.611 million. That balance was well below the targeted $135 million RSF metric. As such, it

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[44] PWD Statement 1 at 18-22.

confirms that PWD was experiencing financial difficulty in FY 2021 (insufficient liquidity) and continues to be in financial difficulty going into FY 2023, having depleted its reserves over prior fiscal years.

Mr. Morgan's contention that PWD financial over-performance is demonstrated in FY 2021 is plainly wrong. He calculates a simple variance between the actual and projected balances for the RSF and suggests that shows financial "over-performance" or financial strength, even though the Department remains in financial difficulty. Please recall that, in deciding this adjustment, the key test is to determine whether there are excess reserves for sharing. That is the determinant of whether a reduction in FY 2023 approved rates is warranted. In the absence of such excess reserves (as is the case here), there can be no sharing.

In the instant context, Mr. Morgan also opines that "positive" or "good" financial performance is demonstrated, if the actual RSF balance in FY 2021 exceeds the projected RSF balance for that year. He assumes that means "sharing" is in order. Again, he is mistaken.

Any judgment as to positive performance has to take into account PWD's deteriorating financial condition. That is, the Department has been in financial difficulty in recent years and remains in financial difficulty at present given current cost and financial pressures it faces — at a time when its financial reserves are (i) well below Rate Board targeted levels ($135 million); and (ii) barely meet the $120 million S&P RSF metric. It bears emphasis that PWD will likely be subject to negative credit rating agency action, if it falls short of the latter metric.

PWD maintains that Mr. Morgan's assessment of "good" or "positive" financial performance for the Department in FY 2021 ignores both regulatory and financial circumstances presented. That is, he overlooks PWD's recent regulatory history (nominal rate increase of $24.5

million for FY 2019-2020; withdrawn rate increase for FY 2021; and $10.411 million in rate relief in FY 2022).[45] The above regulatory actions resulted in annual increases in revenues of roughly 1.33%, 1.2% and 1.85% for FY 2019, FY 2020 and FY 2022, respectively. Such incremental increases were plainly insufficient. Consequently, the Department had no choice but to rely upon available financial reserves to sustain its operations during the above period. PWD now finds itself in a financial morass.[46]

Please also note that several assumptions, underpinning the Advocate's assertion that PWD financial over-performance is demonstrated in FY 2021, are factually in error. For example, the Advocate maintains that Hurricane Ida impacted the Department's financial performance in FY 2021. However, Hurricane Ida occurred in FY 2022, not FY 2021. Fiscal year 2021 started on July 1, 2020 and ended on June 30, 2021.[47] Fiscal year 2022 started on July 1, 2021 and will end on June 30, 2022. The remnants of Hurricane Ida passed through the City and surrounding areas on September 1, 2021.[48] Impacts of Hurricane Ida had no impact on FY 2021 financial performance.[49]

The Advocate also maintains that transfers to the Construction Fund ($13.217 million) in FY 2021 demonstrate financial over-performance.[50] That conclusion is mistaken as well. Such

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45 PWD acknowledges that $34.110 million in additional revenues was approved in the 2021 Rate Determination, as a part of the Settlement. PWD needs all of these additional revenues to sustain its operations and to avoid negative credit rating action.

46 PWD Rebuttal Statement 1 at 7.

47 *See*, Schedule ML-4.

48 PWD Exhibit 3 (Documents Incorporated by Reference), Official Statement – Series 2021C (September 29, 2021) at 27 (regarding Impact of Hurricane Ida).

49 PWD Rebuttal Statement 1 at 9; PWD Hearing Exhibit 2 (Q/A 14).

50 PA Statement 1 at 19-20.

transfers were necessary to support the capital improvement program (CIP) and keep the costs of that program more affordable to our customers. Moreover, the transfers do not demonstrate either over-performance in receiving revenues from customers or the availability of "extra" funds collected through rates. Rather, those funds were transferred to ensure that sufficient funds were available to secure PennVest loans and other low-interest loan programs that minimize borrowing costs for the Department.[51] As stated in the record, when these programs are used, the disbursement of proceeds are made on a matching or reimbursement basis. This means that PWD must use its cash on hand to pay for construction before loan proceeds are made available to the Department.[52] Please also note that the above transfer amounts are not available to the Department in FY 2023. This means that any reduction in rates based on the transfer made in FY 2021 will force the Department to draw down its limited financial reserves in FY 2023.

The Advocate further maintains that, with the $10.441 million in increased revenues approved for FY 2022, PWD financial over-performance is demonstrated.[53] He is mistaken again. In point of fact, the above rate increase had no impact on PWD FY 2021 financial performance. The aforesaid revenue increase became effective on September 1, 2021 and did not impact actual revenues received during FY 2021. As noted above, FY 2021 ended on June 30, 2021. Please recall that there was no adjustment to base rates for FY 2021 (the rate case filed on February 11, 2020 was withdrawn because of the pandemic).

The Advocate also indicates that the Department's presentation regarding cost pressures is "one-sided" and excludes cost savings related to PWD's lower required pension fund

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[51] PWD Rebuttal Statement 1 at 11-12.

[52] PWD Rebuttal Statement 1 at 11.

[53] PA Statement 1 at 8.

contribution (as identified in the last general rate case). This is untrue. Lower required pension contributions were reflected in PWD projections for FY 2022 and FY 2023.[54] This information is documented in the Department's responses to PA discovery requests.[55]

There are numerous other instances of PA misstatements in this record making plain the fact that the Advocate's proposal to reduce FY 2023 approved rates lacks record support.[56] Additional frailties and inconsistencies in connection with the Advocate's proposals are identified in the discussion below.

The Public Advocate's "Even Split" Proposal: The Advocate presents, in the alternative, a fifty percent (50/50 split) sharing proposal.[57] This proposal appears to be premised on the (mistaken) assumption that sharing must occur, regardless of the impact on the Department's ability to (a) maintain its financial stability; (b) pay operating expenses and debt service; (c) comply with its rate covenants and sinking fund reserve requirements; and (d) preserve its credit ratings. This proposal is misguided. There is nothing to share in the instant context. No adjustment is warranted here in view of the Department's financial difficulties.

The Public Advocate's "Asymmetric" Proposal: The Advocate also presents an asymmetric proposal where the amount to be shared is calculated by dividing the available

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54 *See*, PWD discovery response to PA-I-1.

55 In responding to PWD discovery, the Public Advocate demurred as to this issue indicating that it could not confirm the truth of its assertion about the inclusion of lower pension fund contributions in projections for FY 2022-2023 in view of the black box settlement negotiated in the 2021 General Rate Proceeding. *See*, PWD Hearing Exhibit 2 (Q/A 15);Tr. 150, 158-159. *See also*, PWD Rebuttal Statement 2 at 21-22.

56 In addition to the above, the Department identified the following mistaken, inconsistent or unsupported contentions of the Public Advocate: (1) misstatements, PWD Rebuttal Statement 2 at 17-18; (2) use of the 2022 tables beyond their intended purposes, PWD Rebuttal Statement 2 at 10-11; (3) use of residual fund, PWD Rebuttal Statement 2 at 9, 11-13; (4) describing performance as "good," PWD Rebuttal Statement 2 at 13-17; (5) failure to keep the RSF at or above the "balance of concern," PWD Rebuttal Statement 2 at 23-24.

57 PA Statement 1 at 19.

balance (Table 2, line 3) equally and then adding an additional (undivided) amount. The Advocate proposes that the additional (undivided) amount should be the difference between the projected and actual balances in the Residual Fund for FY 2021. This means that a greater than equal share of the available balance (line 3) would be used for the downward adjustment. In fact, the split equates to 61.7%, if the available balance is $10.700 million, as shown in Table 2, line 4.[58]

The Department submits that neither of the Public Advocate's adjustments are warranted. The Advocate's failure to justify the imposition of asymmetrical treatment bears more pointed discussion — as it both ignores PWD current financial difficulties and the terms of the 2021 Settlement.

That is, the Public Advocate's proposal avoids a holistic look at the Department's financial condition and financial stability. The proposal lets ratepayers receive a greater than equal share of benefits (in the form of reduced rates in FY 2023), but increases the cost pressures and risks on the Department for FY 2023. Increasing the downward adjustment also increases the potential for rates to "yo-yo" in the future. Finally, adding more cost pressures and risks on the Department will likely end up costing ratepayers more (over time), since those pressures and risk could lead to a downgrade or other negative action by the rating agencies increasing borrowing costs in future years.

Also, the PA proposal reaches beyond the terms of the 2021 Settlement in looking to Residual Fund balance (comparing FY 2021 actual versus projected balances) as a basis for this additional asymmetrical adjustment. This adjustment is inconsistent with the 2021 Settlement,

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58 That downward adjustment equates to a larger split, assuming the available balance is $4.6 million (i.e., using the starting point of $124.660 million and a Minimum Threshold of $120 million).

the 2021 Rate Determination and the Stipulation negotiated between the Advocate and PWD — all of which indicated that the "starting point" for any PWD FY 2021 financial performance adjustment would be the FY 2021 ending RSF balance. The actual FY 2021 RSF ending balance is the only measure of "over-performance" defined in the 2021 Settlement and the 2021 Rate Determination. The Stipulation reaffirms this as well. Please note that the Advocate repeatedly stated that its position would be in adherence to the Settlement terms.[59] This specific proposal runs counter to the 2021 Settlement and should be rejected for that reason in combination with the litany of other criticisms stated above.

C. THE IMPACT OF THE ADJUSTMENTS

The impacts of the adjustments proposed by the Department and the Public Advocate are shown on lines 5 and 6 in Table 2 above. Assuming the Rate Board decides to adjust (reduce) FY 2023 approved rates and charges, it must also determine if, the changed rates and charges will enable the Department to (a) comply with the rate covenant and sinking fund reserve requirements; and (b) avoid a downgrade or negative action by the rating agencies. The Board initially made an analogous evaluation for FY 2023 approved rates and charges (in the 2021 General Rate Proceeding). Any downward adjustment accepted in this proceeding (changing FY 2023 approved rates and charges) must be subject to a similar evaluation.

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59 PWD Hearing Exhibit 2 at Q/A 5 to 8, 28; Tr. 189; PA Statement 1 at 6-7.

1. **<u>Compliance With Required Metrics</u>.**

The Department provided its updated Financial Plan as corroboration that, if its proposal (zero adjustment) is accepted, it can barely meet required financial metrics under current financial circumstances. This is further confirmed in Schedule BV-4.

The Advocate mistakenly contends that PWD will have "adequate reserves," if its proposal to reduce the FY 2023 Incremental Base Rate Increase (by $6.6 million) is accepted. This contention is not supported by the record. The use of the word "adequate" implies that the Department will have sufficient additional revenues in FY 2023 to maintain its financial stability. This will clearly not be the case, if PWD cannot avoid a rating downgrade or negative action by the rating agencies — assuming the PA proposal is accepted.

Schedule LKM-1, provides a summary of the results of operations for FY 2023 after reflecting the reduction of $6.6 million from approved FY 2023 incremental revenues.[60] In this schedule, the Advocate projects an RSF balance of $96.376 million at the end of FY 2023, as shown on Schedule LKM-1 (line 41a). Please note that there is a $23.624 million gap between the Advocate's projection ($96.376) and $120 million; and a $38.624 million gap between the aforesaid projection and the target of $135 million. On its face, Advocate's projected balance of $96.376 million would place the Department below the RSF balance that is likely to trigger a downgrade or negative action by one or more of the rating agencies. And if the Department is faced with future financial challenges (e.g., storm event), the RSF balance would fall even farther.

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60 PA Statement 1 at 20.

2. <u>Financial Stability; Credit Ratings</u>.

The Public Advocate's proposed downward adjustments of $5.35 million and $6.60 million could trigger a downgrade or negative action by the rating agencies, since their adoption would indicate that the Rate Board is not expecting the Department to maintain the RSF balance above $120 million.

The Department is concerned that any significant reduction of the FY 2023 Incremental Base Rate Increase will be met with a negative reaction by the credit rating agencies.[61] The adoption of Mr. Morgan's proposed adjustment will place the PWD on a trajectory for a credit rating downgrade[62] or negative rating action. Mr. Morgan is willing to risk a downgrade or negative action for the sake of lower rates and charges in FY 2023 — the Department is not.

A downgrade or negative action is a major issue for PWD, since **all** of the rating agencies have also indicated their concerns that PWD financial reserves are dwindling,[63] as discussed above and in this record.[64] Such a reaction could take the form of a credit rating downgrade, negative outlook or market access deterioration.[65] Municipal credit ratings are generally slow to rise and, often go down quickly.[66] Thus, it is critical to assure rating agencies and investors of the long-term commitment to the cost recovery and stability of the Department's finances.[67]

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61 PWD Statement 1 at 6.

62 PWD Rebuttal Statement 1 at 3, 6.

63 PWD Statement 1 at 16-19.

64 PWD Statement 1, Schedule ML-3.

65 PWD Statement 1 at 6.

66 PWD Statement 1 at 6.

67 PWD Statement 1 at 6.

As noted previously, despite acknowledging that there is a "balance of concern" ($120 million S&P RSF metric)[68] in this proceeding, the Public Advocate does not temper or adjust its proposed rate reduction to keep RSF levels above that "balance of concern" for FY 2023. Instead, the Advocate expresses the belief that the rating agencies will maintain the Department's credit rating in FY 2023 even with Mr. Morgan's proposed rate reduction — as if such assessment would be premised upon past performance.[69] That belief is speculative and unpersuasive, particularly since credit ratings are forward-looking.[70]

3. Financial Stability: Future Rates and Charges.

The Department reasonably anticipates that any downward adjustments in this proceeding will impact not only FY 2023, but will spill-over into FY 2024, when PWD must again request increased rates. A rate increase is reasonably anticipated in FY 2024 given the current outlook; and an adjustment (reduction in approved FY 2023 rates) will make that even more likely.

It is obvious that additional revenues will be needed in FY 2024 and beyond to eliminate the reliance on the RSF to meet its annual revenue requirements and move towards the target balance of $135 million in the RSF. Reducing the RSF balance in FY 2023 will only increase the future effort needed to reach the target. As noted above, there is a $23.624 million gap between the Advocate's projection ($96.376) and $120 million; and a $38.624 million gap between that projection and the target of $135 million. So, the Advocate's proposed downward adjustment would knowingly create a greater gap that ratepayers will be called upon to fill in FY 2024 and beyond.

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[68] PA Statement 1 at 15.

[69] Tr. 153-158.

[70] PWD Rebuttal Statement 1 at 7-9.

D. Other Issues

1. Lance Haver: Eliminate the FY 2023 Base Incremental Increase

During cross examination, Mr. Haver suggested that there should be a downward adjustment of $34.110 million so as to eliminate the FY 2023 Incremental Base Rate Increase in its entirety.[71] That suggestion should be rejected by the Rate Board, since it departs entirely from the framework established by the 2021 Settlement and the 2021 Rate Determination.

The Department agreed to "sharing" potential excess reserves under limited circumstances.[72] Regarding federal stimulus funding, the Department agreed to a potential downward adjustment, if such funds where actually received (consistent with the agreed-upon definitions and timing requirements) from the specified non-ratepayer sources. A reduction in rates, especially without actual receipt of stimulus funds, will have the effect of further drawing down PWD financial reserves — without regard to the serious consequences signaled by the rating agencies.[73] The Department's concerns about Mr. Haver's unsupported adjustment are summarized below.

First, Mr. Haver questions the definition of "Federal Stimulus Funding." In the context of the 2021 Settlement, that term means the amounts of stimulus funding that — within the scope of the definition[74] — (i) can be used to reduce operating expenses, (ii) would otherwise be paid by

[71] Tr. 60-61, 186-191.

[72] PWD Rebuttal Statement 1 at 4.

[73] *See*, PWD Rebuttal Statement 1 at 4.

[74] This term is subject to certain exclusions described in footnote 9 of the 2021 Settlement. *See,* 2021 Settlement at 5.

ratepayers, and (iii) were received by PWD during the "Receipt Period" (from July 1, 2021 to December 31, 2021).[75]

Mr. Haver took advantage of the opportunity in the 2021 General Rate Proceeding to challenge the terms in the 2021 Settlement.[76] Mr. Haver, however, did not raise his concerns with regard to the definition of Federal Stimulus Funding as part of his 2021 objections. It is too late for Mr. Haver to argue that the definition (and scope of the 2021 Settlement) should be re-written now.

Second, Mr. Haver questions the use of a "Receipt Period." The Receipt Period started on July 1, 2021 and ended on December 31, 2021, taking into account that the Department was expected to initiate this proceeding in January 2022 (which it did). That timing allowed the Department to calculate the amount of any Federal Stimulus Funding received and reflect that in its proposals in this proceeding.

Again, it is too late for Mr. Haver to argue that the terms should be re-written. Nevertheless, Mr. Haver (implicitly) suggests that the Receipt Period should cover FY 2022 in its entirety. That timing is unreasonable, since it departs entirely from the approved 2021 Settlement terms and would not allow sufficient time to implement any adjustments by September 1, 2022 (which is the start date for the FY 2023 Base Rate Incremental Increase).

Third, Mr. Haver questions whether the Department used "best efforts" to obtain Federal Stimulus Funding (as defined). In the Haver 2021 Objections, Mr. Haver acknowledged that (as of May 10, 2021) there was uncertainty as to whether the Department would receive stimulus

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75 PWD Statement 1 at 9-10.

76 *See*, Lance Haver 2021 Objections to Proposed TAP Settlement: https://www.phila.gov/media/20210510161803/oppose-the-settlement.pdf.

funds.[77] Mr. Haver asserts that the Department should have done more to obtain funds from the City. The Rate Board issued its Rate Determination on June 18, 2021. On June 24, 2021, Philadelphia City Council approved the budget for Fiscal Year 2022. The adopted budget for FY 2022 did not allocate amounts under the American Rescue Plan Act ("ARPA") to PWD for FY 2022. Budgeted expenditures (including those supported by ARPA) are being used to support police, fire, health, recreation services.[78] Mr. Haver does not explain why the City should reverse itself (assuming it could at this point for FY 2022).

Mr. Haver (implicitly) asserts that the Department should have done more to obtain federal stimulus funds. There is no factual basis for that assertion in the record. The Department has applied for numerous grants and low-cost loans, as detailed in the Department's monthly reports filed with the Rate Board.[79] In addition, it should be noted that the Low Income Household Water Assistance Program (LIHWAP) was opened, by the Pennsylvania Department of Human Services (DHS), on January 4, 2022 (which is after the end of the Receipt Period). The applicants under the LIHWAP are tenants, landlords or customers themselves — the applicant is not the Department. The Department is directing customers to PHDC (by visiting PHLRentAssist.org or calling 311 for more information),[80] and will be directing customers to DHS to access LIHWAP funds. That being said, the amounts distributed under LIHWAP are excluded from the definition of Federal Stimulus Funding under the 2021 Stipulation and the 2021 Rate Determination.

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[77] *See*, Haver 2021 Objections to Proposed TAP Settlement at ¶ 6.

[78] PWD Statement 1 at 12-13.

[79] *See*, PWD Exhibit 3 (Documents Incorporated by Reference).

[80] https://www.phila.gov/services/water-gas-utilities/pay-or-dispute-a-water-bill/water-bill-customer-assistance/

Fourth, Mr. Haver expressed concern that the proposed adjustment with regard to stimulus funding is zero. The Rate Board will recall that no adjustment for Federal Stimulus Funding is required, if such funding received by PWD during the Receipt Period was less than $2 million (threshold bucket).[81] Since no funds within the definition and within the Receipt Period were received, there is no basis for a downward adjustment. For the above reasons, PWD submits that Mr. Haver's proposed adjustment should be rejected. Please note that Mr. Haver did not state an adjustment specifically related to FY 2021 Financial Performance.

2. LANCE HAVER: NOTICE OF PROPOSED CHANGES IN RATES

During cross examination, Mr. Haver suggested that the public was not given reasonable notice of this proceeding. Mr. Haver is wrong.

As the Rate Board is aware, the Department works to ensure meaningful access to City services.[82] The Department gave written notice to Philadelphia City Council and the Rate Board of proposed changes in rates. Further, participants in the 2021 Rate Proceeding were notified by e-mail of the opportunity to participate in this proceeding. The general public was notified through information made available on the Water Department's website, the Department of Records website,[83] the Rate Board's website as well as publications in Philadelphia newspapers. Legal notices related to the Advance Notice and Formal Notice were also timely published in three local newspapers. In addition, during the course of the proceeding, notices of public input

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81 PWD Statement 1 at 9.

82 Philadelphia Water Department: Language Access Plan (Updated March 2022) https://www.phila.gov/media/20220322124938/LANGUAGE-ACCESS-PLAN-MARCH-2022_FINAL-Signed.pdf.

83 https://regulations.phila-records.com/ (special rate filing, February 25, 2022).

and technical hearings were provided via print and social media as well as posted at the Rate Board and Department websites.[84]

It is anticipated that Mr. Haver's arguments in his brief (with regard to notice of proposed changes in rates and charges) will mirror the arguments made in his Objections[85] to the 2022 Settlement of the 2022 TAP-R proceeding. So, the Department incorporates its response[86] to said Objections in this brief. As was the case in the above TAP-R proceeding, Mr. Haver's arguments reach beyond the scope of this proceeding and lack foundation.

3. Lance Haver: Objection To Stipulation

The Hearing Officer directed the Department and the Public Advocate to jointly determine how best to implement the Hearing Officer's Order Granting in Part and Denying in Part the Public Advocate's Motion to Strike[87] (dated March 8, 2022) (the "Interim Order"). That Interim Order decided the Public Advocate's Motion to Strike,[88] which sought to exclude portions of the Department's filing (e.g., Schedule BV-4) alleging that same improperly enlarged the scope of the proceeding. Please recall that the Department requested that the Public Advocate's Motion be dismissed and denied.[89]

The final paragraphs of the Interim Order directed PWD and the Advocate to jointly determine how best to implement certain issues in the ruling (primarily related to the use of

84 PWD Hearing Exhibit 1 (outreach and notices). https://www.phila.gov/media/20220427155658/PWD-hearing-exhibit-1-outreach.pdf.

85 https://www.phila.gov/media/20220428173952/haver-tap-brief-final.pdf/.

86 https://www.phila.gov/media/20220504170608/PWD-response-to-haver-objections-final.pdf.

87 https://www.phila.gov/media/20220308150639/2022-Spec-Rate-PA-Motion-Strike-Final.pdf.

88 https://www.phila.gov/media/20220215184351/Motion-to-Strike-Final-2022-02-09.pdf.

89 https://www.phila.gov/media/20220224112952/PWD-Response-to-PA-Motion-FINAL.pdf.

updated financial information in this proceeding). Consistent with the above direction, the Department and the Public Advocate entered into a Stipulation.[90] That Stipulation, which was submitted on April 5, 2022, represents the agreement between the Department and the Public Advocate, as the signatories thereto, as to how they will make use of the updated financial information contained in the Formal Notice in this proceeding.

Mr. Haver objected[91] to the Stipulation on April 8, 2022. However, Mr. Haver's objections did not express any disagreement with the terms of the Stipulation. On their face, Mr. Haver's objections addressed ethics and integrity issues (which are discussed in the next subsection of this Brief). His objections did not relate to either the Department's proposals in the Formal Notice or the use of the updated financial information presented by the Department.

There is no need for the Rate Board or the Hearing Officer to approve the Stipulation or to address Mr. Haver's objections. The Stipulation allows the use of the updated financial information for specified purposes. This was done to narrow the range of the issues that would (potentially) need to be addressed by the Public Advocate in its direct testimony for the technical hearing, which was filed on April 5, 2022. The Stipulation is not binding on non-signatories, and does not impose any restrictions on Mr. Haver. In addition, the Stipulation did not actually impact Mr. Haver, since he did not submit written direct testimony for the technical hearing.

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90 https://www.phila.gov/media/20220406195003/PWD-2022-SPECIAL-STIPULATION-FINAL.pdf.

91 https://www.phila.gov/media/20220408175555/pa-pwd-stipulation-opposition.pdf.

4. LANCE HAVER AND MICHAEL SKIENDZIELEWSKI: ETHICS AND INTEGRITY

The Rate Board has limited jurisdiction.[92] That jurisdiction is limited to "fixing and regulating rates and charges."[93] The Board's jurisdiction does not include authority to investigate, administer or enforce public integrity laws or ethical codes. The refusal to recognize this fact constitutes a determined effort to ignore reality.

Mr. Haver argues that the Public Advocate and the Hearing Officer should be precluded from participating in this proceeding.[94] Mr. Haver alleges that both have disabling conflicts of interest which, in Mr. Haver's opinion, call into question the fairness of the proceeding. Mr. Haver's arguments and allegations were denied by the Rate Board on April 13, 2022.[95] The same or substantially similar arguments and allegations were made by Mr. Haver before the Board in May 2021,[96] and denied,[97] in the 2021 General Rate Proceeding.

Mr. Skiendzielewski did not present written testimony and did not participate in the technical hearings. Mr. Skiendzielewski did, however, send messages[98] to the Rate Board, the Hearing Officer and/or the other participants questioning whether the Rate Board's Legal Counsel should be precluded from participating in this proceeding. Mr. Skiendzielewski alleges

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92 The Rate Board's jurisdiction is discussed more fully in the Department's Brief in the 2021 General Rate Proceeding. https://www.phila.gov/media/20210513093206/Brief-May-11-2021.pdf.

93 *See,* Philadelphia Code §13-101(3).

94 2022: https://www.phila.gov/media/20220325160241/edited-quid-pro-quo-water.pdf.

95 2022: Minutes of Rate Board Meeting for April 13, 2022.

96 2021: https://www.phila.gov/media/20210526131220/exceptions-to-hearing-examiner-report.pdf.

97 2021: https://www.phila.gov/media/20210618105014/2021-General-Rate-Determination-as-filed-with-Records-Dept-20210616.pdf.

98 Mr. Skiendzielewski only asked questions. From the Department's perspective, Mr. Skiendzielewski did not request relief by way of a motion or petition.

that said Counsel has a disabling conflict of interest which, in Mr. Skiendzielewski's opinion, questions the fairness of the proceeding. Mr. Skiendzielewski has made the same allegations in the separate TAP-R proceeding that is pending before the Rate Board. The same or substantially similar allegations were made by Mr. Skiendzielewski before the Board in May 2021[99] and denied[100] in the 2021 General Rate Proceeding.

The Department submits that none of the above-described issues regarding the investigation, administration, or enforcement of public integrity laws or ethical codes should be considered or adopted by the Rate Board, since they are (a) beyond the limited jurisdiction of the Rate Board; and, (b) beyond the limited scope of this adjustment proceeding.

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99 2021: https://www.phila.gov/media/20210513093207/Michael-Motion.pdf and https://www.phila.gov/media/20210526131221/Skiendzielewski-Exceptions.pdf.

100 2021: https://www.phila.gov/media/20210513093208/Order-Skiendzielewski-recusal-may-11-2021-final.pdf and https://www.phila.gov/media/20210618105014/2021-General-Rate-Determination-as-filed-with-Records-Dept-20210616.pdf.

IV. <u>CONCLUSION</u>

For all of the reasons stated in this Brief (together with the facts and information contained in the record), the Department respectfully requests that the Hearing Officer recommend that the Rate Board (1) adopt the Department's proposals (zero adjustment to FY 2023 incremental revenues); (2) find that the rates and charges proposed by the Department, in the Formal Notice, are supported by the record, are in compliance with the Charter, Rate Ordinance, 1989 General Ordinance and other applicable requirements and therefore should be permitted to be placed in effect for service rendered on and after September 1, 2022; and (3) reject any remaining issues, proposals, modifications and/or adjustments by the other participants hereto.

Respectfully submitted,

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