

**BEFORE THE
BOARD OF DIRECTORS OF THE DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY**

**COMMENTS OF THE OFFICE OF THE PEOPLE’S COUNSEL FOR THE DISTRICT
OF COLUMBIA
REGARDING THE WATER AND SEWER AUTHORITY, D.C.
NOTICE OF PROPOSED RULEMAKING FOR
FISCAL YEAR 2021 AND FISCAL YEAR 2022**

INTRODUCTION

Pursuant to the Notice of Proposed Rulemaking (NOPR) published in the District of Columbia Register on March 20, 2020 and May 22, 2020, the Office of People's Counsel for the District of Columbia (OPC or Office), the statutory representative of the District of Columbia ratepayers of water utility services, respectfully submits the Comments of the Office of the People's Counsel for the District of Columbia (Comments) Regarding the Water and Sewer Authority Notice of Proposed Rulemaking for Fiscal Year 2021 (FY2021) and Fiscal Year 2022 (FY2022).

As the statutory consumer advocate for the District’s natural gas, electric, and local telephone ratepayers/consumers, OPC has been steadfast in advocating to protect District ratepayers' fundamental rights to the provision of high-quality, safe, reliable, affordable, and environmentally sustainable utility services. Pursuant to the DC Water Consumer Protection Amendment Act of 2018, OPC is authorized to represent District of Columbia ratepayers in proceedings related to products, services, and rates of the District of Columbia Water and Sewer Authority (DC Water). Specifically, OPC may represent the interests of and advocate for District of Columbia ratepayers at public hearings held by the Authority to establish and adjust water and

sewer rates.¹ OPC's primary mission in all matters pertaining to utility services and rates, including water, is to zealously advocate for the provision of safe, reliable, and high-quality utility services for all District of Columbia consumers at equitable and affordable rates. To this end, OPC has worked to ensure that District residents in all eight wards have access to clean, affordable, and reliable water services. Our mandate to protect and assist District water consumers is especially relevant in the midst of the COVID-19 pandemic.

OPC hereby offers these Comments, including the appended Affidavit and accompanying Exhibits OPC 1-6, in response to the NOPR amending Sections 112 (Fees) of Chapter 1 (Water Supply) and Sections 4100 (Rates for Water Service), 4101 (Rates and Charges for Sewer Service), and 4102 (Customer Assistance Programs) of Chapter 41 (Retail Water and Sewer Rates and Charges) of Title 21 of the District of Columbia Municipal Regulations (DCMR), consistent with Resolution No. 20-19², as previously approved by the Board of Directors (Board) of DC Water on March 5, 2020.

BACKGROUND

As a result of OPC's advocacy for greater transparency in DC Water's ratemaking process, DC Water now posts materials supporting its proposed rate adjustment on its website. Certainly, this is an important initial step towards improving the transparency of DC Water's rate-setting process. In addition, the DC Water Consumer Protection Amendment Act of 2018 states that DC Water shall provide OPC access to any accounts, books, papers, and documents considered necessary to carry out OPC's functions under the Act. Accordingly, OPC reviewed the publicly

¹ D.C. Code §§ 34-2202.05a(1)-(5).

² DC Water Board of Directors' Resolution No. 20-19 (March 5, 2020).

available materials on DC Water’s website and submitted questions to DC Water regarding their Cost-of-Service (COS) Study and other data inputs that affect rates.

SUMMARY OF OPC’S POSITION

Based on OPC’s careful review of the DC Water’s proposed rate adjustment for FY2021 and FY2022 and DC Water’s responses to our questions,³ OPC provides the following recommendations on behalf of DC Water consumers, as detailed in these Comments:

1. **DC Water Should Take a Measured Approach in its Pending Rate Adjustment to Reflect the Negative Economic Impacts and Financial Uncertainty Resulting from the COVID-19 Pandemic.** DC Water should consider the current state of both the national and local District economies.
2. **The NOPR Proposals Must Meet the Long-Established “Just and Reasonable” Legal Standard for Public Utility Rates.** As an instrumentality of the District of Columbia government, DC Water is subject to the Constitutional requirement that rates charged for public utility service must be just and reasonable and commensurate with the value of the services rendered. Accordingly, DC Water must provide evidence that all rates proposed in the NOPR are just and reasonable.
3. **The FY2022 Rate Proposal Should Be Postponed Until after the FY2022 Planning Process Concludes in 2021.** OPC’s review of DC Water’s FY2022 rate proposal shows a failure to demonstrate the reasonableness of the proposal.
4. **DC Water Should Consider Additional Lifeline Tiers Similar to the Water Lifeline Tier for Residential Customers.** Expanding the Lifeline Tier concept beyond the Water rate will result in greater bill savings to the average monthly residential customer’s bill.
5. **DC Water Should Change the Actual Combined Debt Service Coverage Ratios from 1.75 for FY2021 and 1.71 for FY2022 to a Debt Service Coverage Ratio of 1.6 or less.** Using a 1.6 ratio or less will result in lowering the revenue requirement and, in turn, lowering the average customer’s bill.
6. **DC Water’s Enhancements to its CAP Programs Are A Positive Development to Assist Low- and Middle-Income Consumers.** As in 2019, OPC supports the DC Water proposal to make Customer Assistance Program II permanent. In addition, OPC urges DC Water to explore other options to assist customers.

³ See OPC Exhibits 4-6 (DC Water Responses to OPC’s Questions).

DISCUSSION

1. **DC Water Should Take a Measured Approach in Its Pending Rate Adjustment to Reflect the Negative Economic Impacts and Financial Uncertainty Resulting from the COVID-19 Pandemic**

DC Water should take a measured approach to its pending adjustment of rates to reflect and account for the negative economic impacts on DC Water customers and the overall financial uncertainty resulting from the COVID-19 pandemic, as reflected in the current state of both the national and local District economies. While the ultimate depth and duration of the economic crisis is unknown, the initial impact of the economic crisis has been severe, resulting in closed businesses, disruption to the economy, and millions unemployed, many of whom are struggling to meet basic needs, such as buying food and medicine, paying for shelter, and paying for vital utility services. The end of the COVID-19 public health emergency, however defined, will not result in the immediate end of the economic crisis for DC Water consumers.⁴

In the District, its residents have experienced the loss of employment and corresponding income, consequently decreasing the amount of household income available to pay for utility services.⁵ In addition, a large number of businesses are also impacted, putting into question their

⁴ See Robert Shiller, *Why We Cannot Foresee the Pandemic's Long-Term Effects*, New York Times, May 29, 2020. Peter S. Goodman, *Why the Global Recession Could Last a Long Time*, The New York Times, April 1, 2020; https://www.bls.gov/regions/mid-atlantic/district_of_columbia.htm; Heather Long, *Small business used to define America's economy. The pandemic could change that forever*. The Washington Post, May 12, 2020.

⁵https://does.dc.gov/sites/default/files/dc/sites/does/release_content/attachments/DC%20Ward%20Data%20Jun20-May20-Jun19.pdf and https://does.dc.gov/sites/default/files/dc/sites/does/release_content/attachments/CESareaJun20.pdf.

ability to return to full operations, if at all.⁶ Therefore, both residential and commercial customers may face difficulty paying for essential water services. Access to water and sewer service is essential for the health, safety, and welfare of all people, particularly during this unparalleled crisis.⁷ It is against this economic and financial backdrop that OPC presents its recommendations.⁸

2. The NOPR Proposals Must Meet the Long-Established “Just and Reasonable” Standard for Public Utility Rates

Any rates proposed for adoption through the NOPR should be adopted only if the Board determines such rates meet the reasonableness standard established by applicable Constitutional and judicial authority.

The United States Supreme Court has identified a federal Constitutional basis, pursuant to the Fifth Amendment's prohibition against confiscation and the Fourteenth Amendment's guarantee of due process, for imposing a just and reasonable standard on public utility rates.⁹ Under this reasonableness standard, “[w]hat the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience, and on the other hand, *what the public*

⁶ See Zickuhr, Kathryn, *How COVID-19 is affecting small businesses in D.C.*, DC Policy Center, April 30, 2020. Heather Long, *Small business used to define America's economy. The pandemic could change that forever.* The Washington Post, May 12, 2020.

⁷ *The Human Right to Water and Sanitation*, G.A. Res. 64/292, UN Doc. A/RES/64/292 (July 28, 2010), retrieved from <https://undocs.org/A/RES/64/292>); *Human Rights and Access to Safe Drinking Water and Sanitation*, UN Human Rights Council Res 15/9, A/HRC/RES/15/9 (September 30, 2010), retrieved from <https://undocs.org/A/HRC/RES/15/9>; Patricia A. Jones and Amber Moulton, Unitarian Universalist Service Committee, *The Invisible Crisis: Water Unaffordability in the United States*, at p. 29 (May 2016), retrieved from <http://uswateralliance.org/sites/uswateralliance.org/files/Invisible%20Crisis%20-%20Water%20Affordability%20in%20the%20US.pdf>.

⁸ See <https://www.nasuca.org/nwp/wp-content/uploads/2020/05/2020-01-NASUCA-COVID-19-Policy-Resolution-Final-5-12-20-.pdf>.

⁹ See, e.g., *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 693 (1923) (*Bluefield*) (Rates which are not sufficient to yield a reasonable return on the value of property used... are unjust, unreasonable and confiscatory.).

is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."¹⁰

While United States Supreme Court precedent generally involves investor-owned public utilities, the District of Columbia Circuit Court of Appeals in a challenge to water and sewer rates established by the District of Columbia Council, applied this reasonableness standard to the municipal utility's rates.¹¹ When reviewing a challenge to the rates set by the District of Columbia Council in *Metropolitan Washington*, the court cited the reasonableness standard set forth in *Vernon v. Public Utilities Com.*, 318 A.2d 121, 125-26 (1971).¹² The court in that case held the reasonableness standard is "the governing principle for determining rates to be charged by a public utility" and went on to describe it as "the right of the public on one hand to be served at a reasonable charge, and the right of the utility on the other to a fair return on the value of its property used in the service."¹³ As an instrumentality of the District of Columbia government, DC Water's authority to set rates for water and sewer services is subject to the same reasonableness standard applied to its predecessor in *Metropolitan Washington*.¹⁴ Consequently, rates established by DC Water pursuant to the subject NOPR must conform to the reasonableness standard set forth in the applicable Constitutional and judicial precedents.

¹⁰ *Smyth v. Ames*, 169 U.S. 466, (1898) (Emphasis added).

¹¹ *Apartment & Office Bldg. Assoc. of Metropolitan Washington v. District of Columbia*, 415 A.2d 797 (D.C. Cir. 1980) (*Metropolitan Washington*).

¹² See *Metropolitan Washington* citing *Vernon v. Public Utilities Com.*, 318 A.2d 121, 125-26 (Conn. Supp. 1971).

¹³ See *id.*

¹⁴ D.C. Code § 34-2202.02(b).

3. The FY2022 Rate Proposals Should be Postponed Until After the FY2022 Financial Planning Process Concludes in 2021

The NOPR proposes to amend rates, charges, and fees for FY2022 consistent with Resolution No. 20-19. OPC's review of DC Water's FY2022 rate proposal shows a failure to demonstrate the reasonableness of the proposal. Therefore, OPC recommends that DC Water postpone the FY2022 rate proposal until after the FY2022 financial planning process concludes in 2021. While the NOPR includes proposals for FY2022, it is based on incomplete information, as outlined below.

The budget process for the FY2022 rate adjustment has just begun. In a response to OPC's question about the projected FY2022 budget, DC Water responded that it will begin the development of its FY2022 proposed budget in the Summer of 2020 and will conclude with the DC Water Board adoption in the Winter of 2021.¹⁵ In addition, the budget process addresses only a portion of the development of the total revenue requirement and resulting rates to cover those costs. Other components, such as financial policy decisions and revenue offsets, that will have a substantial impact on the total revenue requirement, are developed in multiple decision-making processes throughout the year. Indeed, the COS Study recommends that DC Water revisit budget escalation estimates annually as part of its financial planning process due to the commodity-intensive nature of the water and sewer industry.¹⁶

For the above reasons, the FY2022 rate proposal should be postponed until 2021. This will provide much more accurate and complete information on the actual revenue requirement for FY2022. Also, this will allow the public and OPC to participate more fully in the processes that

¹⁵ See Exhibit OPC-4 (Question 3) and Exhibit OPC-5 (Question 1).

¹⁶ See Section 3.1.1, page 5 of DC Water COS Study.

develop and affect the FY2022 revenue requirement. Public input can only be meaningful when all stakeholders work from the same basic set of facts, data, and analyses. The process in 2021 for the FY2022 rate proposal can follow a similar process followed in 2020 for the instant proceeding.

Finally, postponing the FY2022 rate proposal is prudent considering the current challenging economic environment. While rates should never be higher than absolutely necessary, if the projected FY2022 rates prove to be higher than necessary, customers would be especially harmed by paying unreasonably higher rates during a time when they can least afford it. In any case, according to various projections,¹⁷ the four percent (4%) inflation factor used for the FY2022 rate proposal may be too high by a factor of two. Instead, a more realistic assumption of two percent (2%) for inflation should be used for FY2022.¹⁸

4. DC Water Should Consider Additional Lifeline Tiers Similar to the Water Lifeline Tier for Residential Customers

DC Water should consider additional Lifeline Tiers for the Wastewater rate, Stormwater rate, Customer Fee, and Water System Replacement Fee similar to the Water Lifeline Tier for residential customers. This will encourage water conservation and result in total bill savings for residential customers.

Lifeline rates have been well established in the utility industry generally¹⁹ and in the District for electric, natural gas, and telephone services.²⁰ DC Water's Water Lifeline Tier for residential customers was introduced as an incentive to conserve water and to reduce monthly customer bills by providing a lower rate for the first 4 Ccf of water. It is unclear whether DC

¹⁷ See Paragraphs 35-38 of the Affidavit.

¹⁸ See Paragraph 39 of the Affidavit.

¹⁹ See Paragraph 44 of the Affidavit.

²⁰ See Paragraphs 41-43 of the Affidavit.

Water has considered other Lifeline Tiers. In response to OPC's question why there is not a Tier rate structure for the Customer Metering, Sewer, and Clean Rivers Impervious Area Charge (CRIAC) rates, DC Water said it does not have documents on this matter.²¹

There could be additional bill savings if the Lifeline Tier concept is expanded beyond the Water rate. Currently, the Lifeline Tier for Water is only twenty (20) percent of the average monthly residential customer's bill. The current Lifeline Tier lowers the average residential customer's Water rate by thirteen percent (13%). The Lifeline Rate concept can be applied to the other services at the same 13% proportion. For example, the Sewer Lifeline Tier could mirror the current Water Lifeline Tier by billing the first 4 Ccf of wastewater at a lower rate. The Stormwater/CRIAC Lifeline Tier could be implemented by billing the first segment of a customer's tier Equivalent Residential Unit (ERU) at a lower rate than the remaining ERUs.²² The Lifeline Tier for the Metering Fee could be designed by providing a lower rate for residential customers with the smaller meters.²³ And, the Lifeline Tier for the Water System Replacement Fee (WSRF) could be developed for residential customers only in the form of a lower fee for the smaller meters.²⁴

Applying Lifeline Tiers to the other eighty percent (80%) of the average monthly residential customer's bill will result in greater bill savings. Accordingly, it would reduce the average customer's bill for Sewer from \$52.95 to \$46.07, Stormwater/CRIAC from \$19.52 to \$16.98, Customer Metering Fee from \$4.96 to \$4.32, and Water System Replacement Fee from

²¹ See Exhibit OPC-6 (Question 7).

²² See Paragraphs 51-53 of Affidavit.

²³ See Paragraphs 54-56 of Affidavit.

²⁴ See Paragraphs 57-59 of Affidavit.

\$6.30 to \$5.48.²⁵ This could result in a total bill reduction of \$10.88 per month, or 10.4%, for the average residential customer in FY2021.²⁶

5. DC Water Should Change the Actual Combined Debt Service Coverage Ratios From 1.75 for FY2021 and 1.71 for FY2022 to a Debt Service Coverage Ratio of 1.6 or Less

As per the COS Study, DC Water's proposed Debt Service Coverage is 1.75 for FY2021 and is 1.71 for FY2022. OPC recommends that DC Water change the Actual Combined Debt Service Coverage Ratios to a Debt Service Coverage Ratio of 1.6 or less. In the same COS Study, DC Water management set a Debt Service Coverage Ratio of 1.6. Using the 1.6 ratio will result in lowering the revenue requirement and, in turn, lowering the average customer's bill.²⁷ The Office notes that its recommendation is at the higher range of reasonableness for DC Water Debt Service coverage ratios. While OPC is recommending a ratio of 1.6, lower Debt Service Ratios are viable options. For example, here is a basis for additional savings to residential customers by using a Debt Service Ratio of 1.4, as per DC Water Board policy,²⁸ or a Debt Service Ratio of 1.2, as prescribed by the DC Water Master Indenture of Trust.²⁹

6. DC Water's Enhancements to its CAP Programs are a Positive Development to Assist Low- and Middle-Income Consumers

OPC supports the proposed enhancements to the CAP programs as they will assist low- and middle-income consumers. In the 2019 Customer Assistance Program II (CAP2) proceeding, OPC advocated that DC Water should consider the need to transition to a funding mechanism

²⁵ See Paragraph 49 of the Affidavit.

²⁶ *Id.*

²⁷ See Paragraphs 64-79 of Affidavit and Exhibits OPC 1-3.

²⁸ See Exhibit OPC 5 (Question 11). See Paragraphs 64-79 of Affidavit and Exhibits OPC 1-3.

²⁹ *Id.*

providing ongoing and predictable revenue for CAP2. As in 2019, OPC supports the DC Water proposal to make CAP2 a permanent program.

DC Water is vested with an affirmative responsibility to assist low-income customers. The proposed amendments to the CAP programs support that obligation. Pursuant to Section 34-2202.16(b-1)(1) of the D.C. Code, DC Water has an obligation to “offer financial assistance programs to mitigate the impact of any increases in retail water and sewer rates and the impervious area charge on low-income residents of the District.”³⁰ The Board also approved, via Resolution No. 14-56, its *General Principles of Affordability for Low-Income Customers*, which reinforce the obligation codified in Section 34-2202.16(b-1)(1) of the D.C. Code.³¹

Affordability is a key concern for OPC as we strive to keep utility rates low and to reduce the financial burden on utility consumers. District residents in all eight wards must be able to pay their water bills. Water is the only life sustaining utility service. . The COVID-19 pandemic makes the need for affordable rates for water service even more critical. Therefore, the amendments to the CAP programs to provide rate relief to eligible customers is needed and necessary. OPC further recommends that DC Water explore other options to assist customers, such as the proposal to establish additional Lifeline Tiers described above, as per the DC Water decision to make withdrawals from the Rate Stabilization Fund over the next two years to benefit customers.

CONCLUSION

In conclusion, OPC presents these recommendations in furtherance of its goal of ensuring reasonable rates and tangible benefits to all DC Water ratepayers and consumers. For the above

³⁰ D.C. Code § 34-2202.16(b-1)(1).

³¹ DC Retail Water and Sewer Rates Committee Agenda, September 4, 2014.

reasons, OPC requests that the Board accept the recommendations made herein and grant such other relief as deemed appropriate.

Respectfully submitted,

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