BEFORE THE

PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD

In Re: Philadelphia Water Department Proposed Change in Water, Sewer and Stormwater Rates and Related Charges	: : :	Special Rate Filing: Reconciliation Proceeding for Fiscal Year 2023

MAIN BRIEF OF THE PUBLIC ADVOCATE

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I. <u>Introduction</u>

The Philadelphia Water Department (PWD) initiated this Special Rate Proceeding by Advance Notice on January 21, 2022 and Formal Notice on February 25, 2022. The Special Rate Proceeding was agreed to by PWD and the Public Advocate in the Joint Petition for Partial Settlement in the 2021 Rate Increase Proceeding (Settlement), and approved by the Philadelphia Water, Sewer, and Storm Water Rate Board (Board) in its June 16, 2021 Rate Determination (Rate Determination). Public Hearings in this matter were held on March 23, 2022, and the Technical Hearing was held on April 28, 2022. The record of this proceeding is complete and the matter is appropriately before the Hearing Officer for recommendation to the Board for its final determination.

As set forth in the Settlement:

> The agreed-upon FY 2023 approved rate increase includes incremental additional revenues of $34.110 million ("FY 2023 Base Rate Incremental Increase"). The FY 2023 Base Rate Incremental Increase is subject to two potential adjustments related to (i) Federal Stimulus Funding; and (ii) Changes in FY 2021 Financial Performance, as described below.
>
> The above adjustments will be addressed in a Special Rate Reconciliation Proceeding for FY 2023.
>
> The Special Rate Reconciliation Proceeding is intended to be simple, limited to the two adjustments defined in Paragraph 11.A.(2) (a), and analogous to the TAP-R Reconciliation Proceeding. By approving the Settlement, the Rate Board is agreeing (in advance) to the use of the Special Rate Reconciliation Proceeding. Both the Department and the Public Advocate will be deemed to be Participants in the Special Rate Reconciliation Proceeding without notification to the Rate Board.
>
> The Department shall initiate the Special Rate Reconciliation Proceeding. Any adjustment or reconciliation will be implemented effective September 1, 2022. It is anticipated that the Department will commence the above-described Special Rate Reconciliation Proceeding by filing an Advance Notice on or before March 1, 2022. In

> the Department's sole discretion, the Special Rate Reconciliation Proceeding may or may not be presented as part of the annual TAP-R Reconciliation Proceeding. In any event, the Public Advocate and other stakeholders shall be afforded a reasonable period of time to review and conduct discovery in order to evaluate the Department's reconciliation adjustments and may submit testimony and briefs supporting the Department's requested reduction or a different reduction to the FY 2023 Base Rate Incremental Increase.[1]

Consistent with the language of the Settlement, the Public Advocate endeavored to focus narrowly on the two bases for downward adjustment of the previously-approved FY 2023 incremental rate increase. Briefly summarized, the Settlement authorized a downward adjustment based on the receipt of certain stimulus funding, that would be available to offset operating expenses in the short term, subject to a minimum and maximum threshold (hereinafter, Federal Stimulus Adjustment). Similarly, the Settlement authorized a downward adjustment based on PWD's FY 2021 fiscal year-end balance in its Rate Stabilization Fund (RSF) in 2021, measured against a "minimum threshold" to be determined in this proceeding (hereinafter, Financial Performance Adjustment).

PWD has not taken a narrow and focused approach, departing from the spirit and language of the Settlement. Instead, PWD has introduced voluminous information that is not relevant to measuring the Federal Stimulus or Financial Performance Adjustments, including an Updated Financial Outlook (also referred to as Schedule BV-4) projecting revenues and revenue requirements for FY 2022 and 2023 that deviate from the projections incorporated in the Rate Determination.[2] However, PWD's Updated Financial Outlook is not before the Board for approval in this proceeding. The Public Advocate submitted its Motion to Strike certain portions of PWD's Advance Notice (which were unmodified by its Formal Notice), including the

[1] Settlement at ¶II.A(2).
[2] PA St. 1 at 7.

Updated Financial Outlook, on February 9, 2022. The Hearing Officer granted, in part, and denied, in part, the Public Advocate's motion by order dated April 19, 2022. Ultimately, PWD and the Public Advocate were able to stipulate as to the narrow issues before the Board and the limitations on the use of PWD's Updated Financial Outlook in this proceeding.[3]

Based upon the record of this proceeding, the Public Advocate submits that a downward adjustment to PWD's FY 2023 incremental rate increase is warranted. As explained herein, the Public Advocate submits that the Hearing Officer should recommend, and the Board should approve, a downward adjustment to FY 2023's incremental rate increase. The Public Advocate submits that the minimum adjustment that is warranted is $5.35 million. Nonetheless, the Public Advocate recommends an adjustment of $6.6 million, which more appropriately reflects and shares the degree of outperformance demonstrated by PWD's FY 2021 financial results.

Finally, this Main Brief briefly addresses certain contentions of *pro se* intervenors in this proceeding. The submissions of these *pro se* intervenors have not contributed meaningfully to the record, and the Board should disregard them.

II. The Board Should Approve the Adjustment Proposed by the Public Advocate's Witness.

As set forth in the testimony of Lafayette K. Morgan, Jr. for the Public Advocate, PWD has outperformed its projections for FY 2021, warranting a downward adjustment to the FY 2023 approved incremental rate increase.[4] Mr. Morgan's adjustment is straight-forward, and calculated based upon the shared expectations of PWD, the Public Advocate, and the Board at

[3] See PWD Hearing Exhibit 2 (Morgan), Tab 3.
[4] The Public Advocate agrees with PWD that the threshold for the Federal Stimulus Adjustment was not met. See *infra* §III; see also PA St. 1 at 19.

the time the Settlement was approved by the Rate Determination. As explained by Mr. Morgan, PWD's financial performance in FY 2021 was good, and "attempts by the Department to characterize its FY 2021 financial operating results as negative [are] not valid."[5]

On the basis of his examination, Mr. Morgan identifies a minimum threshold for the RSF that is supported by the Board's Rate Determination. He then compares this amount with the FY 2021 ending balance in the RSF ($124.661 million), determining the extent of outperformance to consider in making the Financial Performance Adjustment. Based on these determinations, he calculates a reasonable adjustment to share PWD's outperformance with customers. Mr. Morgan's proposed adjustment should be approved by the Board.

A. <u>$114 Million (Rounded) is the Appropriate Minimum Threshold for the 2021 Financial Performance Adjustment.</u>

As shown in Appendix A to the Board's Rate Determination, the Settlement rates were expected to produce the agreed upon revenues, and result in a FY 2022 starting balance (i.e., FY 2021 year-end balance) of just under $114 million.[6] Accordingly, as explained by Mr. Morgan:

> [I]t is appropriate to use $113.988 million, the projected Rate Stabilization Fund balance at the time the Settlement was entered, as the threshold. The Settlement was achieved during a unique period with unprecedented circumstances. The $113.988 million is the threshold on which the rates were established in that proceeding and therefore it should be the basis or the threshold for the reconciliation in this proceeding.[7]

PWD asserts that this threshold is not reasonable, based primarily upon its contention that the FY 2021 ending balance in the RSF was not specifically agreed to in the Settlement, which was a black box settlement.[8] As Mr. Morgan explained, "[a] black box settlement is a settlement

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[5] PA St. 1 at 8.
[6] <u>See</u> PA Hrg. Exh. At 13.
[7] PA St. 1 at 15.
[8] <u>See, e.g.</u>, PWD St. 2 at 6-7; Hrg. Tr. at 85-86.

in which the components and the derivation of the settlement amount are not disclosed."[9] Nonetheless, PWD's witnesses contend that certain adjustments to pension expenses were in fact included in the black box Settlement,[10] which is contrary to the plain language of the Settlement and the Rate Determination.[11] Moreover, the Stipulation between PWD and the Public Advocate explicitly identified the "actual"[12] year-end balance in the RSF as an appropriate starting point. Although PWD's witness appeared to question whether this aspect of the Stipulation was reasonable, the record establishes that there "is no controversy" regarding this starting point.[13] Accordingly, PWD's position illogically contends that the actual RSF balance is reasonable for calculating the Financial Performance Adjustment, but the projected RSF balance at the time rates were set is not.

As established on the record of the FY 2021 Rate Proceeding, PWD's Formal Notice projected that it would end FY 2021 with $109.188 million in the RSF.[14] Once PWD and the Public Advocate were able to agree upon the terms of the black box Settlement, PWD produced the revenue requirements projections incorporating the Settlement terms, which were approved by the Board in the Rate Determination. As shown therein, the rate model projection anticipated that the FY 2021 ending RSF balance would be $113.988 million.[15] PWD's witnesses, while

[9] PWD-PA-I-16 (response).
[10] See PWD St. 2-R at 21.
[11] Hrg. Tr. at 101-104.
[12] As shown in PA-I-13 and discussed during the hearing, the balances shown in response to PA-I-13 and utilized in Schedule BV-4 are all "preliminary." Accordingly, any reference to "actual" 2021 year-end results in this proceeding should be understood to mean "preliminary."
[13] Tr. at 66.
[14] 2021 Rate Proceeding, PWD St. 7A, Sch. BV-1, Table C-1, line 41.
[15] PA Hrg. Exh. At 13.

contending that PWD did not agree to this balance in Settlement, nonetheless conceded that it was the Board's decision based upon the record of the 2021 Rate Proceeding.[16]

Accordingly, the incremental revenue requirements agreed to in the black box Settlement, once input into the rate model, resulted in the 2021 year end RSF balance projection that was $4.8 million higher than the projection included in PWD's 2021 Formal Notice. As a result, it is unquestionably reasonable (and more favorable to PWD than the alternative, i.e., its own, lower 2021 Formal Notice projection) to rely upon the $113.988 million figure included in the Rate Determination, as that was the anticipated level of RSF reserves produced by PWD's rate model.

For all of the foregoing reasons, the Board should adopt the Public Advocate's recommendation and measure PWD's FY 2021 "actual" financial performance, as reflected in the RSF, against the projection set forth in its Rate Determination. Indeed, of the two potential minimum thresholds supported by the record, the Public Advocate's recommendation is consistent with the best information publicly available at the conclusion of the 2021 Rate Proceeding.

B. <u>Measured Against the Advocate's Minimum Threshold, There is $10.7 Million to be Shared Between PWD and Customers.</u>

As explained above and set forth in Mr. Morgan's testimony, PWD's "actual" RSF balance at 2021 fiscal year-end was $124.661 million. Accordingly, Mr. Morgan calculates "a significant difference of approximately $10.7 million in the ending balance of the Rate Stabilization Fund."[17] This amount, representing the difference between the ending balance of

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[16] Hrg. Tr. at 88 ("I would like to point out that there are a number of projections of the Rate Stabilization Fund balance on the record. The Board reviews or makes their decisions based on what's on the record.")
[17] PA St. 1 at 11.

$113.988 million reflected in the Rate Determination and the "actual" year-end balance of $124.661 million in the RSF, is the amount Mr. Morgan concludes ratepayers are entitled to share.[18]

PWD's witnesses did not express any disagreement with Mr. Morgan's calculations.[19] Instead, as discussed above, PWD relies upon its financial goal of retaining $135 million in the RSF, contending that it did not agree in the Settlement with the $114 million RSF fund balance clearly reflected in the Board's Rate Determination.[20] Nonetheless, PWD's witnesses affirmed that, in the course of the 2021 Rate Proceeding, they did not expect to obtain a $135 million 2021 year-end RSF balance.[21] Mr. Morgan's calculation of $10.7 million to be shared between PWD and its customers is reasonable, supported by the record, and straight-forward. The Board should recognize that $10.7 million is the correct amount to be shared pursuant to the Financial Performance Adjustment.

C. Of the $10.7 Million in Outperformance, the Board Should Return at Least Half, but Preferably $6.6 Million, to PWD's Customers.

Mr. Morgan's testimony concludes that the minimum amount that should be returned to customers via the Financial Performance Adjustment is half ($5.35 million) of the $10.7 million in outperformance he calculates. Nonetheless, because the RSF, alone, does not capture the full extent of PWD's outperformance, Mr. Morgan recommends that a larger amount ($6.6 million) be returned to customers. This amount is calculated as the sum of the outperformance reflected in the Residual Fund ($1.24 million) and $5.35 million.[22] Mr. Morgan's adjustment is more than

[18] PA St. 1 at 19.
[19] See, e.g., Hrg. Tr. at 21-22, 74.
[20] Hrg. Tr. at 13.
[21] Hrg. Tr. at 129-130.
[22] PA St. 1 at 20.

adequately supported. In total, as Mr. Morgan shows, PWD retained approximately $12 million more in combined reserves at 2021 fiscal year-end than is reflected in the Rate Determination.[23] As demonstrated in his testimony and at hearing, PWD also made a discretionary transfer of more than $13 million to the Construction Fund which was not anticipated in its 2021 projections.[24] This transfer resulted in higher levels of senior debt service coverage (rounding to 1.28x)[25] and constituted funds that could have contributed to a higher year-end RSF balance.[26] Although this transfer may result in debt service savings in future years,[27] it nonetheless was not anticipated by the parties[28] and the Board at the time of the Settlement and the Rate Determination. The funds available for this transfer were achieved due to PWD's outperformance.

PWD witnesses contend that Mr. Morgan's proposal to return $6.6 million to customers is flawed because Mr. Morgan relies, in part, upon the Residual Fund balance.[29] However, at hearing, PWD's witnesses recognized that Mr. Morgan was free to reach his own "interpretation" regarding sharing, and that his adjustment was not necessarily "inconsistent" with the Settlement.[30] Accordingly, PWD's *interpretation* is that the Settlement's silence regarding the Residual Fund precludes its consideration in determining the Financial Performance Adjustment.[31] This position is unsupportable. Indeed, PWD's witnesses confirmed

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[23] PA St. 1 at 16.
[24] See PA St. 1 at 13; Hrg. Tr. at 16-17.
[25] PWD-PA-I-26 (response) ("I also note that according to the B&V's Financial Plan Model, PWD's FY 2021 senior debt service coverage rounds to 1.28x, not 1.27x ($238,197,000 / $186,158,000 = 1.27954).").
[26] Hrg. Tr. at 17.
[27] Hrg. Tr. at 17-18.
[28] The Board's Regulations use the term "participant" (Board Reg. §I(m)) whereas the Philadelphia Code uses the term "party" (Phila. Code §13-101(9)). To the Public Advocate's knowledge, there is no distinction in meaning intended, and so the Public Advocate uses them interchangeably herein.
[29] See PWD St. 2-R at 9.
[30] Hrg. Tr. at 75-76.
[31] Hrg. Tr. at 76-77.

that their contention that no adjustment should be made is premised upon a minimum threshold of $135 million, which figure appears nowhere in the Settlement.[32] Likewise, although the differential in the Residual Fund balance identified by Mr. Morgan is readily measured by comparing PWD's "actual" financial results against the Board's Rate Determination, PWD's position is premised upon third-party statements (e.g., S&P's ratings report), that reflect myriad considerations beyond the simple and straight-forward assessment of PWD's financial performance against the expectations set forth in the Board's Rate Determination.[33]

Ultimately, the "actual" year-end balance in the RSF is the product not just of PWD's financial performance, but also reflects discretionary decisions made in operating the utility. Mr. Morgan's position is informed not just by the RSF balance, but by PWD's decision to make an additional $13 million transfer to the Construction Fund, as well as the determination that resulted in a higher than anticipated balance in the Residual Fund. It is important that the Board take notice of these factors, as they are directly relevant to understanding and assessing PWD's "actual" financial performance relative to the assumptions at the time it set PWD rates for FY 2023.

For all of the foregoing reasons, the Public Advocate maintains that the Board should approve a downward adjustment to FY 2023 rates and charges to return $6.6 million to customers in the form of incrementally lower rates. However, the minimum adjustment should, in no event, be less than $5.35 million. In any case, the record clearly demonstrates that a Financial Performance Adjustment is warranted and appropriate.

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[32] Hrg. Tr. at 77.
[33] <u>See</u> Hrg. Tr. at 79-80.

III. **The Board Should Reject PWD's Assertion That no Adjustment Should be Made to the FY 2023 Incremental Rate Increase.**

PWD contends that no adjustment to the approved FY 2023 incremental rate increase ($34.110 million) should be made, based on either the Federal Stimulus Adjustment or the Financial Performance Adjustment.[34] PWD submits, and the Public Advocate agrees, that it did not receive adequate funding to justify a reduction to the FY 2023 incremental rate increase based on the Federal Stimulus Adjustment as set forth in the Settlement.[35] With respect to the Financial Performance Adjustment, PWD's belief that no adjustment to the FY 2023 incremental rate increase should be made is premised upon three main assertions.

First, PWD submits that the "minimum threshold" balance in the RSF for use in determining whether an adjustment is warranted should be set at $135 million.[36] PWD relies upon this fund balance as having been acknowledged in the Board's 2018 Rate Determination.[37] Accordingly, since the year-end balance in the RSF in FY 2021 was below $135 million, PWD submits no adjustment should be made.

Second, PWD submits that it is facing cost pressures and other challenges in FY 2023.[38] On this basis, PWD asserts that reducing the FY 2023 incremental rate increase would contribute to financial risk, in particular the risk of a credit rating downgrade. However, there is no

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[34] PWD St. 1 at 3.

[35] PWD's FY 2021 Financial Performance already accounts for a reimbursement of approximately $2.1 million PWD received prior to the 2021 fiscal year-end, and so is captured by the FY 2021 financial outcomes subject to the Financial Performance Adjustment. See PWD St. 1 at 11-12.

[36] PWD St. 1 at 15.

[37] PWD's witnesses refer to this $135 million threshold as "an amount agreed to" in the 2018 Rate Proceeding. Hrg. Tr. at 125-126. This is an inaccurate description. As set forth in the July 12, 2018 Rate Determination, PWD sought to target a $150 million balance in the RSF, with an additional $15 million in the Residual Fund. <u>See</u> 2018 Rate Determination at 33-37. The Board established a target of combined reserves of $150 million, which PWD has interpreted as a goal of $135 million in the RSF and $15 million in the Residual Fund. <u>See</u> 2018 Rate Determination at 38. This was the Board's determination; not an agreement between participants.

[38] PWD St. 1 at 17.

provision in the Settlement or the Rate Determination that indicates future financial risk is a factor to be considered in making the FY 2023 adjustment, which is based on past financial performance. Nonetheless, PWD's assertions are, pursuant to the Stipulation, of limited significance and primarily illustrative.

Finally, PWD submits that reducing the FY 2023 incremental rate increase could cause a "yo-yo" effect in rates. Although this characterization is inaccurate, PWD clarifies that if an adjustment is made, it predicts that additional rate relief would be required in future years.[39]

None of these assertions support maintaining the entirety of the $34.110 million incremental rate increase.

A. <u>$135 Million is not an Appropriate Minimum Threshold.</u>

PWD concedes that, in the 2021 Rate Proceeding, its goal was not to achieve a $135 million balance in the RSF.[40] Indeed, according to PWD's witness, PWD was "willing to forego it for the sake of COVID and putting pressure on … customers."[41] Furthermore, as the 2018 Rate Determination makes clear, a $135 million RSF balance is not a magic number, and not intended to bind the Board in future rate determinations.[42] Furthermore, and contrary to testimony asserting that PWD has sought to maintain as much of its fund balance as possible,[43] PWD took actions directly contrary to that objective. Indeed, as PWD acknowledges, it made the decision, at the end of FY 2021, to transfer more than $13 million from the Revenue Fund to

[39] PWD St. 1 at 17.
[40] Hrg. Tr. at 129-130.
[41] Hrg. Tr. at 130.
[42] 2018 Rate Determination, at 23 ("These metrics approved by the Board are not mandated requirements and should not be considered to be either strict ceilings or floors, except and to the extent required by City Council or applicable bond covenants. Rather, the Board's determinations in this regard should be viewed as targets to be considered by the Department in its future operations and by the Board in determining the need for future rate increases.")
[43] Hrg. Tr. at 130.

the Construction Fund. Had this transfer not been made, PWD would have retained "more in reserves, less in capital."[44]

Neither PWD, the Public Advocate, nor the Board recognized a $135 million RSF balance as a financial objective for FY 2021 in the Settlement or the Rate Determination. More importantly, PWD has recognized that, in the context of a global pandemic (that has yet to subside), its financial objectives should be checked against the reality of customer sensitivity to increasing rates and charges. With this in mind, it is clear that PWD's utilization of a $135 million minimum threshold is not supportable and, even if it were, that PWD has demonstrated, based on its ability to direct funds in such a way as to effect its year-end reserve fund balances, that it could nonetheless have attained in excess of that amount in FY 2021.[45] For these reasons, the Board should reject PWD's proposed use of $135 million as the RSF minimum threshold.

B. <u>PWD's Identification of Future Financial Risks Does not Justify Refusing to Make a Downward Adjustment.</u>

PWD has identified certain future financial risks that it believes may place additional pressure on rates. Specifically, PWD witnesses testified that labor costs and health care costs will be higher than projected in FY 2023, the Finance Department increased the amount of PWD's pension contributions, and PWD anticipated higher chemical costs in FY 2022 and 2023.[46] PWD's consultants made these adjustments, as well as other adjustments, to projections

[44] Hrg. Tr. at 17.
[45] PWD's FY 2021 preliminary actual RSF fund balance was reported to be $124.66 million. If the $13.217 million transfer to the construction fund had not been made and PWD had directed the additional $1.24 million in its Residual Fund to the RSF, PWD's RSF fund balance would have been approximately $139 million. <u>See also</u>, PA St 1 at 13 ("[W]hen one adds back…the extra amount transferred to the Construction Fund, the Department would have surpassed the ending balance of $135 million").
[46] PWD St. 1 at 18-20.

of operating expenses forecasting cost increases.[47] Accordingly, these new assumptions are incorporated into PWD's Updated Financial Outlook. Importantly, PWD and the Public Advocate reached the following agreement regarding the Updated Financial Outlook (referred to as Schedule BV-4):

> Schedule BV-4 may be used for the limited purpose of (i) supporting or corroborating the parties positions regarding adjustments (or absence of adjustments) proposed for FY 2023 incremental revenues and, assuming an adjustment is made to FY 2023 incremental revenues, (ii) establishing whether such resulting revenues (net of the adjustment) will be sufficient to meet the required financial metrics and maintain the utility's financial stability (to avoid negative credit rating action).[48]

As a result, the Updated Financial Outlook is not presented to the Board for its approval or disapproval, and the Public Advocate has not made adjustments to the assumptions underlying it. Indeed, as PWD agreed at hearing, even if the Public Advocate had conducted a cost of service study, adjusting revenues and expenses for FY 2022 and 2023 set forth in the Updated Financial Forecast, those projections would not form the basis for an adjustment in this proceeding.[49] Likewise, PWD's projections *should not form the basis for denying an adjustment* in this proceeding.

In general, PWD asserts that its Updated Financial Outlook should be recognized by the Board due to the financial pressures forecasted and the assertion that the credit ratings agencies may downgrade PWD's bonds if certain outcomes occur. Generally, PWD contends that its credit ratings concerns derive, in part, from comparison with seven "peer" utilities.[50] However, PWD fails to rebut Mr. Morgan's conclusion that the criteria for identifying PWD's "peers" is uncertain, and that there are "certainly more than seven municipal utilities" to which comparison

[47] See BV-4 at 8-12.
[48] Stipulation ¶10.
[49] Hrg. Tr. at 25.
[50] See, e.g., PWD St. 1, Sch. ML-2; PWD St. 2 at 6, 8; PWD St. 1-R at 14; 23-24; Hrg. Tr. at 126-127.

could be made.[51] As Mr. Morgan concludes, "one has to question whether the peer selection skews the result of the comparison to support PWD's narrative."[52]

More specifically, however, PWD points to S&P's indication that it would likely lower PWD's rating if its RSF balance falls below $120 million.[53] Overall, PWD's witnesses focused on the importance of liquidity, in light of projected cost increases, in satisfying the rating agencies.[54] However, Mr. Morgan criticizes PWD's emphasis on cost increases, without consideration of potential cost savings.[55] Additionally, Mr. Morgan concludes that an adjustment based on FY 2021 over-performance is not necessarily determinative of the FY 2023 year-end balance in FY 2023 (which will depend on multiple factors), calling into question the potential for a credit ratings downgrade.[56] Furthermore, if Mr. Morgan's adjustment is approved, PWD's liquidity would nonetheless improve due to the overall increase in rates.[57] Finally, as Mr. Morgan explained, the credit ratings agencies, including S&P, are not just focused on RSF balance, but are looking at other considerations as well, and nonetheless maintaining "A" ratings with stable outlooks.[58]

Ultimately, it remains true that PWD's projections have repeatedly been shown to be conservative, and that PWD typically outperforms its financial projections.[59] Accordingly, if the Board reviews the Updated Financial Outlook and PWD's arguments regarding its corroborative value, and considers the evaluations of the credit ratings agencies, the Public Advocate submits

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[51] PA St. 1 at 18.
[52] Id.
[53] See PWD St. 2 at 5.
[54] PWD St. 1-R at 7-8, 14, 16; PWD St. 2-R at 15.
[55] PA St. 1 at 18-19.
[56] PA St. 1 at 14-15.
[57] Hrg. Tr. at 154-155.
[58] Hrg. Tr. at 155-158.
[59] See, e.g., Hrg. Tr at 153 ("What we do know is that PWD has had a history of over-performing.")

that the logical conclusion is still that PWD will continue its pattern of outperforming. FY 2021 is a prime example. Although PWD did not receive a rate increase in FY 2021, it was nonetheless able to produce between $12,697,000[60] and $14,540,000[61] more in Net Revenues after Operations than it anticipated when it filed its Formal Notice in the 2021 Rate Proceeding. While perhaps remarkable in the context of a pandemic, this accomplishment does not stand out historically. Rather, PWD's outperformance of its projections is a well-known and repeating pattern.[62] Accordingly, and contrary to PWD's assertions, the Advocate's assessment of PWD financial performance is not solely based on a single year,[63] but considers FY 2021's financial performance in the larger context of PWD's outperformance over multiple years.

Ultimately, the Settlement does not call upon PWD, the Public Advocate, or the Board to assess PWD's claims regarding future cost pressures and future financial risks. Those may or may not materialize and the costs associated with them may or may not be material. But, it is readily apparent, based upon Schedule BV-4, that even PWD's rate consultants anticipate that PWD will continue to outperform its projections of revenues.[64] As a result, the Public Advocate maintains that an adjustment is appropriate, even if the Board takes into consideration the financial risks PWD has identified.

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[60] Compare PA-I-13 (attachment), line 19 ($236,355) with 2021 Rate Proceeding PWD St. 7A, Sch. BV-1, line 19 ($223,658).

[61] PA St. 1 at 9 (Table, line 13).

[62] See, e.g., 2018 Rate Determination at 56 ("In addition, according to PWD, it outperformed its projections of service revenues in FY 2016 and FY 2017.") (citations omitted).

[63] PWD St. 1-R at 5.

[64] See PA St. 1 at 16-17 ("Nonetheless, PWD's rate consultants anticipate PWD's outperformance will continue and that PWD will conclude FY 2023 with more than $28 million in combined reserves than projected in settlement of the 2021 Rate Proceeding."). This statement was unrebutted on the record of this proceeding.

C. The Need for Additional Rate Relief in Future Years is Speculative and Beyond the Scope of this Proceeding.

Although it is important to consider the long term impact on customers when establishing rates and charges, the Public Advocate questions the predictive value associated with a proposed reduction to the FY 2023 incremental rate increase. Indeed, the entire model by which rates and charges would be established in the future would, assuming PWD's traditional filing practices, continue to include projections upon projections, with year-end data for the year preceding the effective rates unavailable and subject to change.[65] Indeed, this is the premise upon which the 2021 Financial Performance Adjustment was based: that PWD's FY 2021 financial results were not known at the time of the Settlement, and, if those results were known, they would potentially have been the basis for a lower settlement amount.

Ultimately, neither the Settlement nor the Rate Determination calls upon the Board to pre-judge the impact of the 2021 Financial Performance Adjustment on potential future rate increase requests by PWD. That hypothetical occurrence is beyond the scope of this proceeding and need not be given any weight in reaching a determination.

IV. Positions of *Pro Se* Participants Lack Merit.

Throughout this proceeding, as in past proceedings and the ongoing TAP-R proceeding, two *pro se* participants have raised various positions which are irrelevant and function largely as distractions from the important work of other participants, the Hearing Officer, and the Board. As discussed herein, those positions are without merit and should be disregarded.

[65] PWD typically files its Advance Notice in February or March, several months before the close of the Fiscal Year, making it impossible to determine what its financial condition for the year of filing will actually be.

A. Lance Haver's Accusations and Misunderstandings Should not be Given Consideration by the Board.

Throughout this Proceeding, *pro se* participant Lance Haver has made various accusations against the Public Advocate and the Hearing Officer, which are unfounded and inappropriate.[66] Haver has not submitted testimony, conducted discovery, or otherwise presented any relevant material for the Board's consideration in determining the outcome of this Special Rate Proceeding.[67] Instead, the clearest statement the Advocate can identify regarding Haver's proposal is an unsupported request made via his public input statement that "[t]he rates should be rolled back by $100 million."[68] There is no basis for such an adjustment under the Board-approved Settlement, which limits potential adjustments to a maximum of $34.110 million.

During the technical hearing in this proceeding, Haver engaged in examination of PWD witnesses apparently intending to challenge the Settlement approved by the Board in the 2021 Rate Proceeding.[69] Haver also attempted to obtain information from PWD's witnesses regarding PWD's efforts to obtain Federal financial assistance, which information has been reported to the Board monthly, and published on its publicly-accessible website, pursuant to the Settlement itself.[70] Haver then questioned the Public Advocate's witness regarding: the notice of public

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[66] The Hearing Officer and the Board have repeatedly rejected Haver's assertions. The Public Advocate will not revisit them at length here.

[67] The Public Advocate submits it may be worth revisiting how the Hearing Officer, in the 2018 Rate Proceeding, addressed "testimony" at the May 11, 2017 technical hearing from the City Fire Commissioner, allowing the statement to be considered public input (having been removed from PWD filed rebuttal), rather than witness testimony. See May 11 Public Hearing Exhibit at https://www.phila.gov/media/20180521170252/TESTIMONYOFFIRECOMMISSIONER5.9.18.pdf. This could point to a process in the future that permits statements by *pro se* intervenors without imposing on other participants the need to respond to their contentions in the same way as they would those parties who engage fully (i.e., taking part in discovery, filing testimony and/or rebuttal, etc.).

[68] March 23 Pub. Hrg. Tr. at 13-14.

[69] Hrg. Tr. at 107-110.

[70] Hrg. Tr. at 110-122.

hearings issued by the Board;[71] positions taken by the Public Advocate's witness in the 2021 Rate Proceeding;[72] the bond ratings agencies' role in setting water rates;[73] PWD's efforts to obtain stimulus funding;[74] the financial impact of the Settlement in the 2021 Rate Proceeding;[75] and Mr. Morgan's recommendation to reduce the 2023 incremental rate increase approved in the Rate Determination.[76] Haver's questioning largely rehashed or revisited various theories he has expressed regarding the Settlement, which are not appropriately before the Board.

Ultimately, Haver appears to mistakenly believe that he is entitled to interrogate other parties' witnesses freely to "put on his case in his way."[77] The Hearing Officer and other participants have been extraordinarily patient in allowing Haver to examine these witnesses, but ultimately Haver provides no support for the assertion that it is his right to build his case on the cross-examination of PWD and Public Advocate witnesses. As discussed above, Haver has not introduced testimony, nor engaged in discovery to develop "his case." Aside from a statement at a public input hearing, he has failed to express any opinion on the record of this proceeding as to what he believes the Board should do regarding the FY 2023 rates, and the potential adjustments at issue in this Special Rate Proceeding. Instead, he has used the hearing process to explore matters that are largely irrelevant to and/or beyond the scope of the testimony of PWD and Public Advocate witnesses. Accordingly, Haver has not provided relevant information concerning the ultimate decision the Board must make in this proceeding. For all of the

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[71] Hrg. Tr. at 166-169.
[72] Hrg. Tr. at 170-174; 186-187; 190-191.
[73] Hrg. Tr. at 174-175.
[74] Hrg. Tr. at 177-178; 191.
[75] Hrg. Tr. at 196.
[76] Hrg. Tr. at 179-185.
[77] Hrg. Tr. at 49; 114.

foregoing reasons, Haver's submissions in this proceeding should not influence the Board's final determination.

B. Michael Skiendzielewski's Emails do not Raise Appropriate Considerations for the Board in This Proceeding.

Pro se participant Michael Skiendzielewski has repeatedly emailed the Hearing Officer, Board members, and participants, primarily raising concerns about the Board's designated counsel in the Philadelphia Law Department, and inquiring as to the legal/ethical disclosure obligations of individuals serving as Public Advocate and the Hearing Officer. Regarding the Board's designated counsel, Skiendzielewski's contentions have been previously addressed by the Board, and are simply not appropriate for this proceeding. His inquiries as to legal/ethical disclosure obligations are being addressed through a separate process.[78]

Skiendzielewski did not engage in discovery, did not submit testimony, and does not appear to have any opinion about the subject matter of this Special Rate Proceeding, i.e., the potential adjustment to FY 2023 rates and charges. For these reasons, the Board need not respond to Skiendzielewski's off-the-record email submissions, which have appropriately been responded to, as necessary, by the Hearing Officer.

[78] 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.

V. **Conclusion**

For all of the foregoing reasons, the Public Advocate submits that the Board should approve a downward adjustment to FY 2023's incremental rate increase, consistent with the testimony of Mr. Morgan.

Respectfully submitted,

/s/ Robert W. Ballenger
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