

**Before the  
Philadelphia Water, Sewer and Storm Water Rate Board**

**In Re: Philadelphia Water Department** :  
**Proposed FY2019-2021** : **Advance Notice Filed February 12, 2018**  
**Rate Increase** :

**Public Advocate’s Answer to PWD Objections  
And Motion to Compel Responses to Discovery Requests**

The Public Advocate submits this Answer and Motion, requesting that the Hearing Officer deny the Philadelphia Water Department’s (PWD) Objections and compel PWD to respond to the Public Advocate’s Interrogatories and Requests for Production of Documents, PA-I-1, PA-I-2, PA-I-3, PA-I-4, PA-I-5, PA-I-6, PA-I-7, PA-I-8, PA-I-11, PA-I-12, PA-I-13, PA-I-14, PA-I-17, PA-I-18, and PA-I-20. The Public Advocate hereby withdraws PA-I-19.

The Public Advocate submitted the discovery requests at issue in this motion on February 15, 2018. PWD submitted objections to the enumerated discovery requests on February 21, 2018. PWD’s objections are attached as Exhibit 1 hereto. For the reasons set forth herein, the Public Advocate submits that the Hearing Officer should compel PWD to respond to the enumerated requests. In addition, the Public Advocate respectfully requests the Hearing Officer order PWD to provide full and complete responses to PA-I-9 and PA-I-10, which responses were due on February 22, 2018.

In Pennsylvania, a party is permitted to seek discovery of such matters as may be relevant to the subject matter, so long as they are not privileged, even though such evidence may be inadmissible. There must be some connection between the information sought and the action itself before it becomes discoverable. All of the Public Advocate’s requests are directly related to PWD’s rate filing and to issues relating to the City Treasurer’s potential conflicts of interest regarding which a full and complete record must be established. PWD should be directed to

respond to the Public Advocate’s enumerated discovery requests for the reasons more fully described below.

### **I. Response to PWD’s General Objections**

PWD’s objections commence with a list of boilerplate “General Objections,” directed against all discovery requests at issue here, which lack sufficient explanation or basis for their evaluation. PWD states that it’s “General Objections” are “incorporated into each of the specific objections and responses…” and that its “specific objection or response shall not be construed as a waiver” of its General Objections. PWD Objections, ¶ 9. PWD’s objections raise whatever applicable privilege may be available to it under any rule, doctrine or immunity, whether created by statute or common law. PWD Objections, ¶ 3. Neither the Hearing Officer nor the Public Advocate should be required to search for privileges which PWD has neither articulated nor even located to justify its objections.

PWD’s effort to apply these General Objections to each specific data request, without explanation or context, must fail. Indeed, PWD asserts its General Objections “to the extent” they may apply to the Public Advocate’s interrogatories, without any explanation of how or whether such objections may apply. As PWD observes, the Rate Board’s regulations state that procedural standards analogous to those utilized in rate proceedings before the PUC are to be employed by the Hearing Officer in this case. See PWD Objections, footnote 1; Rate Board Regulation II(7)(b)(5). The Pennsylvania Public Utility Commission (PUC) specifically requires that an objecting party “include a description of the facts and circumstances purporting to justify the objection.” 52 Pa. Code § 5.342(c)(3).<sup>1</sup> The PUC has specifically found objections nearly identical to the General Objections listed by PWD “**highly improper.**” See Pa. PUC v. Pa.

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<sup>1</sup> Similarly, Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy v. Pennsylvania Gas & Water Co., 36 Pa. D & C.2d 705, 707 (Pa. Ct. Com. Pl. 1965).

American Water Co., 2011 Pa. PUC LEXIS 1523 (July 21, 2011). PWD has failed, in its General Objections, to provide any explanation of the facts and circumstances that could conceivably justify its list of boilerplate objections. Accordingly, PWD's General Objections are facially inadequate and should be disregarded by the Hearing Officer employing procedural standards analogous to those utilized by the PUC.

Without sufficient specificity, PWD's General Objections cannot be evaluated on their merits, and must fail.

## **II. Response to PWD's Specific Objections**

### **1. PA-I-1 – PA-I-8**

In discovery requests numbered PA-I-1 through PA-I-8, the Public Advocate requested written description of the services provided by the City Treasurer's office regarding: PWD operating funds or accounts (PA-I-1); PWD capital funds or accounts (PA-I-2); PWD debt service funds or accounts (PA-I-3); PWD debt service reserve funds or accounts (PA-I-4); the Water Fund (PA-I-5); water and wastewater revenue bonds (PA-I-6); PWD debt other than water and wastewater revenue bonds (PA-I-7); and the Water Department's annual budget (PA-I-8). PWD raises three identical objections to these requests. First, PWD objects "to the extent" the requests seek information that it is not relevant to the rate request, and so not reasonably calculated to lead to the discovery of admissible evidence. Second, PWD objects "to the extent" the requests are duplicative or cumulative with other requests. Third, PWD objects "to the extent" the requests require PWD to produce information or documents that are a matter of public record or otherwise accessible to the Public Advocate.<sup>2</sup>

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<sup>2</sup> For unknown reasons, PWD also includes in its objection to PA-I-1 through PA-I-8 the statement "[s]ee also, General Objections 1, 6 and 8" thereby cross-referencing the paragraphs of the General Objections that contain identical objections to those described in PWD's specific objections. This manner of

A. PWD's Relevancy Objection Should be Overruled.

i. *The Public Advocate's Requests Seek Information Relevant to Proposed Rates and Charges.*

PWD objects "to the extent" the requested information is not relevant to the proposed changes in PWD rates and charges and "to the extent" the information is not reasonably calculated to lead to the discovery of admissible evidence. The Rate Board Regulations provide that, subject to the Hearing Officer's direction, "[p]articipants shall be permitted to propound information requests regarding any matter, not privileged, that is relevant to the proceeding." Regulation 8(b)(1). The Hearing Officer may limit discovery in the event the request is unduly burdensome, relates to privileged subject matter, or in the event the request is otherwise objectionable. Regulation 8(b)(1). There is no ground for an objection "to the extent" the information sought is not relevant. PWD's objection is thus improper, and appears to concede that, in providing a response, at least some of the information requested is, in fact relevant. The Public Advocate contends that the information sought is demonstrably relevant, without qualification, and is reasonably calculated to lead to the discovery of admissible evidence. In applying the discovery standards in the Rate Board Regulations, the Hearing Officer should look to PUC standards for guidance and elaboration, particularly concerning the scope of permissible discovery.

PUC regulations define the scope of permissible discovery as follows:

[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not grounds for an objection that the

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duplicating objections by cross-reference is consistently employed by PWD without elaboration or explanation.

information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.  
52 Pa. Code § 5.321(c).

In applying these standards, the PUC has determined that relevant evidence is evidence tending to prove or disprove an alleged fact or evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Black's Law Dictionary, 6<sup>th</sup> Ed. at 1291; *see also*, Smith v. Morrison, 47 A.3d 131,137 (Pa. Super 2012), *alloc. denied*, 57 A.3d 71 (Pa. 2012) (Information is relevant “if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.”). PWD’s objections should be overruled because the Public Advocate’s requests are reasonably calculated not only to lead to the discovery of admissible evidence, but because they directly relate to evidence which is, by operation of the Board’s Regulations, already a part of the Hearing Record.

The Public Advocate’s requests are for descriptions of services provided by the City Treasurer’s Office regarding various PWD funds, accounts, debts, and budgeting practices. The status of PWD’s funds, accounts and debts is clearly relevant to this proceeding. For example, PWD’s rate consultant, Black & Veatch dedicates extensive discussion to the revenue assumptions included in this proceeding, regarding operating and capital funds and accounts, as well as debt service on existing and projected debt. See, e.g., PWD St. 9A at 21, 27-28, 51, 54, 68, 77, 78, Sched. BV-E1, Table C-1, C-8. With respect to PWD budgeting practices, Black & Veatch acknowledges that, for purposes of projecting operating and maintenance expense, PWD’s FY 2018 budget is the “beginning base budget.” PWD St. 9A at 34. Thus the status of PWD’s budget is similarly relevant to this proceeding.

PWD thus appears to argue that the services provided by the City Treasurer's Offices regarding those crucial factors in this case, concerning PWD financial operations, debts and budgets are not relevant. This is incorrect. As set out in the PUC regulation above, within the defined scope of permissible discovery is the "identity and location of persons having knowledge of a discoverable matter." The scope of services provided by the City Treasurer's Office regarding PWD accounts, funds, debts and budgets are directly associated with identifying the extent to which the City Treasurer has knowledge of discoverable matter in this proceeding. Accordingly, the requests for a description of services provided by the City Treasurer's Office, as sought in PA-I-1 through PA-I-8 are relevant, within the scope of permissible discovery, and the Hearing Officer should order that such information be provided.

PWD indicates that information related, but not necessarily responsive, to the Public Advocate's requests, has been provided in sections of PWD's Official Statement, which "generally describe the cash management and debt management services provided by the City Treasurer's Office." PWD response to PA-I-1 (incorporated by reference in response to PA-I-2 through PA-I-8). PWD has not stated or confirmed that these services represent the full range of services provided by the City Treasurer's Office, and so the Public Advocate must assume that the Official Statement does not fully and completely respond to the discovery requests.

Notwithstanding this recognition, the referenced sections of PWD's Official Statement provide as follows:

- Approximately 14 City departments and agencies, including the Revenue Department and Department of Public Property, provide services to the Water Department for which they bill the Water Department at the close of each Fiscal Year ("Interfund Charges"). These services are distinct from the ones discussed in the previous paragraph and include, but are not limited to, cash management (City Treasurer); auditing (City Controller); debt management (City Treasurer); testing and hiring (Human Resources and Labor Relations); and other support

services (Managing Director's Office, Civil Service Commission, Department of Licenses & Inspections, and Police Department). PWD Ex. 5 at 17.

- The Director of Finance is also responsible for the appointment and supervision of the City Treasurer, whose office manages the City's debt program and serves as the disbursing agent for the distribution of checks and electronic payments from the City Treasury and the management of cash resources. PWD Ex. 5 at IV-3
- Pursuant to the City Charter, the City Treasurer is the City official responsible for managing cash collected into the City Treasury. The available cash balances in excess of daily expenses are placed in demand accounts, swept into money market mutual funds, or used to make investments directed by professional investment managers. These investments are held in segregated trust accounts at a separate financial institution. Cash balances related to revenue bonds for water and sewer and the airport are directly deposited and held separately in trust. A fiscal agent manages these cash balances in accordance with the applicable bond documents and the investment practice is guided by the administrative direction of the City Treasurer per the Investment Committee and the Investment Policy. PWD Ex. 5 at IV-75.
- [The Director of Finance's written Investment Policy] provides for an ad hoc Investment Committee consisting of the Director of Finance, the City Treasurer and one representative each from the Water Department, the Division of Aviation, and PGW. PWD Ex. 5 at IV-76.

On the basis of the foregoing statements in PWD's Official Statement, it is clear that the City Treasurer provides services related to PWD funds, accounts and debts. The Public Advocate's request is therefore reasonable and proper, as it seeks to understand more clearly the full range of services the City Treasurer's Office provides. Notably, the fact that PWD has included such information in its Advance Notice should be construed as a waiver to any objections PWD may have to the relevance of PA-I-1 through PA-I-8. Under the Board's regulations, the Hearing Record *is required to include* the Advance Notice and "any supporting documents and any documents incorporated by reference as part of the documents submitted with the Advance Notice." Regulation 8(b)(1). The Public Advocate submits that PWD may not validly object to discovery aimed at clarifying and/or elaborating on the content of PWD's Official Statement, which it included in its Advance Notice and is required to be admitted to the record. The evidence sought is clearly relevant as it specifically relates to evidence that PWD

has already proffered and which is explicitly admitted to the record. PWD's request for additional rates is based on projections directly related to judgments about the adequacy of the flow of customer and non-customer revenues to various accounts and funds. Information regarding how those judgments were made must not be declared out of bounds to the parties and to the Rate Board.

*ii. The Public Advocate's Requests Seek Information Relevant to the Potential Appearance of Bias And Lack of Impartiality.*

The services described in PWD's Official Statement offer a glimpse into the potentially conflicting roles the City Treasurer, as head of the City Treasurer's Office and as a member of the Water Rate Board, may serve. Indeed, the Public Advocate has expressed its deep concern about the City Treasurer's service in detailed correspondence with the City Solicitor's Office and the Rate Board's counsel. Copies of this correspondence are attached at Exhibit 2 to this Motion to Compel. Most significantly, as the correspondence makes clear, the Public Advocate need not show actual bias, but only the appearance of bias, lack of impartiality or potential for non-objectivity in order to raise and support its due process concerns relating to the City Treasurer's service on the Rate Board. Evidence supporting the appearance of bias and/or establishing the potential for actual bias, is discoverable and must not be barred. Evidence of the City Treasurer's conflicted status in this proceeding is not only relevant, but it must be the subject of discovery in order to ensure that the parties are not denied due process. The Public Advocate's discovery is reasonably calculated to obtain this information, which must be assessed on the record in this proceeding in order to determine the propriety (or lack thereof) of the City Treasurer's service on the Rate Board.

Pennsylvania courts, examining the potential impact of bias in administrative proceedings under the Local Agency Law,<sup>3</sup> have clearly indicated that a factual inquiry into potential bias is appropriate and necessary on the record before the agency. In Pittsburgh Bd. of Ed. v. MJN, 524 A.2d 1385 (Pa. Commw. Ct. 1987), the Commonwealth Court remanded a trial court order for further action by the Local Agency, where the Local Agency had failed to develop “a full and complete record” on the issue of bias. In that case, the common pleas court, on appeal from the local agency determination, permitted the taking of additional discovery on the issue of bias at the local agency, which it reviewed de novo and relied upon in finding that the appellant had been denied a fair hearing. MJN, 524 A.2d at 1386-87. The Commonwealth Court affirmed that the trial court had jurisdiction to order further evidence to be developed on the issue of bias because the local agency failed to develop a full and complete record itself. As explained by the Commonwealth Court, when an issue of bias or commingling is exists, “it raises the question of whether the party on whose behalf the hearing is held was given a fair hearing before a fair tribunal.” MJN, 524 A.2d at 1389. MJN affirms that this basic due process right applies in local administrative agency determinations.

*iii. Summary.*

In sum, response to PA-I-1 through PA-I-8 must be required because these discovery requests seek information regarding the decisions relating to PWD finances and budget process. Understanding those finances and processes are vital to assessing PWD’s proposed increase in customer rates and charges. Responses are also necessary to develop of a full and complete record regarding the factual issue surrounding the appearance of bias created by the service of the City Treasurer on the Rate Board. This evidence must be developed in this proceeding

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<sup>3</sup> Exhibit 2, providing copies of correspondence regarding the appearance of bias of the City Treasurer, provides further explanation of the Board’s status as a Local Agency and the due process provisions that apply to the Rate Board’s determination under Pennsylvania Law.

because failure to permit that record to be developed exposes the Board's determination to de novo review under Pennsylvania law.

B. PWD's Objection Regarding Duplicative or Cumulative Requests Should be Overruled.

The Public Advocate's data requests are intended to obtain discovery of the services the City Treasurer provides with respect to different funds, accounts, debts and the budget process. PWD has objected identically to each specific request, asserting that its objection applies "to the extent" the request is duplicative or cumulative with other requests. The Public Advocate's requests PA-I-1 through PA-I-8 each seek to understand the specific services the City Treasurer's Office provides with respect to a particular fund, account, debt or process. PWD's objection "to the extent" these requests are duplicative or cumulative is inappropriate and presupposes that, if PWD were to answer one of these requests, it would thereby fully answer all of these requests. In effect, PWD argues that, by not providing a response to one data request, it has created a valid objection to each other data request for which the response would be the same. This is an improper objection. PWD cannot legitimately claim that the response to one question, which it has not provided, can form the basis for an objection to another question. Indeed, if PWD's response to one question was identical to another, the proper response to that other question would be to reference its prior response, and affirm that the services provided are identical. Instead, PWD seeks to forge an objection solely on the basis of its lack of a response. The Public Advocate respectfully submits that PWD's objection is unfounded and should be overruled.

C. PWD's Objection Regarding Publicly Available Information Should be Overruled.

PWD asserts that it should not be required to provide a description of services provided by the City Treasurer's Office to PWD funds, accounts, debts and processes, "to the extent" that responding to those requests would require it to produce information that is a matter of public record or otherwise accessible to the Public Advocate. PWD's objection is inconsistent with modern civil procedure rules, which do not generally recognize an objection to discovery for publicly available information. The Hearing Officer should be aware that the PUC follows Pennsylvania Rules of Civil Procedure concerning the scope of discovery, which incorporate Federal standards. This body of law confirms that PWD's objection should be overruled.

At one time, decades ago, Pennsylvania Courts held that discovery could be limited in circumstances in which "the plaintiff seeks to obtain information and facts which are readily available to him without seeking equitable discovery, since many of the facts are matters of public record," and when "the plaintiff, having acted as attorney in the matters concerned has, or should have, the information he pretends to seek." Fenerty v. Duffin, 347 Pa. 497, 498-99, 32 A.2d 731, 733 (1943). However, subsequent determinations recognized that this limitation was not compatible with the Pennsylvania Rules of Civil Procedure. This distinction was clarified in a subsequent case, overruling an identical objection, as follows:

Defendant contends on the authority of Fenerty v. Duffin et al., 347 Pa. 497 (1943), that a "bill of discovery" cannot be maintained to discover matters concerning which plaintiffs have the same means of information as defendant. Under the Pennsylvania Rules of Civil Procedure relating to discovery, as amended April 12, 1954, and effective July 1, 1954, the test is whether the information desired "will substantially aid in the preparation of the pleadings or the preparation or trial of the case": Pa. R. C. P. 4007(a). We think that it may well do so.  
Eisenberg v. Penn Traffic Co., 6 Pa. D. & C.2d 364, 367 (Pa. Com. Pl. 1956)

The PUC regulation concerning the scope of permissible discovery, 52 Pa. Code § 5.321, cited above, is identical in all material respects to the discovery rules applicable under the Pennsylvania Rules of Civil Procedure. The current Pennsylvania Rules of Civil Procedure incorporate the scope of discovery utilized in the Federal rules.<sup>4</sup> Accordingly, as has been recognized in multiple federal proceedings, and is generally a matter of hornbook law, matters of public record, which may be equally available to the requester, are generally discoverable. As explained in Wright & Miller's Federal Practice and Procedure treatise:

[D]iscovery has been allowed even though the facts are not exclusively or peculiarly within the knowledge of the party from whom discovery is sought, and it is not usually ground for objection that the information is equally available to the interrogator or is a matter of public record.  
§ 2014Matters Known to the Examining Party, 8 Fed. Prac. & Proc. Civ. § 2014 (3d ed.) (internal citations omitted).

The Public Advocate is not aware of any publicly available information that would answer its data requests numbered PA-I-1 through PA-I-8. But that is beside the point. PWD's objection is invalid and inconsistent with general discovery standards in Pennsylvania and the specific standards at the PUC which are persuasive authority in this proceeding. In general, as explained at length above, the Public Advocate's discovery requests seek relevant information, relating to evidence already of record. The Public Advocate's requests are reasonably calculated to lead to the discovery of admissible evidence.

## **2. PA-I-9 and PA-I-10**

The Public Advocate issued PA-I-9 and PA-I-10 on February 15, 2018 and responses were due on February 22, 2018. Following review of PWD's response, the Public Advocate corresponded with PWD's counsel on February 22, 2018, alerting PWD's counsel that the

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<sup>4</sup> See Pa. RCP 4003.1 (Scope of Discovery Generally. Opinions and Contentions.), Explanatory Comment ("Rule 4003.1 incorporates the broad Federal discovery rule and replaces former Rule 4007(a).")

response to PA-I-10 was incomplete and/or nonresponsive. Upon further review, the Public Advocate has also determined that PWD's response to PA-I-9 is incomplete and/or nonresponsive. The Public Advocate respectfully requests the Hearing Officer order PWD to fully respond to PA-I-9 and PA-I-10.

A. The Hearing Officer Should Compel Complete Response to PA-I-9.

The Public Advocate's request PA-I-9 provided as follows:

PA-I-9. Reference the April 5, 2016 transcript in the 2016 rate proceeding, at Page 107 (explaining the City Treasurer's Office's practice for formulating interest rate assumptions in the Water Department's debt service budget):

- a. Does the City Treasurer's Office utilize the same practice to formulate interest rate assumptions for the Water Department's debt service that was described in the April 5, 2016 transcript in the 2016 rate proceeding, at Page 107?
- b. If the answer to PA-I-9(a) is anything other than an unequivocal "yes," please provide a description of the practice used to formulate the interest rate assumptions for the Water Department's debt service.
- c. Please identify all individuals, by name and title, who participated in formulating the interest rate assumptions for the Water Department's debt service shown in the filing (reference Schedule BV-E1, Table C-9).

On February 22, PWD provided the following statement in response to PA-I-9:

The City Treasurer's Office does not utilize the same approach. The decision regarding interest rate assumptions were made in consultation with the Department's financial advisors, PFM and Acacia Financial by reviewing historic interest rates trends over an extended time horizon while including a moderate increase to develop projected debt service. The parties involved include PFM, Acacia Financial and Philadelphia Water Department.

The response to PA-I-9 clearly states that the "City Treasurer's Office does not utilize the same approach" described in the question. The reasonable inference to be drawn from this statement is that the City Treasurer's Office now utilizes some other approach to determining PWD's interest rate assumptions. Indeed, the response indicates that the "interest rate assumptions were made in consultation with" the Department's financial advisors. Ultimately,

PA-I-9(c) requested specific identification of “all individuals, by name and title, who participated in formulating the interest rate assumptions for the Water Department’s debt service shown in the filing.” PWD has failed to respond to this request. A complete list of all persons who participated in in formulating the interest rate assumptions for PWD debt service, including personnel at PWD and the City Treasurer’s Office, as well as outside consultants, should be provided in response to PA-I-9(c).

**B. The Hearing Officer Should Compel Complete Response to PA-I-10.**

The Public Advocate’s request PA-I-10 provided as follows:

PA-I-10. Reference PWD Statement No. 2 in the 2016 rate proceeding (Direct Testimony of Melissa LaBuda), at Page 18 (“As part of the City’s budgeting process, the Department works with the City of Philadelphia Treasurer’s Office to establish the Department’s debt service budget for the following five fiscal years”):

- a. Does the Water Department work with the City Treasurer’s Office to establish its debt service budget as part of the City’s budgeting process, including projected debt service for five fiscal years, as described in the 2016 rate proceeding?
- b. If the answer to PA-I-10 (a) is anything other than an unequivocal “yes,” please provide a description of the practice used to establish the Water Department’s debt service budget as part of the City’s budgeting process.
- c. Please identify all individuals, by name and title, who participate in establishing the Water Department’s debt service budget as part of the City’s budgeting process.

On February 22, PWD provided the following statement in response to PA-I-10:

The annual debt service budget is formulated in consultation with the Department’s financial advisors, PFM and Acacia Financial, in addition to using the Black & Veatch projected total capital improvement costs less the portion to be funded from current revenues. The results from each projected debt issuance as well as current debt payments due and payable are summarized and sent to the Executive Director of the Sinking Fund Commission. The budget is largely determined by actual principal and interest owed to bond holders.

Following a review of this response, the Public Advocate alerted PWD's counsel to the fact that no response was provided to PA-I-10(a) and PA-I-10(c). PWD's counsel indicated, in an interim, informal response, that the narrative provided was a qualified as opposed to unequivocal yes, apparently intended to respond to PA-I-10(b). Accordingly, the Public Advocate submits that PWD must be directed to provide an affirmative formal response to PA-I-10(a), that PWD does indeed work with the City Treasurer's Office to establish its debt service budget as part of the City budgeting process.

In response to the Public Advocate's concern that PWD had not provided a response to PA-I-10(c), PWD's counsel indicated that those individuals listed as responding to the question are involved in establishing PWD's debt service budget. The Public Advocate respectfully requests the Hearing Officer order PWD to provide a complete response to PA-I-10(c), which requests identification of "all individuals, by name and title, who participate in establishing the Water Department's debt service budget as part of the City's budgeting process." Based on PWD's narrative response to PA-I-10(b), PWD clearly indicates that its "debt service budget is formulated in consultation" with the Department's financial advisors. At the same time, PWD indicates that its response to PA-I-10(a) is a qualified, but affirmative one. A complete list of all persons who are involved in the budgeting process for PWD debt service, including personnel at PWD and the City Treasurer's Office, as well as outside consultants, should be provided in response to PA-I-10(c).

### **3. PA-I-11 – PA-I-12**

Through two data requests, the Public Advocate requested confirmation that the water Department's Deputy Commissioner in charge of finance (PA-I-11) and the City Treasurer (PA-I-12) serve on the City of Philadelphia's Investment Committee. PWD objected on the basis that this interrogatory is irrelevant to the rate proceeding, and asserting that the Public Advocate must

establish some reasonable nexus between service on the Investment Committee and the proposed changes in PWD rates and charges. PWD cites no authority for the proposition that the Public Advocate must establish some nexus between service on the Investment Committee and PWD's proposed rates and charges. As discussed more fully above, the lawful scope of discovery is articulated in the Board's regulation, and should be interpreted consistently with the PUC standards. See Board Regulations §§ 8(b)(1), 8(b)(5).

The Public Advocate's discovery requests seek information regarding PWD financial matters that are relevant to its request for an increase in rates and charges. The PUC regulation concerning the scope of discovery (set forth above) explicitly includes the identity of persons who may have discoverable information. The Public Advocate's discovery seeks to verify two members the Investment Committee whose determinations relate directly to PWD funds and accounts. The Public Advocate's requests are clearly relevant to rates and charges and PWD's objection should be overruled.

Additionally, a critical factual issue in this case is the appearance of bias or actual lack of impartiality of a member of the Rate Board, the City Treasurer, who separately provides various services to and with respect to PWD funds and accounts, debts, bonds, and budget processes. The Public Advocate submits that confirming the mutual service of the City Treasurer and PWD's Deputy Commissioner in charge of finance on the City's Investment Committee is relevant to this proceeding, regardless of the clear nexus that mutual service has to proposed rates and charges. As set forth more fully above, Pennsylvania courts, examining the potential impact of bias in administrative proceedings under the Local Agency Law, have clearly indicated that a factual inquiry into potential bias is appropriate and necessary on the record before the agency. The Public Advocate's discovery is intended to contribute to a full record upon which

the Board may reach a determination as to whether the City Treasurer's service raises a due process issue which must be rectified prior to rendering a decision in this proceeding.

**4. PA-I-13 – PA-I-14**

The Public Advocate requested, with respect to each Investment Committee meeting held in FY 2017 and FY 2018 (to date), the agenda, meeting minutes, and relevant documentation distributed to committee members concerning PWD funds or accounts. PA-I-13, PA-I-14. PWD objected on the basis that these interrogatories are irrelevant to the rate proceeding, and asserting that the Public Advocate must establish some reasonable nexus between service on the Investment Committee and the proposed changes in PWD rates and charges. Furthermore, PWD objected that these requests were unduly burdensome, requiring it to compile meeting minutes over an unreasonable period, and that doing so was unreasonable given the limited time period for responding to discovery in this proceeding. Finally, PWD asserts an objection "to the extent" the Public Advocate's discovery seeks privileged information regarding "government decision-making and deliberations."

Subsequent to filing its objection, PWD's counsel informed the Public Advocate that it was assembling information in response to at least one of these requests. Because the Public Advocate is not certain that PWD will provide the information responsive to these discovery requests, the Public Advocate, at this time, urges the Hearing Officer to overrule PWD's objections.

**A. PWD's Relevancy Objection Should be Overruled.**

The performance of PWD funds and accounts, the review of that performance, and the direction provided to investment managers is clearly directly relevant to PWD's overall financial status. It is essential that the parties be able to review PWD's financial performance, as well as its financial plan, in evaluating PWD's request for an increase in customer rates and charges.

See, e.g, PWD Financial Plan, PWD St. 9A, Sched. BV-E5. Accordingly, Investment Committee materials are directly relevant to this proceeding.

Moreover, as explained above, the Public Advocate does not believe a nexus between the Investment Committee and PWD's proposed rates and charges must be established in order to pursue relevant evidence regarding the potential existence of a conflict of interest, or appearance of a lack of impartiality created by the service of the City Treasurer on the Rate Board. The Public Advocate incorporates its arguments in response to PWD's objections to PA-I-11 and PA-I-12 herein.

**B. The Discovery Requests Are Not Unduly Burdensome.**

Regarding PWD's objection that the Public Advocate's discovery requests are unduly burdensome, PWD fails to provide any explanation supporting its objection. Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy v. Pennsylvania Gas & Water Co., 36 Pa. D & C.2d 705, 707 (Pa. Ct. Com. Pl. 1965). An objection reciting that interrogatories are "extremely broad, burdensome and improper" is inadequate because it requires a court to guess at the basis for objections. Hilton v. Willought, 13 Pa. D & C.3d 587, 591 (Pa. Ct. Com. Pl. 1980). PWD has provided no explanation whatsoever, leaving the Hearing Officer to guess why PWD believes the requests to be unduly burdensome. In fact, the Public Advocate's requests are not unduly burdensome. According to PWD's Official Statement, the Investment Committee meets quarterly. PWD Ex. 5, at IV-76. Under any quarterly meeting schedule that could be crafted for FY 2017 and FY 2018 to date, the Public Advocate's request is for the agendas, meeting minutes, and relevant documentation distributed at six or possibly seven regular meetings. PWD has not shown how providing this information would be unduly burdensome (and, as mentioned

above, PWD appears now to be preparing to provide the information). The Public Advocate submits that these reasonably drawn and narrow discovery requests should be answered.

C. PWD's Deliberative Process Privilege Objection Must Be Overruled.

Finally, PWD raises an objection “to the extent” the requested material is privileged, under the deliberative process privilege (also referred to as the “executive privilege” or “government privilege”). The Hearing Officer should be skeptical of PWD’s assertion of privilege because, “[a]s a general rule, Pennsylvania does not favor evidentiary privileges.” Van Hine v. Dept. of State of Com. 856 A.2d 204, 206 (Pa. Commw. Ct. 2004). Moreover, PWD’s objection must be overruled for multiple reasons. First, PWD has not properly raised the deliberative privilege exception. Most importantly, the privilege only attaches to protect documents that, if disclosed, would seriously hamper the function of government or contravene the public interest. Van Hine, 856 A.2d at 208. PWD has not alleged that disclosure would hamper in any way the function of City government and the Public Advocate cannot fathom how meeting agendas, concluded meeting minutes and documents concerning the financial performance of PWD funds and accounts would hamper the function of City government.

It is well-settled in Pennsylvania that the deliberative process privilege only applies to “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” Com. v. Vartan, 733 A.2d 1258, 1263 (Pa. 1999) (citing Redland v. Dept. of the Army of the U.S., 55 F.3d 827). PWD has not asserted that any documentation requested is confidential. To support a claim for privilege at least three requirements must be fulfilled. See Van Hine, 856 A.2d at 208 (citing Chladek v. Com., 1998 WL 126915 (E.D. Pa. 1998)). First, the head of the agency claiming the privilege must personally review the material. Upon information and belief, Commissioner McCarty does not attend Investment Committee meetings.

PWD has not satisfied this prong because it has not verified that Commissioner McCarty received, much less reviewed, the requested information. Second, there must be a specific designation and description of the documents claimed to be privileged. PWD has only raised an objection “to the extent” the documents may be privileged and has failed to provide the required specific designation, describing the documents that it asserts are privileged. Finally, there must be precise and certain reasons for preserving the confidentiality of the communications, which should be made by affidavit. No such precise and certain reasons verifying the need to treat the requested documents as confidential have been provided and PWD has failed to supply an affidavit from Commissioner McCarty.

Even if PWD were to seek to satisfy the three prongs required to assert privilege under Van Hine, the privilege does not attach to any information that is purely factual, even if that information is used by decision-makers in their deliberations. Vartan, 733 A.2d at 1264. The Public Advocate’s request is for factual information. First, the Public Advocate has requested copies of meeting agendas. Under no circumstances could a meeting agenda qualify as advice or confidential deliberations within the privilege. The Public Advocate has also requested meeting minutes and copies of distributed documents relevant to the Water Department’s funds and accounts. As described above, Investment Committee meetings involve evaluation of the performance of investment managers and the delivery of further instructions to those managers. The meeting minutes and associated meeting documents are thus purely factual in nature to the extent they involve measurable financial performance. Moreover, to the extent the documents reflect instructions to investment managers, those instructions are not deliberative, but involve final decisions.<sup>5</sup> Finally, to the extent any portion of the requested information may qualify

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<sup>5</sup> To be protected by the deliberative process privilege, “the communication must have been made before the deliberative process was completed.” Vartan, 733 A.2d at 1264.

under the deliberative process privilege, PWD can only claim its privilege by demonstrating that factual information is not readily severable from any advice or underlying confidential deliberations. See, e.g., Ario v. Deloitte & Touche LLP, 934 A.2d 1290 (Pa. Commw. Ct. 2007). PWD has made no showing of non-severability whatsoever.

Ultimately, the deliberative process privilege is a qualified one. Even if PWD could properly assert the privilege, which it cannot, disclosure may be ordered if the Public Advocate can demonstrate the need for disclosure of the material is greater than PWD's interest in non-disclosure. See Star-Kist Foods, Inc. v. U.S., 600 F.Supp. 212, 217 (CIT 1984). PWD has not alleged any interest in non-disclosure. "To meet its burden, the government must present more than a bare conclusion or statement that the documents sought are privileged." Joe v. Prison Health Servs., Inc., 782 A.2d 24, 33–34 (Pa. Commw. Ct. 2001). PWD has submitted nothing more than a barebones statement claiming the existence of the privilege and that, to some unknown extent, PWD desires the privilege to shield Investment Committee meeting documentation from discovery. This assertion is totally inadequate and PWD has failed to satisfy the legal standards to claim the deliberative process privilege. In contrast, the public interest in obtaining this information is significant as the information sought relates to the financial performance of PWD, which is of direct relevance to its request for rates and charges.

##### **5. PA-I-17**

The Public Advocate requested copies of correspondence between PWD and the City Treasurer's Office over a short period of time (from September 14, 2017 through present), limited to the following topics: PWD revenue bonds, PWD indebtedness other than revenue bonds, PWD revenues and PWD financial performance. PWD objected that the request is overly broad and unduly burdensome, particularly given the limited period of time in this proceeding to

provide discovery responses. PWD also objected “to the extent” the information requested is within the deliberative process privilege.

A. The Discovery Request is Not Overly Broad or Unduly Burdensome.

Regarding PWD’s objection that the Public Advocate’s discovery is overly broad and unduly burdensome, PWD fails to provide any explanation supporting its objection. As explained above, Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy, 36 Pa. D & C.2d at 707. An objection reciting that interrogatories are “extremely broad, burdensome and improper” is inadequate because it requires a court to guess at the basis for objections. Hilton, 13 Pa. D & C.3d at 591. PWD has provided no explanation, leaving the Hearing Officer to guess why PWD believes the request to be over-broad or burdensome. In fact, the Public Advocate’s request is not overly broad or unduly burdensome. The Public Advocate’s request is limited to a short period of time and a small number of topics. PWD’s objection should be overruled.

B. PWD’s Deliberative Process Privilege Objection Must Be Overruled.

As described in response to PWD’s Objections to PA-I-13 and PA-I-14, there are specific legal requirements that must be satisfied to assert and maintain the deliberative process privilege. PWD has utterly failed to satisfy its initial burden to assert the privilege, both substantively and procedurally. PWD has not shown how disclosure of the requested information would seriously hamper the function of government or contravene the public interest. PWD has not claimed the correspondence is confidential. PWD has not satisfied the formal prerequisites to asserting the privilege: PWD has not attested to personal review of the materials by Commissioner McCarty; PWD has not provided a specific description and designation of the documents claimed to be privileged; and, finally, PWD has not provided an affidavit setting forth precise and certain

reasons for preserving the confidentiality of the communications. PWD has submitted nothing more than a barebones statement claiming the existence of the privilege and that, to some unknown extent, PWD desires the privilege to shield correspondence between it and the City Treasurer from discovery.

In contrast, the Public Advocate's interest in obtaining the sought after discovery is very high, as understanding the relationship between the Water Department and the City Treasurer, concerning specifically identified matters, seeks to establish a full and complete record concerning PWD debts, revenues and financial performance. Similarly, the discovery seeks to establish a full and complete record concerning the appearance of potential bias or lack of impartiality created by the City Treasurer's service on the Rate Board. The public interest in disclosure significantly outweighs any potential interest the City may have in non-disclosure. PWD's deliberative process privilege must be overruled.

**6. PA-I-18**

The Public Advocate requested copies of correspondence between PWD and the City Treasurer's Office regarding 2017 proposed legislation amending PWD's general bond ordinance, currently designated City Council Bill No. 171110. PWD objected that the request is overly broad and unduly burdensome, particularly given the limited period of time in this proceeding to provide discovery responses. PWD also objected "to the extent" the information requested is within the deliberative process privilege.

**A. The Discovery Request is Not Overly Broad or Unduly Burdensome.**

Regarding PWD's objection that the Public Advocate's discovery is overly broad and unduly burdensome, PWD fails to provide any explanation supporting its objection. As explained above, Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy, 36 Pa. D &

C.2d at 707. An objection reciting that interrogatories are “extremely broad, burdensome and improper” is inadequate because it requires a court to guess at the basis for objections. Hilton, 13 Pa. D & C.3d at 591. PWD has provided no explanation, leaving the Hearing Officer to guess why PWD believes the request to be over-broad or burdensome. In fact, the Public Advocate’s request is not overly broad or unduly burdensome. The Public Advocate’s request is limited to a specific subject matter, a currently pending City Council Ordinance, which was introduced on December 14, 2017. Although the Public Advocate did not designate a specific time frame as an additional parameter for the sought after information (since relevant and responsive correspondence could predate the introduction of the ordinance), the recentness of the introduced ordinance sufficiently establishes the reasonable scope and timeframe for PWD to identify responsive information. PWD’s objection should be overruled.

**B. PWD’s Deliberative Process Privilege Objection Must Be Overruled.**

As described in response to PWD’s Objections to PA-I-13 and PA-I-14, there are specific legal requirements that must be satisfied to assert and maintain the deliberative process privilege. PWD has failed to satisfy its initial burden to assert the privilege, both substantively and procedurally. PWD has not shown how disclosure of the requested information would seriously hamper the function of government or contravene the public interest. PWD has not claimed the correspondence is confidential. PWD has not satisfied the formal prerequisites to asserting the privilege: PWD has not attested to personal review of the materials by Commissioner McCarty; PWD has not provided a specific description and designation of the documents claimed to be privileged; and, finally, PWD has not provided an affidavit setting forth precise and certain reasons for preserving the confidentiality of the communications. PWD has submitted nothing more than a barebones statement claiming the existence of the privilege and that, to some

unknown extent, PWD desires the privilege to shield correspondence between it and the City Treasurer from discovery.

In contrast, the Public Advocate's interest in obtaining the sought after discovery is very high. Through this discovery the Public Advocate seeks to assist the Rate Board in establishing a full and complete record of the mutual goals and parallel pursuits being undertaken by PWD and the City Treasurer's Office to impose financial standards that will increase customer rates and charges. In response to PA-I-16, PWD acknowledges that all debt related ordinances, including Bill 171110, are coordinated by the City Treasurer's Office. Among other things, Bill 171110 would increase PWD's annual mandatory Capital Account Deposit, funded directly by customer rates, from 1% to 1.5% of the total value of the net assets of PWD. See Section 1(b) of Bill 171110, attached as Exhibit 3 hereto. At the same time, PWD is requesting that the Rate Board approve, as an assumption utilized in imposing higher rates and charges, an identical increase from 1% to 1.5% of the annual Capital Account Deposit. As demonstrated in Black & Veatch's testimony, the impact of this change is to increase the Capital Account Deposit by \$12.7 million in FY 2019. PWD St. 9A, at 41 (summarizing budgeted Capital Account Deposits of 1% for FY 2018 and 1.5% for FY 2019 - FY2023). Accordingly, the Public Advocate's discovery appropriately seeks evidence that may show a coordinated effort between PWD and the City Treasurer's Office which is vital to establishing a full and complete record concerning the appearance of potential bias or lack of impartiality created by the City Treasurer's service on the Rate Board. The public interest in disclosure significantly outweighs any potential interest the City may have in non-disclosure. PWD's deliberative process privilege must be overruled.

**7. PA-I-19**

The Public Advocate respectfully withdraws PA-I-19.

8. PA-I-20

The Public Advocate requested copies of correspondence between PWD and the City Treasurer's Office regarding PWD's proposed rate increase for FY 2019-2021. PWD objected that the request is overly broad and unduly burdensome, particularly given the limited period of time in this proceeding to provide discovery responses. PWD also objected "to the extent" the information requested is within the deliberative process privilege.

A. The Discovery Request is Not Overly Broad or Unduly Burdensome.

Regarding PWD's objection that the Public Advocate's discovery is overly broad and unduly burdensome, PWD fails to provide any explanation supporting its objection. As explained above, Pennsylvania courts have required that objections to interrogatories be specific and that they set forth in clear detail the matters to which exception is taken. Ruddy v. Pennsylvania Gas & Water Co., 36 Pa. D&C 2d 705, 707 (1965). An objection reciting that interrogatories are "extremely broad, burdensome and improper" is inadequate because it requires a court to guess at the basis for objections. Hilton v. Willought, 13 Pa. D&C3d 587, 591. PWD has provided no explanation whatsoever, leaving the Hearing Officer to guess why PWD believes the request to be over-broad or burdensome. In fact, the Public Advocate's request is not overly broad or unduly burdensome. The Public Advocate's request is limited to a specific subject matter, PWD's proposed FY 2019-2021 rate increase, which was recently commenced by PWD's filing of its Advance Notice. Although the Public Advocate did not designate a specific time frame as an additional parameter for the sought after information, the recentness of the PWD's commencement of this rate increase proceeding sufficiently establishes the reasonable scope and timeframe for PWD to identify responsive information. PWD's objection should be overruled.

B. PWD's Deliberative Process Privilege Objection Must Be Overruled.

As described in response to PWD's Objections to PA-I-13 and PA-I-14, there are specific legal requirements that must be satisfied to assert and maintain the deliberative process privilege. PWD has utterly failed to satisfy its initial burden to assert the privilege, both substantively and procedurally. PWD has not shown how disclosure of the requested information would seriously hamper the function of government or contravene the public interest. PWD has not claimed the correspondence is confidential. PWD has not satisfied the formal prerequisites to asserting the privilege: PWD has not attested to personal review of the materials by Commissioner McCarty; PWD has not provided a specific description and designation of the documents claimed to be privileged; and, finally, PWD has not provided an affidavit setting forth precise and certain reasons for preserving the confidentiality of the communications. PWD has submitted nothing more than a barebones statement claiming the existence of the privilege and that, to some unknown extent, PWD desires the privilege to shield correspondence between it and the City Treasurer from discovery.

In contrast, the Public Advocate's interest in obtaining the sought after discovery is very high. Through this discovery the Public Advocate seeks to assist the Rate Board in establishing a full and complete record of the mutual goals and parallel pursuits being undertaken by PWD and the City Treasurer's Office to impose financial standards that will increase customer rates and charges. As described above, through pending City Council legislation and this rate proceeding, PWD and the City Treasurer's Office are seeking to increase PWD's annual mandatory Capital Account Deposit, funded directly by customer rates, from 1% to 1.5% of the total value of the net assets of PWD. As demonstrated in Black & Veatch's testimony, the impact of this change is to increase the Capital Account Deposit by \$12.7 million in FY 2019. PWD St. 9A, at 41 (summarizing budgeted Capital Account Deposits of 1% for FY 2018 and

1.5% for FY 2019 - FY2023). Accordingly, the Public Advocate's discovery appropriately seeks evidence that may show a coordinated effort between PWD and the City Treasurer's Office which is vital to establishing a full and complete record concerning the appearance of potential bias or lack of impartiality created by the City Treasurer's service on the Rate Board. The public interest in disclosure significantly outweighs any potential interest the City may have in non-disclosure. PWD's deliberative process privilege must be overruled.

### **III. Conclusion**

The Public Advocate submits that the Hearing Officer should deny PWD's Objections and direct it to answer the Public Advocate's discovery requests. PWD's Objections, if sustained, would undermine the free-flow of information that is required in order for a full and transparent review, satisfying the due process requirements imposed on the Rate Board pursuant to Pennsylvania law, to be conducted. In addition, despite PWD's historical insistence on the need to curtail the length of rate proceedings, the scale and lack of substantiation of PWD's Objections may reasonably be considered to reflect an intent to limit or delay the Public Advocate and the Board's access to essential information. The Hearing Officer should deny PWD's Objections and order immediate, full and complete responses (including responses to PA-I-9 and PA-I-10, to which PWD's initial responses were incomplete and/or nonresponsive).

Respectfully submitted,



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ROBERT W. BALLENGER  
JOSIE B.H. PICKENS  
JOLINE R. PRICE  
PHILIP A. BERTOCCI

For the Public Advocate

COMMUNITY LEGAL SERVICES, INC.  
1424 Chestnut Street  
Philadelphia, PA 19102  
215-981-3788

February 26, 2018

**EXHIBIT 1**  
**PWD Objections**

**PHILADELPHIA WATER DEPARTMENT RESPONSES TO  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS PROPOUNDED BY THE PUBLIC ADVOCATE**

The Philadelphia Water Department (“Department” or “PWD”) responds to the following Interrogatories and Requests for Production of Documents (Set I) propounded by the Public Advocate PA-I: 1-8, 11-14, 17-20. PWD requests that the Hearing Officer sustain the Department’s objections and strike or limit the discovery requests identified herein.<sup>1</sup>

**General Objections**

1. The Department objects to each interrogatory and request to the extent that it seeks information that is not relevant to the proposed changes in PWD rates and charges as set forth in the rate filing, and as such, is not reasonably calculated to lead to the discovery of admissible evidence for purposes of rate setting.

2. By answering any part of the interrogatories and requests and/or by providing any part of the requested information, PWD does not concede the relevance, materiality or admissibility of any of the information sought therein for use as evidence in any hearing. PWD expressly reserves the right to object to further discovery on the subject matter and claims in any of these interrogatories and requests.

3. The Department objects to each interrogatory and request insofar as it seeks production or disclosure of documents or information subject to any applicable privilege (including government decision-making and deliberations; attorney-client privilege; and attorney work product), rule, doctrine or immunity whether created by statute or common law.

4. The Department objects to each interrogatory and request to the extent that it seeks confidential, privileged, proprietary or other privileged information.

5. The Department objects to each interrogatory and request identified herein to the extent that they seek information that is not relevant and not material to the subject matter and claims of this proceeding, and as such, are not reasonably calculated to lead to the discovery of admissible evidence.

6. The Department objects to each interrogatory and request to the extent it is duplicative and cumulative.

7. The Department objects to each interrogatory and request to the extent that it seeks sensitive and private information, the disclosure of which would violate federal, state or local law and/or the privacy rights of persons not parties to this action.

8. The Department objects to each interrogatory and request to the extent it seeks information not in PWD’s possession, custody and control, and to the extent it seeks documents which are already in the possession of the Public Advocate or accessible to the Advocate or are a matter of public record.

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<sup>1</sup> Consistent with Rate Board Regulation II(7)(b)(1), the Hearing Officer may limit discovery (i) as to subject matter that is privileged; (ii) to the extent that the information request is unreasonably burdensome (e.g., because of time, extent or expense related to producing the information requested) and/or (iii) to the extent the request is otherwise objectionable. The Hearing Officer shall also not be bound by the formal rules of procedure, but shall generally employ procedural standards analogous to those utilized in utility ratemaking proceedings at the Pennsylvania Public Utility Commission. See, Rate Board Regulation II(7)(b)(5).

9. The applicable general objections, as stated above (“General Objections”), are incorporated into each of the specific objections and responses that follow. Stating a specific objection or response shall not be construed as a waiver of these General Objections.

## RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

### Relevance/Information Independently Accessible

**PA-I-1.** Please provide a description of all services performed by the City Treasurer’s Office regarding PWD operating funds or accounts.

**Response:** Objection. The Department objects to the above interrogatory to the extent that it seeks information that is not relevant to the proposed changes in PWD rates and charges as set forth in the rate filing, and as such, is not reasonably calculated to lead to the discovery of admissible evidence for purposes of rate setting. The Department also objects to the above interrogatory to the extent it is duplicative or cumulative with other requests (e.g., PA-I-2 through PA-I-8). PWD further objects to the above interrogatory to the extent that it requires PWD to produce information or documents that are a matter of public record or are otherwise as accessible to the Public Advocate. Please note that the documents referenced below have already been provided in an attempt to provide relevant information related to the interrogatory/request. See, PWD Official Statement at pages 19, IV-3, IV-75-76 and IV-83, which generally describe the cash management and debt management services provided by the City Treasurer’s Office (PWD Exhibit 5). See also, General Objections 1, 6 and 8.

**PA-I-2.** Please provide a description of all services performed by the City Treasurer’s Office regarding PWD capital funds or accounts.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-3.** Please provide a description of all services performed by the City Treasurer’s Office regarding PWD debt service funds or accounts.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-4.** Please provide a description of all services performed by the City Treasurer’s Office regarding PWD debt service reserve funds or accounts.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-5.** Please provide a description of all services performed by the City Treasurer’s Office regarding the Water Fund.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-6.** Please provide a description of all services performed by the City Treasurer’s Office regarding water and wastewater revenue bonds.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-7.** Please provide a description of all services performed by the City Treasurer's Office regarding PWD debt other than water and wastewater revenue bonds.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

**PA-I-8.** Please provide a description of all services provided by the City Treasurer's Office regarding the Water Department's annual budget.

**Response:** Objection. The response to PA-I-1 is incorporated herein by reference.

### **Relevance**

**PA-I-11.** Please confirm that the Water Department's Deputy Commissioner in charge of finance serves as a member of the City of Philadelphia's Investment Committee.

**Response.** Objection. The Department objects to this interrogatory as irrelevant to the rate proceeding. No nexus has been established connecting service on the above Investment Committee with proposed changes in PWD rates and charges. PWD believes that this interrogatory, as written, is irrelevant to rate setting. See also, General Objections 1 and 5.

**PA-I-12.** Please confirm that the City Treasurer serves as a member of the City of Philadelphia's Investment Committee.

**Response:** Objection. The Department objects to this interrogatory as irrelevant to the rate proceeding. No nexus has been established connecting service on the above Investment Committee with proposed changes in PWD rates and charges. PWD believes that this interrogatory, as written, is irrelevant to rate setting. See also, General Objections 1 and 5.

### **Relevance/Deliberative Process/Unduly Burdensome**

**PA-I-13.** For each meeting of the Investment Committee held in FY 2017, please provide:

- a. A copy of the agenda.
- b. A copy of the meeting minutes.
- c. A copy of all documents relevant to the operating, capital, debt service, and debt service reserve accounts of the Water Department that were distributed to Investment Committee members.

**Response:** Objection. The Department objects to this interrogatory as irrelevant to the rate proceeding. No nexus has been established connecting service on the above Investment Committee with proposed changes in PWD rates and charges. The Department believes that this interrogatory, as written, is irrelevant to rate setting. The Department further objects to this interrogatory as unduly burdensome in requesting the compilation of meeting minutes over an annual period (FY 2017) together with numerous other requested documents. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD finally objects to the above interrogatory and request for production of documents to the extent same requests privileged information (government decision-making and deliberations) which would be contained in Investment Committee meeting minutes. See also, General Objections 1 and 3.

**PA-I-14.** For each meeting of the Investment Committee held in FY 2018 to date, please provide:

- a. A copy of the agenda.
- b. A copy of the meeting minutes.
- c. A copy of all documents relevant to the operating, capital, debt service, and debt service reserve accounts of the Water Department that were distributed to Investment Committee members.

**Response:** Objection. The Department objects to this interrogatory as irrelevant to the rate proceeding. No nexus has been established connecting service on the above Investment Committee with proposed changes in PWD rates and charges. The Department believes that this interrogatory, as written, is irrelevant to rate setting. The Department further objects to this interrogatory as unduly burdensome in requesting the compilation of meeting minutes over an annual period (FY 2018) together with numerous other requested documents. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD finally objects to the above interrogatory and request for production of documents to the extent same requests privileged information (government decision-making and deliberations) which would be contained in Investment Committee meeting minutes. See also, General Objections 1 and 3.

**PA-I-17.** Please provide copies of all correspondence (written, electronic or otherwise) between the Philadelphia Water Department and the City Treasurer from September 14, 2017 through present, regarding:

- a. PWD revenue bonds.
- b. PWD indebtedness other than revenue bonds.
- c. PWD revenues.
- d. PWD financial performance.

**Response:** The Department objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to the above subject matter. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD further objects to the above interrogatory and request for production of documents to the extent that same request privileged information (government decision-making and deliberations) which would be contained in the requested correspondence. See also, General Objection 3.

**PA-I-18.** Please provide a copy of all correspondence (written, electronic or otherwise) between the Water Department and the City Treasurer's Office regarding 2017 proposed legislation amending PWD's general bond ordinance, currently designated City Council Bill No. 171110.

**Response:** The Department objects to this interrogatory and request to the extent same seek privileged information (government decision-making and deliberations) contained in the requested correspondence (written, electronic or otherwise). The Department further objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to City Council Bill No. 171110 over an undefined period of time. The

interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. See also, General Objection 3.

**PA-I-19.** Please provide a copy of all correspondence (written, electronic or otherwise) between the Water Department and the City Treasurer's Office regarding the 2016 rate proceeding.

**Response:** The Department objects to this interrogatory and request as wholly irrelevant to the instant rate proceeding. The Department further objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to the 2016 rate proceeding over an undefined period. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD also objects to the above interrogatory and request for production of documents to the extent that same request privileged information (government decision-making and deliberations) which would be contained in the requested correspondence. See also, General Objections 1, 3 and 5.

**PA-I-20.** Please provide a copy of all correspondence (written, electronic or otherwise) between the Water Department and the City Treasurer's Office regarding PWD's proposed rate increase for FY 2019-2021.

**Response:** The Department objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to the proposed rate proceeding over an undefined period. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD also objects to the above interrogatory and request for production of documents to the extent that same request privileged information (government decision-making and deliberations) which would be contained in the requested correspondence. See also, General Objection 3.

All responses provided by Debra McCarty

**EXHIBIT 2**  
**Correspondence Regarding**  
**City Treasurer's Board Service**



COMMUNITY LEGAL SERVICES  
OF PHILADELPHIA

October 25, 2017

VIA EMAIL AND USPS

Sozi Pedro Tulante  
City Solicitor  
1515 Arch Street, 17<sup>th</sup> Floor  
Philadelphia, PA 19102-1595

**RE: Appointment of City Treasurer to Water Rate Board**

Dear Mr. Tulante:

Community Legal Services, Inc. (CLS) recently became aware of the appointment of Ms. Rasheia Johnson, the Treasurer of the City of Philadelphia, to serve as a member of the Philadelphia Water, Sewer and Storm Water Rate Board (Board) for a term ending July 1, 2019.<sup>1</sup> Resolution No. 170746. CLS believes that the appointment of the City Treasurer to the Board is impermissible, in violation of the legal standards applicable to the Board.<sup>2</sup> We would welcome an opportunity to discuss this matter with you directly, and will certainly consider any legal analysis that could support a different conclusion.

CLS does not question Ms. Johnson's qualifications, skills or performance in her service as Treasurer to the City of Philadelphia. Nonetheless, the City Treasurer's service on the Board would violate the express requirements of the Home Rule Charter and the Philadelphia Code that the Board be constituted as an "independent" body. Due to her management responsibilities concerning all City bond issuances and debt (including Water Department bond issuances and debt), Ms. Johnson's participation in rate proceedings would compromise the ability of the Board to render legally defensible rate determinations.

You may recall that, on November 6, 2012, voters approved an amendment to the Philadelphia Home Rule Charter to permit City Council to establish an "independent rate-making body" to fix and regulate water and sewer rates in Philadelphia. This approval authorized a specific Charter change to ensure that water and sewer rates would be set by an authority free from the influence of officials associated with Water Department operations or finances. City Council enacted Bill

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<sup>1</sup> CLS regrets that it was not aware of this Resolution prior to its passage. CLS does not systematically receive notification of resolutions when introduced, and was not serving as Public Advocate when City Council acted on Resolution No. 170746.

<sup>2</sup> CLS was recently reappointed to serve as Public Advocate for the Water Department's forthcoming rate proceeding with the duty to fully represent the interests of small user customers, including the lawful, fair and appropriate due process review of proposed rates and charges.

RBallenger@CLSPHILA.org ▪ Direct Dial: 215.981.3788 ▪ Fax: 267.765.6481

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WWW.CLSPHILA.ORG

No. 130251, amending Philadelphia Code §13-101 to establish the Board as an “independent rate-making body,” thereby effectuating the intent of Philadelphia voters.

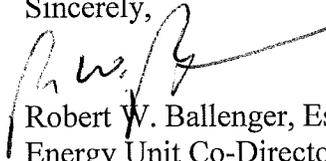
The City Treasurer’s service on the Board is inconsistent with Council’s express and appropriate determination that the Board must be independent. The City Treasurer does not satisfy this standard due to her financial management responsibilities regarding bond issuances. Moreover, the City Treasurer cannot be expected to make decisions that may not be totally consistent with other financial goals and priorities of the City Administration. It is our opinion that the City Treasurer’s service on the Board would not satisfy applicable impartiality standards and presents an irreconcilable conflict of interest, contrary to the due process requirements that attach to the Board’s rate determinations under Pennsylvania administrative agency law.

Ultimately, the City Treasurer’s service on the Board risks undermining the very goals of City Council and the voters in establishing an independent rate-making body. Water Department customers cannot have confidence that Board-determined rates satisfy the legally required just and reasonable standard, if the Board which makes such vital determinations lacks all the hallmarks of independence and impartiality.

It is to be noted that CLS testified before City Council in January 2015, urging City Council not to approve the appointment of then City Treasurer, Nancy Winkler, to the Board. Although City Council nonetheless appointed Ms. Winkler to the Board, she did not participate in any review of proposed rates and charges. Indeed, her service on the Board concluded prior to the consideration of PWD’s FY 2017 and 2018 rate increase request.

Again, we respectfully submit that the City Treasurer should not serve on the Board and would welcome an opportunity to discuss our concerns with you directly.

Sincerely,



Robert W. Ballenger, Esq.  
Energy Unit Co-Director  
Community Legal Services, Inc.

cc: J. Christmas  
B. Murken  
D. Cantu-Hertzler  
S. Popowsky



# CITY OF PHILADELPHIA

LAW DEPARTMENT  
One Parkway  
1515 Arch Street  
Philadelphia, PA 19102-1595  
Sozi Pedro Tulante, City Solicitor

Daniel W. Cantú-Hertzler  
Senior Attorney  
215-683-5061 (direct dial)  
215-683-5069 (fax)  
daniel.cantu-hertzler@phila.gov

November 7, 2017

Via Email to RBallenger@clsphila.org and Regular Mail

Robert W. Ballenger, Esquire  
Community Legal Services of Philadelphia  
1424 Chestnut Street  
Philadelphia PA 19102-2505

**Re: Appointment of City Treasurer to Water Rate Board**

Dear Mr. Ballenger:

City Solicitor Sozi Pedro Tulante has asked me to respond to your letter of October 25, 2017, in which you stated the belief of Community Legal Services, Inc. that the Mayor's appointment of City Treasurer Rasheia Johnson to the City's Water, Sewer and Storm Water Rate Board was impermissible under the legal standards applicable to that Board. You argue that the Philadelphia Code and Home Rule Charter establish the Rate Board as an independent body, and that Ms. Johnson's service would compromise this independence because of her managerial responsibility for bonds and other debt of the Water Fund. You further argue that her presence on the Board would undermine customers' confidence that the rates determined by the Board will be just and reasonable.

We have carefully considered your arguments. It is the opinion of this Office that the Rate Board is no less independent under applicable provisions of the Code and Home Rule Charter because of the presence of the City Treasurer as one of five members. Her membership does not violate the Code or Charter provisions concerning the Rate Board, both as they are written and in the context of the Charter as a whole. It could at least as easily be contended that her membership may enhance rather than detract from public confidence in the actions and decisions of the Board. The legislative history – including, now, City Council's confirmation of two City Treasurers as members of the Board – clearly demonstrates that Council intended that the Rate Board be independent of the Water Department but not of other Administration appointees.

Sincerely,

  
Daniel W. Cantú-Hertzler

cc (via email): Sozi Pedro Tulante, City Solicitor  
John D. Christmas, Special Assistant  
Robert Murken, Director of Legislative Affairs  
Sonny Popowsky, Chair, Water, Sewer and Storm Water Rate Board



COMMUNITY LEGAL SERVICES  
OF PHILADELPHIA

December 15, 2017

Daniel W. Cantú-Hertzler  
Senior Attorney  
Philadelphia Law Department  
1515 Arch Street  
Philadelphia, PA 19102-1595

Dear Mr. Cantú-Hertzler:

I received your November 7, 2017 reply to my October 25, 2017 letter. Your letter responds to one of CLS's concerns regarding the service of the City Treasurer on the Philadelphia Water, Sewer and Storm Water Rate Board (Board). In your letter, you state your opinion that the City Treasurer's service would not compromise the "independence" of the Board within the meaning of the Philadelphia Code and Home Rule Charter.<sup>1</sup> However, you appear to have overlooked the second major concern set forth in our October 27 letter:

It is our opinion that the City Treasurer's service on the Board would not satisfy applicable impartiality standards and presents an irreconcilable conflict of interest, contrary to the due process requirements that attach to the Board's rate determinations under Pennsylvania administrative agency law.

A local agency, such as the Board, must avoid not only actual bias, but even the appearance of bias, in rendering an adjudication. As a courtesy, I have attached an outline which includes some relevant case citations and observations based on the record of past rate cases, PWD's Official Statements, and PWD's pre-filing materials in the forthcoming case, regarding the City Treasurer's conflicted status. I hope this outline provides you some further context regarding the basis of my opinion that the Board: (1) engages in an "adjudication" within the meaning of Pennsylvania law when it determines rates and charges for the Water Department, and so (2) must satisfy applicable due process standards including avoiding even the appearance of bias, partiality or non-objectivity. The applicable caselaw strongly supports a finding that the City Treasurer's participation in adjudicating a water rate increase offends due process.

Because even the appearance of a lack of impartiality is sufficient to warrant judicial scrutiny, I am deeply concerned that the City's reluctance to rectify the inherent bias represented by the City Treasurer's service on the Board will cast a cloud over the Board's determination before it is even rendered. A rate increase approved by the Board, as currently comprised,

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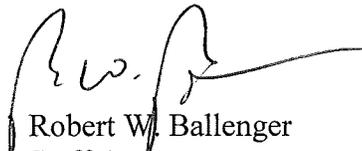
<sup>1</sup> I disagree with that position, but this letter elaborates on CLS's due process concerns, to which there was no response.

presents an appealable issue for any party, not just the Public Advocate, raising unnecessary and completely avoidable risk for the City, the Department and the Board. Although the clearest risk would be to the legality of the Board's determination and resulting rates, there are numerous other risks including litigation expense, potential reputational harm to the Board, and bond market risks to the Water Department associated with disclosure of litigation.

CLS supported the establishment of the Board and has contributed significant time and effort to ensuring the adoption of fair and reasonable procedures for reviewing and deciding upon any request for an increase in rates. We anticipated that the forthcoming General Rate Increase Proceeding would present an opportunity for the Board to dedicate its exclusive attention to determining appropriate rates and charges and resolving related issues. It would be disappointing, after all the work that has been done by the Board, the Department and CLS, to burden the Board with the additional task of addressing the due process implications of its composition and failure to satisfy applicable standards of impartiality. Unless concerns regarding the City Treasurer's service can be resolved, evidence of the City Treasurer's conflicted status in the General Rate Increase Proceeding must be documented, considered on the hearing record, and preserved for potential appeal like all other findings and conclusions.

I appreciate your willingness to discuss these issues briefly by phone this afternoon. I continue to be available to discuss this matter and hope that you will reconsider your position on the City Treasurer's service. If the City Administration moves with deliberate speed, I believe there remains sufficient time for a substitute to be appointed to the Board.

Sincerely,



Robert W. Ballenger  
Staff Attorney

cc. Sozi Pedro Tulante, City Solicitor  
Sonny Popowsky, Chair, Water, Sewer and Storm Water Rate Board

Independence and Impartiality of Philadelphia Water, Sewer and Storm Water Rate Board (Board)

1. Ramifications of “independence” for purposes of Pennsylvania administrative law.
  - a. The establishment of an “independent” board fundamentally alters the due process analysis applicable to PWD ratemaking. See Public Advocate’s January 21, 2016 Due Process Memorandum:  
<http://www.phila.gov/water/rateboard/PDF/PublicAdvocateDueProcessMemorandum.pdf>.
  - b. Prior to this change, PWD rates were established by regulation (quasi-legislative action), by the Water Commissioner. The rate determination resulting from this arrangement was not an appealable adjudication. Instead, the regulation could only be challenged by an original jurisdiction action in equity in Common Pleas Court. Public Advocate v. Brunwasser, 22 A.3d 261 (Pa. Cmwlth. 2011).
  - c. PWD must now apply to the independent Board for a determination of any right to increase/alter any rates and charges; the Water Commissioner lacks the authority to regulate PWD’s rates and charges.
  - d. PWD’s rights to charge, and customers’ obligations to pay, with respect to water billing amounts, are determined by the Board, which determination is explicitly subject to a 30 day right of appeal to the Philadelphia Court of Common Pleas. Phila. Code § 13-101(9) (approved January 2014).<sup>1</sup>
  - e. The Board is a “Local Agency” as defined in 2 Pa. C.S. § 101 and its actions are governed by the Local Agency Law (2 Pa. C.S. §§105, 551-588, 751-754).
  - f. The Board’s determination of PWD rates and charges (and associated issues) is an adjudication within the meaning of the Pennsylvania Administrative Agency Law, guaranteeing the due process rights of participants.
    - i. 2 Pa. C.S. §101 provides the following definition of Adjudication: “Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.”
    - ii. Pennsylvania Coal Min. Ass’n v. Ins. Dep’t, 370 A.2d 685, 694 (Pa. 1977) (determination of mandatory black lung insurance rates invalidated because of lack of administrative due process).
    - iii. Action Alliance v. Phila. Gas Comm’n, 6 D&C 3d 144 (Phila. CCP 1977) (Gas Commission rate determinations for PGW constitute final, appealable adjudications, subject to federal/state due process requirements).
  - g. The Board’s regulations recognize the adjudicatory nature of its determinations regarding rates and charges, clarifying procedural rights of participants, setting forth rules and requirements for discovery, submission of testimony/briefs/exceptions, participation in hearings, the establishment of, and reliance upon, a hearing record, etc.
2. A local agency must avoid even the appearance of bias or impropriety in rendering an adjudication.
  - a. Pennsylvania Supreme Court Cases:
    - i. Gardner v. Repasky, 252 A.2d 704 (Pa. 1969) (reversing civil service commission suspension of appellant’s employment where commissioner had complained about appellant’s performance, then sat on Commission voting to suspend him). Gardner incorporated the U.S. Supreme Court’s standard, from Commonwealth Coatings Corp. v. Continental Casualty, 393 U.S. 145 (1968) (“[A]ny tribunal permitted by

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<sup>1</sup> It is worth noting that, prior to the ordinance establishing the Board, Judge Brobson’s determination that PWD rates could only be challenged in an original jurisdiction action in equity was predicated on the absence of an appeal right under any applicable statute or ordinance, that would vest appeals jurisdiction pursuant to 42 Pa. C.S. §933(a). Brunwasser, 22 A.3d at 269.

law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.”)

- ii. Horn v. Hilltown Twp., 461 Pa. 745, 748, 337 A.2d 858, 860 (Pa. 1975) (“[W]hile we are not faced with a tribunal that has allegedly denied due process to a litigant, we are presented with a governmental body charged with certain decision-making functions that must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it... While no prejudice has been shown by this conflict of interest, it is our opinion that such a procedure is susceptible to prejudice and, therefore, must be prohibited.”)
- iii. Riverwalk Casino, LP v. Pennsylvania Gaming Control Bd., 592 Pa. 505, 527–29, 926 A.2d 926, 939–40 (Pa. 2007), citing Kuszyk v. Zoning Hearing Bd., 834 A.2d at 665 (Pa. Commw. Ct. 2003):

“The Court recognizes that due process requires a local governing body in the performance of its quasi-judicial functions to avoid even the appearance of bias or impropriety.... A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of that right.”

In Riverwalk, the Court ultimately held that reversal was not warranted as the outcome would not have been different if the vote of the allegedly biased member were disregarded.

b. Pennsylvania Commonwealth Court Cases:

- i. Bell v. City of Philadelphia, Bd. of Pensions & Ret., 478 A.2d 537, at 538-39 (Pa. Commw. Ct. 1984) (“The principle that judicial proceedings must not only be unbiased, but must also avoid the appearance of bias, is firmly entrenched in our law by a plethora of cases.”)
  - ii. FR&S, Inc. v. Comm. Dept. of Env. Res., 537 A.2d 957, 965-966 (Pa. Commw. Ct. 1988) vacated the administrative adjudication where the board’s chairman was a former attorney for one of the litigating parties (even though there was an absence of technical commingling), because “regardless of the best intentions, which we can presume the chairman has possessed, an appearance of bias has so tarnished these proceedings that the adjudication cannot be upheld.”
  - iii. Purcell v. Reading Sch. Dist., 167 A.3d 216, 226 (Pa. Commw. Ct. 2017), reconsideration denied (Sept. 7, 2017), citing Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204, 1210 (Pa. 1992), held “Purcell does not need to prove a stacked deck to prevail; rather, all she needs to establish is that the District's process was infected with ‘the appearance of non-objectivity.’”
  - iv. The appearance of non-objectivity, alone, is sufficient to trigger judicial scrutiny. Caln Nether Co., L.P. v. Bd. of Supervisors of Thornbury Twp., 840 A.2d 484, 496 (Pa. Cmwlth. 2004); In re Arnold, 984 A.2d 1, 8 (Pa. Commw. Ct. 2009).
3. Inclusion of the City Treasurer on the Board does not satisfy the applicable standards for impartiality.
- a. Among the City Treasurer’s functions is the obligation to maintain and improve the City’s credit ratings, including the ratings of Water Department revenue bonds. City Treasurer’s website, as of 10/27/17.
  - b. The City Treasurer’s role is of a financial and fiduciary nature, supplying facts (assumptions regarding PWD finances) utilized in the derivation of rate assumptions and managing water fund cash and investments.
    - i. The City Treasurer has been cited as the source of PWD assumptions regarding interest rates on forecast debt issuances. April 5, 2016 Tr. at 107-110. See also October 25, 2017 PWD Pre-filing Materials, at 8 (setting forth interest rate assumptions during the rate period and beyond).

- ii. PWD has stated that it works with the City Treasurer to establish its projected debt service budget. PWD's FY 2018 debt service budget was estimated at \$223 million. FY 2017-2018 Rate Proceeding, PWD St. No-2 at 18.
  - iii. The City Treasurer and the Water Department Deputy Commissioner of Finance sit on the City's Investment Committee. PWD Series 2017B Official Statement, July 26, 2017.
  - iv. The City Treasurer oversees water fund investments of approximately \$680M. PWD Series 2017B Official Statement, July 26, 2017.
  - v. The City Treasurer guides the investment practice of cash balances in the water fund, under her administrative direction. PWD Series 2017B Official Statement, July 26, 2017.
- c. PWD has already indicated that a key driver in the forthcoming rate proceeding is its financial forecast and anticipated credit rating. At least three specific goals have already been disclosed, all of which pertain to PWD credit ratings and thus involve the core obligations of the City Treasurer:
- i. Increase the Capital Account Deposit by 0.5% (estimated revenue value of approximately \$11M). October 25, 2017 PWD Pre-filing Materials, at 9.
  - ii. Increase debt service coverage to 1.30x (.10x above legally mandated 1.20x; this differential of 0.10x has an estimated revenue value of approximately \$22M). October 25, 2017 PWD Pre-filing Materials, at 8.
  - iii. Maintain at least \$150M in the Rate Stabilization Fund to satisfy credit rating agencies. October 25, 2017 PWD Pre-filing Materials, at 9.

# EXHIBIT 3

City Council Bill No. 171110



# City of Philadelphia

City Council  
Chief Clerk's Office  
402 City Hall  
Philadelphia, PA 19107

**BILL NO. 171110**

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**Introduced December 14, 2017**

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**Councilmember Blackwell  
for  
Council President Clarke**

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**Referred to the  
Committee on Finance**

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## **AN ORDINANCE**

Constituting the Twenty-First Supplemental Ordinance to the Restated General Water and Wastewater Revenue Bond Ordinance of 1989, as amended and supplemented (the "General Ordinance"), providing for certain amendments to the General Ordinance under certain terms and conditions.

### *THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:*

SECTION 1. *Amendment of Section 2.01 of the General Ordinance.* Section 2.01 of the Restated General Water and Wastewater Revenue Bond Ordinance of 1989, as amended and supplemented (the "General Ordinance"), entitled *Definitions* is hereby amended, as follows.

(a) The defined term "Balloon Bonds" is added after "Act" as set forth below.

"Balloon Bonds" means any Series of Bonds, or any portion of a Series of Bonds, designated by a Determination as Balloon Bonds, (a) 25% or more of the principal payments (including mandatory sinking fund payments) of which are due in a single year, or (b) 25% or more of the principal of which may, at the option of the holder or holders thereof, be redeemed at one time; provided, however that a Variable Rate Bond that is able to be redeemed at the option of the Holder shall not constitute a Balloon Bond.

# City of Philadelphia

*BILL NO. 171110 continued*

(b) The definition of “Capital Account Deposit Amount” is amended by replacing “one percent (1%) with “1.50%”.

(c) The definition of “Credit Facility” is restated in its entirety as set forth below.

“Credit Facility” means any letter of credit, standby bond purchase agreement, line of credit, surety bond, insurance policy or other insurance commitment or similar agreement (other than a Qualified Swap or an Exchange Agreement) that is provided by a commercial bank, insurance company or other institution.

(d) The defined term “Debt Reserve Facility” is added after “Debt Reserve Account” as set forth below.

“Debt Reserve Facility” has the meaning set forth in Section 4.09(e) hereof.

(e) The definition of “Debt Reserve Requirement” is restated in its entirety as set forth below.

“Debt Reserve Requirement” means (i) with respect to all Bonds outstanding (regardless whether interest thereon may be excluded from the gross income of the holder thereof for federal income tax purposes) (a) whose Debt Service Requirements are payable from the Sinking Fund (i.e., excluding Subordinated Bonds) and (b) that are of a Series for which the City has not created a Series Debt Reserve Subaccount, an amount equal to the greatest amount of Debt Service Requirements on such Bonds payable in any one Fiscal Year (except that such Debt Service Requirements will be computed as if any Qualified Swap did not exist and the Debt Service Requirements attributable to any Variable Rate Bonds may be based upon the fixed rate of interest as set forth in the Supplemental Ordinance or Determination for such Bonds) determined as of any particular date, and (ii) with respect to the amount to be deposited in the Debt Reserve Account, pursuant to the first paragraph of Section 4.09 hereof, in connection with the issuance of such a Series of Bonds, the lesser of (x) the

# City of Philadelphia

*BILL NO. 171110 continued*

amount necessary to comply clause (i) and (y) the maximum amount permitted to be financed with proceeds of Bonds permitted by Section 148(d)(1) the Code (or any successor provision).

(f) The definition of “Debt Service Requirements” is restated in its entirety as set forth below.

“Debt Service Requirements,” with reference to a specified period, means:

A. amounts required to be paid into any mandatory sinking fund established for the benefit of Bonds during the period;

B. amounts needed to pay the principal or redemption price of Bonds maturing during the period and not to be redeemed at or prior to maturity through any sinking fund established for the Bonds;

C. interest payable on Bonds during the period, with adjustments for capitalized interest or redemption through any sinking fund established for the benefit of Bonds; and

D. all net amounts, if any, due and payable by the City under a Qualified Swap during such period.

For purposes of estimating Debt Service Requirements for any future period, (i) any Option Bond outstanding during such period shall be assumed to mature on the stated maturity date thereof, except that the principal amount of any Option Bond tendered for payment and cancellation before its stated maturity date shall be deemed to accrue on the date required for payment pursuant such tender; and (ii) Debt Service Requirements on Bonds for which the City has entered into a Qualified Swap shall be calculated assuming that the interest rate on such Bonds shall equal the stated fixed or variable rate on the Qualified Swap or, if applicable and if greater such stated rate, the applicable rate for any Bonds issued in connection with the Qualified Swap adjusted, the case of a variable rate

# City of Philadelphia

*BILL NO. 171110 continued*

obligation, as provided in Section 5.01 hereof. Calculation of Debt Service Requirements with respect to Variable Rate Bonds and Balloon Bonds shall be subject to adjustment as permitted by Section 5.01(c) hereof.

(g) The defined term “Kroll” is added after “Interim Debt” as set forth below.

“Kroll” means Kroll Bond Rating Agency, Inc. and any successor thereto.

(h) The definition of “Rating Agency” is restated in its entirety as set forth below.

“Rating Agency” means any rating service that has issued a credit rating on the Bonds which is in effect at the time in question or, upon discontinuance of any of such rating services, such other nationally recognized rating service or services if any such rating service has issued a credit rating on the Bonds at the request of the City and such credit rating is in effect at the time in question.”

(i) The defined term “Series Debt Reserve Requirement” is added after “Series” as set forth below.

“Series Debt Reserve Requirement” means, for any Series of Bonds, the amount, if any, required pursuant to a Supplemental Ordinance or Determination to be reserved and (if such amount is greater than zero dollars (\$0)) deposited or maintained in the Series Debt Reserve Subaccount established for such Series of Bonds; provided that such amount may equal zero dollars (\$0); and provided further that such amount may not exceed the lesser of (i) the greatest amount of Debt Service Requirements payable on such Series of Bonds in any one Fiscal Year and (ii) the maximum amount permitted to be financed with proceeds of such Series of Bonds permitted by Section 148(d)(1) the Code (or any successor provision).

(j) The defined term “Series Debt Reserve Subaccount” is added after “Series Debt Reserve Requirement” as set forth below.

# City of Philadelphia

*BILL NO. 171110 continued*

“Series Debt Reserve Subaccount” means any subaccount of the Debt Reserve Account created, pursuant to a Supplemental Ordinance or Determination for a particular Series of Bonds, which Series of Bonds will not otherwise be secured by the Debt Reserve Account and for which a Series Debt Reserve Requirement applies.

(k) The definition of “Substitute Credit Facility” is restated in its entirety as set forth below.

“Substitute Credit Facility” means any letter of credit, standby bond purchase agreement, line of credit, surety bond, insurance policy or other insurance commitment or similar agreement (other than a Qualified Swap or an Exchange Agreement) that replaces a Credit Facility and is provided by a commercial bank, insurance company or other financial institution.”

SECTION 2. *Amendment of Section 4.09 of General Ordinance.* Section 4.09 of the General Ordinance is restated in its entirety as set forth below.

## Section 4.09. *Debt Reserve Account.*

(a) Unless otherwise provided in the applicable Supplemental Ordinance in compliance with this Section 4.09, the City shall, under direction of the Director of Finance, deposit in the Debt Reserve Account from the proceeds of sale of each Series of Bonds issued hereunder, an amount which, when added to the existing balance in the Debt Reserve Account, will be equal to the Debt Reserve Requirement immediately after the issuance of such Series of Bonds. The money and investments in the Debt Reserve Account shall be held and maintained in an amount equal at all times to the Debt Reserve Requirement; provided that if the Supplemental Ordinance authorizing a Series of Bonds shall authorize the accumulation from Project Revenues of a reserve of such amount in respect of such Bonds over a period of not more than three (3) Fiscal Years after the issuance and delivery of such Bonds, then the full payment of the annual deposits required under such Supplemental Ordinance will meet the Debt Reserve Requirements of this Ordinance in respect of such Bonds.

# City of Philadelphia

*BILL NO. 171110 continued*

(b) Notwithstanding any provision of subsection (a) this Section 4.09 to the contrary, a Supplemental Ordinance may provide for the establishment of a Series Debt Reserve Requirement for each Series of Bonds issued pursuant to such Supplemental Ordinance, and a separate Series Debt Reserve Subaccount (if such Series Debt Reserve Requirement is greater than zero dollars (\$0)) within the Debt Reserve Account in respect of such Series of Bonds. The City shall not designate a Series Debt Reserve Requirement for a Series of Bonds unless (i) such Series of Bonds will be refunding Bonds issued pursuant to Section 5.04(g) hereof, or (ii) the City first obtains written confirmation from any one Rating Agency then rating the Bonds that such action, in and of itself, will not result in a downgrade, suspension or withdrawal of the credit rating on any Bonds Outstanding hereunder. The City shall deposit in the Series Debt Reserve Subaccount created pursuant to any Supplemental Ordinance, the Series Debt Reserve Requirement for such Series of Bonds. The money and investments in each Series Debt Reserve Subaccount shall be held and maintained in an amount equal at all times to the Series Debt Reserve Requirement for such Series secured thereby, as provided in the Supplemental Ordinance authorizing such Series of Bonds. All amounts in each Series Debt Reserve Subaccount shall be available solely to secure and pay the Debt Service Requirements of the Bonds for which such subaccount was created pursuant to such Supplemental Ordinance; and the Holders of such Bonds shall otherwise have no interests in or rights to amounts in the Debt Reserve Account.

(c) If at any time and for any reason, the moneys in the Debt Service Account of the Sinking Fund shall be insufficient to pay, as and when due, the principal of (and premium, if any) or interest on any Bond or Bonds or other obligations payable from the Debt Service Account then due (including under Swap Agreements and Credit Facilities), the Fiscal Agent is hereby authorized and directed to withdraw from the Debt Reserve Account or, as applicable, any Series Debt Reserve Subaccount, and pay over the amount of such deficiency for deposit in the Debt

# City of Philadelphia

*BILL NO. 171110 continued*

Service Account to pay such obligations. If by reason of such withdrawal or for any other reason there shall be a deficiency in the Debt Reserve Account or a Series Debt Reserve Subaccount, the City hereby covenants to restore such deficiency promptly from Net Revenues; provided that in the event that there simultaneously shall be deficiencies in the Debt Reserve Account and one or more Series Debt Reserve Subaccounts, the City hereby covenants to restore such deficiencies from Net Revenues on a pari passu basis, based on the Debt Reserve Requirement and the Series Debt Reserve Requirement(s) outstanding; and provided further, that notwithstanding the preceding proviso, the Supplemental Ordinance or Determination pursuant to which a Series Debt Reserve Requirement is established may provide for the restoration of such a deficiency in the related Series Debt Reserve Subaccount from Net Revenues on a less than pari passu basis for the related Series of Bonds.

(d) (i) Subject to the provisions of Section 4.09(d)(ii) and Section 4.09(e), any moneys in the Debt Reserve Account or any Series Debt Reserve Subaccount in excess of, respectively, the Debt Reserve Requirement or the Series Debt Reserve Requirement, shall be transferred and applied, at the written direction of the City, to any of the following purposes:

(A) to the Debt Service Account, to pay the Debt Service Requirements on Bonds secured by such account or subaccount, including without limitation redemption price in connection with the optional redemption of any such Bonds; or

(B) to an escrow fund or account established to facilitate the payment of Bonds pursuant to Section 11.01 hereof, to pay the Debt Service Requirements on Bonds secured by such account or subaccount, including without limitation redemption price in connection with the optional redemption of any such Bonds; or

# City of Philadelphia

*BILL NO. 171110 continued*

(C) if such moneys do not constitute tax-exempt bond proceeds, to the Residual Fund for the purposes thereof.

(ii) In connection with the issuance of refunding Bonds pursuant to Section 5.04(g) hereof, the City may transfer amounts from the Debt Reserve Account or a Series Debt Reserve Subaccount held by the Fiscal Agent in respect of the Bonds being refunded to the Debt Reserve Account or a Series Debt Reserve Subaccount to satisfy any debt reserve requirements in respect of such refunding Bonds.

(e) Notwithstanding the foregoing provisions, in lieu of the required deposits into the Debt Reserve Account or any Series Debt Reserve Subaccount thereof, the City may cause to be deposited therein a surety bond or an insurance policy payable to the Fiscal Agent for the account of the Bondholders and any Qualified Swap or an irrevocable letter of credit to be benefitted thereby in an amount equal to the difference between the Debt Reserve Requirement or the Series Debt Reserve Requirement and the remaining sums, if any, then on deposit in the Debt Reserve Account or Series Debt Reserve Subaccount. The surety bond, insurance policy or letter of credit (hereinafter referred to, collectively, as the “Debt Reserve Facility”) shall be payable (upon the giving of notice as required thereunder) on any interest payment date on which moneys will be required to be withdrawn from the Debt Reserve Account or Series Debt Reserve Subaccount and applied to the payment of Debt Service Requirements of the Bonds secured thereby if such withdrawal cannot be met by amounts on deposit in the Debt Reserve Account or Series Debt Reserve Subaccount, or provided from any other Fund under this Ordinance.

If a disbursement is made pursuant to a surety bond, an insurance policy or a letter of credit provided pursuant to this subsection, the City shall be obligated either (i) to reinstate the maximum limits of the surety bond insurance policy or letter of credit or (ii) to deposit into the Debt Reserve Account or applicable Series Debt Reserve

# City of Philadelphia

*BILL NO. 171110 continued*

Subaccount, funds in the amount of the disbursement made under such surety bond insurance policy or letter of credit, or combination of such alternatives, as shall provide that the amount in the Debt Reserve Account or applicable Series Debt Reserve Subaccount equals the Debt Reserve Requirement or the Series Debt Reserve Requirement within a time period not longer than would be required to restore the Debt Reserve Account or the Series Debt Reserve Requirement by operation of this Section 4.09 and from the same source of funds as provided herein.

The insurer providing a surety bond or insurance policy pursuant to this subsection (e) shall be an insurer whose municipal bond insurance policies insuring the payment, when due, of the principal of and interest on municipal bond issues results in such issues being rated in not lower than the “A” category (without regard to gradations) by any one Rating Agency. The letter of credit issuer providing a letter of credit pursuant to this subsection (e) shall be a bank or trust company that is rated not lower than the “A” category (without regard to gradations) by any one Rating Agency; and the letter of credit itself shall be rated in at least “A” category of such Rating Agency. Upon the occurrence of any reduction or suspension of any credit rating with respect to such bond insurance policy or letter of credit or the provider thereof) required by this Section 4.09, the City shall so notify the provider of the surety, bond insurance policy or letter of credit and prior to the effective date of any cancellation of such surety, bond insurance policy or letter of credit, shall either provide a substitute surety bond, insurance policy or letter of credit rating requirements of this Section 4.09 or shall deposit cash in the Debt Reserve Account or applicable Series Debt Reserve Subaccount so that the amount in such account or subaccount shall equal the Debt Reserve Requirement or Series Debt Reserve Requirement, respectively.

In the event that after the City has deposited cash as required in connection with a Debt Reserve Facility rating reduction or suspension, but prior to any cancellation thereof, such Debt Reserve Facility meets the rating criteria set forth in this subsection for deposit, no excess of the

# City of Philadelphia

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Debt Reserve Requirement shall result for purposes of Section 4.09(d) hereof.

SECTION 3. *Amendment of Section 5.01 of General Ordinance.* Section 5.01 of the General Ordinance is restated in its entirety as set forth below.

## Section 5.01. *Rate Covenant.*

(a) The City covenants with the Bondholders that it will, at a minimum, impose, charge and collect in each Fiscal Year such water and wastewater rents, rates, fees and charges as shall yield Net Revenues which shall be equal to at least:

(i) 1.20 times the Debt Service Requirements for such Fiscal Year (excluding Debt Service Requirements in respect of Subordinated Bonds); and

(ii) 0.90 times Debt Service Requirements for such Fiscal Year (excluding Debt Service Requirements in respect of Subordinated Bonds); provided that, for purposes of this clause (ii), Net Revenues shall be calculated to exclude therefrom any amounts transferred from the Rate Stabilization Fund to the Revenue Fund in, or as of the end of, such Fiscal Year; and

(iii) 1.00 times (A) the Debt Service Requirements for such Fiscal Year (including Debt Service Requirements in respect of Subordinated Bonds); (B) amounts required to be deposited into the Debt Reserve Account during such Fiscal Year; (C) the principal or redemption price of and interest on General Obligation Bonds payable during such Fiscal Year; (D) debt service requirements on Interim Debt payable during such Fiscal Year; and (E) the Capital Account Deposit Amount for such Fiscal Year (less any amounts transferred from the Residual Fund to the Capital Account during such Fiscal Year).

(b) In estimating Debt Service Requirements on any Interim Debt for the purposes of projecting compliance with this Section, the City shall be entitled to assume that

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(i) such Interim Debt will be amortized over a period of up to the maximum term permitted by the Act, provided, however, such period shall not be in excess of the useful life of the assets to be financed, on an approximately level debt service basis and bear interest at the average interest rate on bonds of a similar maturity and credit rating (without any credit enhancement) as the Bonds outstanding under this Ordinance. Promptly upon any material change in the circumstances which were contemplated at the time such rents, rates, fees and charges were most recently reviewed, but not less frequently than once in each Fiscal Year, the City shall review the rents, rates, fees and charges as necessary to enable the City to comply with the foregoing requirements; provided that such rents, rates, fees and charges shall in any event produce moneys sufficient to enable the City to comply with its covenants in this Ordinance.

(c) In estimating Debt Service Requirements on any Variable Rate Bonds for purposes of projecting compliance with this Section or funding the Reserve Account, the City shall be entitled to assume that such Variable Rate Bonds will bear interest at a rate equal to (i) the average interest rate on the Variable Rate Bonds during the period of twenty-four (24) consecutive calendar months preceding the date of calculation or (ii) if the Variable Rate Bonds were not Outstanding during the entire twenty-four (24) month period, the average interest rate on the Variable Rate Bonds since their date of issue or (iii) such other rate as may be specified in a Supplemental Ordinance or Determination.

(d) The City represents that it has, by its Code of General Ordinances, as amended, authorized the imposition of rents, rates, fees and charges by the Water Department sufficient from time to time to comply with the Rate Covenant and covenants with the Holders of Bonds that it will not repeal or materially adversely dilute or impair such authorization.

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SECTION 4. *Amendment of Section 5.01(c) of General Ordinance.* Section 5.01 of the General Ordinance is further amended by restating subsection (c) thereof in its entirety as set forth below.

(c)(i) In the event that any Bonds Outstanding are, or any proposed Series of Bonds are to be, Balloon Bonds, then Debt Service Requirements on such Balloon Bonds shall be calculated for purposes of projecting compliance with this Section and Section 5.04, or for purposes of determining the Debt Reserve Requirement or Series Debt Reserve Requirement (as applicable) for a particular Series of Balloon Bonds, whether for any period prior to or after the date of calculation, as follows.

(A) If such Balloon Bonds are not Capital Appreciation Bonds, then, for purposes of determining Debt Service Requirements, each maturity that constitutes Balloon Bonds shall, unless otherwise provided in a Supplemental Ordinance under which such Balloon Bonds are issued, be treated as if it were to be amortized over a period of no more than 30 years and with substantially level annual debt service funding payments commencing not later than the year following the year in which such Balloon Bonds were issued, and extending not later than the stated or deemed, as the case may be, final maturity of such Balloon Bonds, but in no event later than 30 years from the date such Balloon Bonds were originally issued; and the interest rate used for such computation shall be that rate quoted in The Bond Buyer 25 Revenue Bond Index, or its successor or replacement index, for the last week of the month preceding the date of calculation as published by *The Bond Buyer*, or if that index is no longer published, another similar index designated in a Determination, or if a Determination fails to select a replacement index, that rate determined by a banking institution or an investment banking institution as the interest rate or rates at which the City could reasonably expect to borrow by incurring indebtedness with the same term as assumed above, with no credit enhancement and taking into consideration whether such Bonds bear interest which is or is not excluded from gross income for federal income tax purposes; with respect to any Bonds only a

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portion of which constitutes Balloon Bonds, the remaining portion shall be treated as described in such other provision of the definition of Debt Service Requirements as shall be applicable and, with respect to any Bonds or that portion of a series thereof which constitutes Balloon Bonds, all Debt Service Requirements becoming due prior to the year of the stated maturity of the Balloon Bonds shall be treated as described in such other provision of Debt Service Requirements as shall be applicable; and

(B) If such Balloon Bonds are Capital Appreciation Bonds, by assuming that the Accreted Value of such Bonds for purposes of determining Debt Service Requirements, each maturity that constitutes Balloon Bonds shall, unless otherwise provided in a Supplemental Ordinance under which such Balloon Bonds are issued, be treated as if it were to be amortized over a period of no more than 30 years and with substantially level annual debt service funding payments commencing not later than the year following the year in which such Balloon Bonds were issued, and extending not later than the stated or deemed, as the case may be, final maturity of such Balloon Bonds, but in no event later than 30 years from the date such Balloon Bonds were originally issued; and the interest rate used for such computation shall be that rate quoted in The Bond Buyer 25 Revenue Bond Index, or its successor or replacement index, for the last week of the month preceding the date of calculation as published by *The Bond Buyer*, or if that index is no longer published, another similar index designated in a Determination, or if a Determination fails to select a replacement index, that rate determined by a banking institution or an investment banking institution as the interest rate or rates at which the City could reasonably expect to borrow by incurring indebtedness with the same term as assumed above, with no credit enhancement and taking into consideration whether such Bonds bear interest which is or is not excluded from gross income for federal income tax purposes; with respect to any Bonds only a portion of which constitutes Balloon Bonds, the remaining portion shall be treated as described in such other provision of the definition of Debt Service Requirements as shall be applicable and, with respect to

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any Bonds or that portion of a series thereof which constitutes Balloon Bonds, all Debt Service Requirements becoming due prior to the year of the stated maturity of the Balloon Bonds shall be treated as described in such other provision of Debt Service Requirements as shall be applicable.

(ii) In estimating Debt Service Requirements on any Variable Rate Bonds for purposes of projecting compliance with this Section or funding the Reserve Account, the City shall be entitled to assume that such Variable Rate Bonds will bear interest at a rate equal to (A) the average interest rate on the Variable Rate Bonds during the period of twenty-four (24) consecutive calendar months preceding the date of calculation or (B) if the Variable Rate Bonds were not Outstanding during the entire twenty-four (24) month period, the average interest rate on the Variable Rate Bonds since their date of issue or (C) such other rate as may be specified in a Supplemental Ordinance or Determination.

SECTION 5. *Amendment of Section 10.01 of General Ordinance.* Section 10.01 of the General Ordinance is restated in its entirety as set forth below.

Section 10.01. *Amendments and Modifications.* In addition to the enactment of Supplemental Ordinances supplementing or amending this Ordinance in connection with the issuance of successive Series of Bonds, this Ordinance and any Supplemental Ordinance may be further supplemented, modified or amended: (a) to cure any ambiguity, formal defect or omission herein or therein or to make such provisions in regard to matters or questions arising hereunder or thereunder which shall not be inconsistent with the provisions hereof or thereof and which shall not adversely affect the interests of Bondholders; (b) to grant to or confer upon Bondholders, or a trustee, if any, for the benefit of Bondholders any additional rights, remedies, powers, authority, or security that may be lawfully granted or conferred; (c) to incorporate modifications requested by any Rating Agency or Credit Facility provider to obtain or maintain a credit rating on any Series of Bonds; (d) to comply with any

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mandatory provision of state or federal law or with any permissive provision of such law or regulation which does not substantially impair the security or right to payment of the Bonds; provided however that no amendment or modification discussed in parts (a)-(d) of this Section 10.01 shall be made with respect to any Outstanding Bonds to alter the amount, rate or time of payment, respectively, of the principal thereof or the interest thereon or to alter the redemption provisions thereof without the written consent of the Holders of all affected Outstanding Bonds; and (e) except as aforesaid, in such other respect as may be authorized in writing by the Holders of a majority in principal amount or Original Value in the case of Capital Appreciation Bonds of the Bonds Outstanding and affected. In the case of a Credit Facility, Standby Agreement or Qualified Swap, if and to the extent provided in the Supplemental Ordinance and Determination of Bonds related thereto, the provider thereof may be the representative of the Bondholders of such Series or portion of such Series for purposes of Bondholder consent, approval or authorization. The written authorization of Bondholders of any supplement to or modification or amendment of this Ordinance or any Supplemental Ordinance need not approve the particular form of any proposed supplement, modification or amendment but only the substance thereof. Bonds, the payment for which has been provided for in accordance with Section 6.04 hereof, shall be deemed to be not Outstanding.

SECTION 6. *Other Elections Under the General Ordinance.* The Bond Committee is authorized on behalf of the City, without any further action by City Council, to make any and all additional elections under the General Ordinance as it shall determine to be in the best interest of the City as and when it shall deem such elections to be appropriate.

SECTION 7. *Effect of Ordinance.* This Ordinance is amendatory and supplementary to the General Ordinance and all sections of the General Ordinance and the Act not inconsistent herewith shall remain effective. All definitions of terms contained in the General Ordinance shall apply to such terms in this Ordinance, except to the extent they are amended by this Ordinance. No further action of City Council is necessary for this Ordinance to become effective. Sections 1(b), 1(d), 1(e) and 1(g), Section 3 and Section 7 shall become effective immediately. Notwithstanding Section 8,

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the amendments set forth in Sections 1 through 5 (except Sections 1(b), 1(d), 1(e) and 1(g) and Section 3) shall become effective upon the consent of the Holders of at least sixty- seven percent (67%) of the Outstanding Bonds (the “67% Effective Date”). The City, through the Director of Finance, shall publish notice of the 67% Effective Date to all Holders upon the occurrence of the consent of at least sixty-seven percent (67%) of the Outstanding Bonds. Publication through the Electronic Municipal Market Access System (EMMA) or such other nationally recognized municipal securities information repository shall constitute an acceptable mode of publication.

SECTION 8. *Effective Date.* Subject to the provisions of Section 7, this Ordinance shall take effect immediately.