

BEFORE THE
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD

In the Matter of the Philadelphia Water Department's Proposed Change in Water, Wastewater and Stormwater Rates and Charges	Fiscal Years 2024 and 2025
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**PHILADELPHIA WATER DEPARTMENT'S
MEMORANDUM IN OPPOSITION TO
LANCE HAVER'S MOTION TO REMOVE HEARING OFFICER**

I. INTRODUCTION

This memorandum is submitted on behalf of the Philadelphia Water Department ("Department" or "PWD") in response to Lance Haver's Motion ("Haver Motion" or "Motion") to the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board" or "Board") seeking the removal of the Rate Board's appointed Hearing Officer, Marlane R. Chestnut because of conduct by the Hearing Officer that Mr. Haver views as biased and prejudicial. The central question presented by the Motion is:

Should the Rate Board remove the appointed
Hearing Officer based upon the conduct
complained of by Mr. Haver?

The Department maintains that the Motion should be denied and dismissed.

II. ARGUMENT

The Hearing Officer is appointed (hired) by the Rate Board¹ to (among other things) prepare a Report, which is later adopted, modified or rejected by the Rate Board.² To create the record for the Report (and the Board's Rate Determination), the Hearing Officer has the power and authority to conduct and preside over all public hearings and technical review hearings and make all procedural rulings necessary to conduct a fair, impartial and expeditious hearing process, including the exclusion of irrelevant or redundant testimony or evidence.³

¹ Board Regulations at § II.B.1(a).

² Board Regulations at §§ II.B.1(b) and II.A.3(a).

³ Board Regulations at § II.B.1.(b).

A. The Motion Does Not Justify the Removal of the Hearing Officer.

Mr. Haver claims that the statements and rulings cited in the Motion were prejudicial and indicated bias on the part of the Hearing Officer and constitute grounds for her removal. However, in every instance, (i) the complained of statements and procedural rulings are consistent with the prescribed responsibilities of the Hearing Officer (discussed below) and (ii) none of the cited statements and rulings barred Mr. Haver from exploring any issue complained of via discovery or testimony to be presented at the technical hearings or in his brief. Mr. Haver was a participant in both the informal and technical hearings in the 2023 general rate case. In fact, Mr. Haver filed discovery on numerous topics including ARPA funding, PWD office renovations, cost saving strategies, cost saving innovations, purchasing procedures, management audits and numerous other issues. Many of these discovery requests followed the public input hearings.⁴ Mr. Haver also filed testimony on April 12, 2023 (in the technical hearings) addressing many of the same issues.

It bears emphasis that the Hearing Officer denied the Public Advocate's motion to exclude Mr. Haver's testimony from the technical hearings.⁵ So, Mr. Haver's continued, full and unimpeded substantive participation in the general rate case was actually facilitated by the order of the Hearing Officer (not the other way around). The point of the foregoing is that the rulings and directions of the Hearing Officer, complained of in the Motion, had no prejudicial effect on Mr. Haver's substantive position in the rate case or his ability to present his position. The technical hearings, by design, follow the public input hearings and allow certain issues to be explored in greater depth. And briefing provides an additional opportunity to present various arguments in support of his position. Mr. Haver's contentions in the Motion are therefore groundless.

B. The Hearing Officer Conducted Fair and Orderly Public Input Hearings.

The Hearing Officer is charged with the orderly conduct of PWD rate proceedings. Rate Board regulations prescribe the "rules of the road" for public input and technical hearings.

⁴ See, Haver Interrogatories and Requests for Production of Documents, Sets LH-II and LH-III, filed on March 27, 2023 and April 25, 2023, respectively.

⁵ The Public Advocate filed a Motion to Exclude and Designate as Public Input the Direct Testimony of Pro Se Participant Lance Haver, dated April 20, 2023. The Hearing Officer denied the above motion to exclude on April 25, 2023.

With regard to public input hearings specifically (the primary focus of the Motion), the hearing officer is to allow members of the public to present oral or written testimony in response to the proposed rate increase. In a given public input hearing, if oral testimony is to be presented, the hearing officer may impose time limits and may exclude persons who impede the orderly conduct of the public hearing, as appropriate.⁶ Oral testimony usually follows opening statements by the Department and Public Advocate.

This year, Mr. Haver requested an opportunity to present an opening statement. The Hearing Officer granted his request. Mr. Haver was allowed to repeat this statement at each of four public input hearings.⁷ And as alluded to earlier, the Hearing Officer also denied the Public Advocate's motion to exclude Mr. Haver's testimony from the technical hearings.⁸ This allowed the widest possible participation by Mr. Haver in the general rate case. So, despite the histrionics and the repeated and rather loud criticisms of the process, the Hearing Officer was generous in allowing all voices to be heard.

The public input hearings are not to be the confrontational proceedings with cross examination on random topics and "gotcha moments," as Mr. Haver envisions. The purpose of such hearings is to permit the general public to indicate their concerns, including ability to pay considerations. These proceedings are also to be conducted in an orderly manner. PWD maintains that the procedural rulings and directions of the Hearing Officer, that are the subject of the Motion, are a part of "regular order" and are consistent with the Rate Board regulations and her prescribed responsibilities.

C. Disagreement with Hearing Officer Does Not Establish Bias or Prejudice.

The Motion expresses Mr. Haver's disagreement over the Hearing Officer's procedural rulings or directions and does not establish bias or prejudice on the part of the Hearing Officer.

The Hearing Officer is charged to make the procedural rulings and to provide the direction about which Mr. Haver complains. The Hearing Officer can rule in Mr. Haver's favor (as she did in many instances) or she can rule against him depending on the circumstances presented. A specific ruling or

⁶ See, Rate Board Regulations at Section II.B.4(f)(2).

⁷ Tr. 12-15 [March 22 at 3:00 pm Public Input Hearing]; Tr. 9-11 [March 22 at 6:00 pm Public Input Hearing]; Tr. 10-13 [March 23 at 3:00 pm Public Input Hearing]; Tr. 10-13 [March 23 at 6:00 pm Public Input Hearing].

⁸ See, Order Denying Public Advocate's Motion to Exclude, dated April 25, 2023.

rulings (in isolation) do not indicate bias or prejudice. Also, notably the specific procedural rulings complained of were not prejudicial to Mr. Haver in this case. To be sure, it is unlikely that any participant will prevail on all procedural rulings. And a tally of such rulings, in and of itself, does not indicate bias or prejudice on the part of the Hearing Officer.

By way of example, in his Motion, Mr. Haver directs our attention to the March 23, 2023 public input hearing (at 6:00 PM), where in providing an excerpt from the transcript of that hearing, he indicates that PWD had decided not to seek ARPA funding from the City of Philadelphia (“City”) to offset the need for rate relief.⁹ This editorial comment is inaccurate. The Department’s request for additional funding from the City and the correspondence of the City in response thereto was noted of record and is currently posted at the Rate Board website. PWD Statement 2A at 25 (Finance Panel), PWD Statement 7 at 28-29 (Black & Veatch), Federal Funding Information Request (dated February 27, 2023) and the City Council Rate Update (dated March 15, 2023) are a part of the record and all address similar subject matter (external funding requested by PWD) and pre-date the public input hearings in this proceeding.

In this context, Mr. Haver distorts the record and then pivots to assign blame to the Hearing Officer for this imagined grievance. In the transcript excerpt set forth in his Motion, the Hearing Officer is explaining to a public participant (Keith Jackson) that PWD is one of ten operating departments seeking an allocation of ARPA dollars (federal funding) received by the City.¹⁰ This statement is true. The Hearing Officer did not overstep her authority in directing the public participant’s attention to the factual circumstances presented. In any event, Mr. Haver was not prejudiced by the Hearing Officer’s observation.

⁹ See, Motion at Paragraph 3. The external funding reference generally refers to monies received by the City pursuant to the American Rescue Plan Act (“ARPA”). Public Law No: 117-2. Section 9901 of the ARPA, *inter alia*, provides funds to certain governmental entities that may be used, among other things, to make necessary investments in water, sewer, or broadband infrastructure. Section 2912 of American Rescue Plan Act allocates \$500 million to the U.S. Department of Health and Human Services to assist low-income households that pay a high proportion of household income for drinking water and wastewater services. The funds under Section 2912 of ARPA are in addition to the funds under Section 501 of the CARES Act.

¹⁰ Tr. 60 [March 23 at 6:00 pm Public Input Hearing].

Mr. Haver (in concert with others) also complains about PWD office renovations at the public input hearings on March 23, 2023.¹¹ PWD personnel and counsel attending the hearing had no detailed knowledge of the subject renovations. The Hearing Officer indicated that a written response would be appropriate.¹² The Department's written response was provided on April 10, 2023.¹³ Nonetheless, Mr. Haver complains of prejudice in his Motion. He specifically argues that (i) the Hearing Officer's direction (to provide a written response to the question asked by a public participant) was an attempt to cover-up such office renovation expenditures (amounting to millions of dollars according to Mr. Haver); and that (ii) this and other rulings helped PWD raise rates.¹⁴ In essence, Mr. Haver is complaining that he was denied his "gotcha moment." His penchant is to ask random questions often unrelated to the rate filing in an attempt embarrass a given witness. It appears to be the surprise reaction rather than the substantive response that he seeks to elicit.¹⁵

Please note, as documented in the April 10th written response to public participant questions provided by the Department to address this and other questions, the office renovation expenditures in question were \$830,000 in amount and were incurred prior to the test years (unrelated to the rate case).¹⁶ Also, notably Mr. Haver was not barred from pursuing the issue of office renovations and, in fact, raised that issue in his discovery requests, at the technical hearings and in his brief — all following the March

¹¹ Tr. 39-42 [March 23 at 3:00 pm Public Input Hearing]; See Motion at Paragraph 1.

¹² Tr. 42 [March 23 at 3:00 pm Public Input Hearing].

¹³ See, 2023 Public Input Hearing Responses (posted at Rate Board website on April 10, 2023). This response addressed PWD office renovations as well as other issues raised by Mr. Haver (e.g., federal assistance sought by PWD, cost cutting/efficiency measures undertaken, strategic partnerships and rate affordability).

¹⁴ As noted above, the Hearing Officer indicated that a written response would be appropriate in this context; and such response was provided by the Department. This ruling did not cover-up anything. As to the second contention (rulings helped PWD to raise rates), this was purely speculative as neither the Hearing Officer's Report or the Rate Determination in this case had issued as of the date the Motion was filed.

¹⁵ This appears to be Mr. Haver's intent on May 4, 2023 when he questions Commissioner Hayman. Tr. 76 [May 4, 2023]. The question raised by Mr. Haver was outside of the scope of the Commissioner's testimony and related to a program administered by WRB (TAP enrollment). The procedural ruling in effect directing Mr. Haver to ask his question of the appropriate witness (Deputy Revenue Commissioner Susan Crosby who appeared on May 5, 2023) was consistent with the Hearing Officer's responsibilities as defined in the Board's regulations.

¹⁶ See, 2023 Public Input Hearing Responses at page 4.

23rd public input hearing.¹⁷ Again, Mr. Haver was not prejudiced by the direction given by the Hearing Officer.

Another issue raised by Mr. Haver relates to outreach for the public input hearings. He criticizes the Hearing Officer for not holding the Public Advocate accountable for “lack of outreach” in connection with the public hearings.¹⁸ His criticism is misplaced. The Rate Board, the Public Advocate and the Department, collectively conducted outreach to facilitate greater public attendance. This took the form of communication via legal advertisements, emails, blogs, social media postings as well as other communications.¹⁹ Evidence of this effort was provided in hearing exhibits, statements and discovery responses — all of which are posted at the Rate Board website.²⁰ Mr. Haver evidently failed to observe that public input hearings were well attended in the general rate case. In point of fact, there were 33 customer participants who spoke at the public input hearings (as well as other members of the public in attendance) together with more than 40 written comments submitted to the Rate Board.²¹

Mr. Haver inartfully uses this issue to criticize the Public Advocate and the Hearing Officer. That is, he indicates that the Advocate’s contract should not have been extended (presumably in part because outreach did not meet his standards) and that the Hearing Officer had fallen short by not taking the Advocate to task on this issue.²² The Board has already addressed the issue of renewal of the Advocate’s contract²³ and based on the participation in the general rate case (together with the above described

¹⁷ See, Haver Interrogatories and Requests for Production of Documents (LH-III-1) and Haver Brief at 8.

¹⁸ Mr. Haver also indicates that the Hearing Officer attempted to help the Advocate avoid public scrutiny for its agreement to settle the 2021 rate proceeding. This contention is also untrue. Moreover, the settlement is now history and one of the few times a PWD general rate case has settled (twice since 1980).

¹⁹ See, Public Advocate Outreach Report, dated May 3, 2023; PWD Statement 8.

²⁰ *Id.*

²¹ See, Hearing Officer’s Report at 14-18; PWD Brief at Appendix C.

²² Haver Motion at Paragraph 5, 11, 13, 14.

²³ See, Mr. Haver’s Motion to Remove Public Advocate and Direct Appeal which was denied at the April 13, 2022 Rate Board Meeting.

outreach to facilitate same), the public was motivated to express its concerns about the rate case. Mr. Haver is again mistaken.²⁴

Mr. Haver also criticizes the Hearing Officer for suggesting that the interests of the Department and its customers are (or should be) aligned. Judge Chestnut observed at the public input hearings that PWD and its customers should basically want the same thing.²⁵ That is, neither PWD or its customers want service terminations and rates should be affordable. The Department does not disagree with this observation.²⁶ However, Mr. Haver believes that, in making this statement, the Hearing Officer is not seeing critical differences between PWD and its customers (pointing to the “comfort of bondholders” referred to in the Motion to illustrate this point).²⁷ He forgets, however, that the rating agencies (surrogates for future bondholders) positively “credit” PWD for maintaining a “safety net” for its customers and essentially want PWD to have the wherewithal to pay its bills (including debt service). The point of the foregoing is that there is common ground or at least a middle ground between the competing interests of customers and the utility. Mr. Haver faults the Hearing Officer for suggesting that we should find it. Please note that once again this observation by the Hearing Officer is not prejudicial to Mr. Haver.

Mr. Haver also criticizes the Hearing Officer in connection with the settlement of the 2021 general rate case. He suggests that she is protecting the Advocate from criticism with regard to its role in negotiating a settlement with the Department.²⁸ This assertion is unfounded and is directly drawn from the 2021 rate case, repeated in the 2022 Special Rate Proceeding and raised once again in Mr. Haver’s Motion

²⁴ Mr. Haver may want to turn the Rate Board’s attention to the Tiered Assistance Program Rate Rider (TAP-R) Annual Adjustment proceeding where no public participants attended. That is not a departure from the norm. The TAP-R proceeding is a reconciliation proceeding to recover the TAP discount and, in every instance to date, the administrative issues raised in the TAP-R proceeding have been addressed via settlement, as opposed to litigation. Please also note that TAP-R surcharge rates actually significantly decreased in the proceeding this year. Although a participant in the TAP-R proceeding, Mr. Haver neither attended the public input hearings or the technical hearings in that proceeding. See, PWD Brief at 4, 9 [2023 TAP-R Proceeding].

²⁵ See, e.g., Tr. 22 [March 22 at 3:00 P.M. Public Input Proceeding].

²⁶ PWD has adopted a shut-off policy to minimize service terminations and provide a safety net for vulnerable households. See, PWD Statement 5 at 13-14.

²⁷ See, Motion at Paragraph 7.

²⁸ See, Motion at Paragraph 5.

to Disclose in this proceeding. In each instance, his claims were rejected.²⁹ Likewise, his criticisms should be rejected here.

III. CONCLUSION

Based upon the foregoing, the Department submits that the Motion should be denied and dismissed. The circumstances presented do not justify delay by the Rate Board in acting on the proposed rates and charges.

Respectfully submitted,

/s/ Andre Dasent

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²⁹ See, 2021 Rate Determination at 17-29; 2022 Rate Determination (Special Rate Proceeding) at 23; and Order Dismissing Motion to Disclose at 3 (2023 General Rate Case).