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July 15, 2022

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: John Kerr Musgrave, IV v. Pittsburgh Water and Sewer Authority
Docket No. C-2020-3020714

Dear Secretary Chiavetta:

Enclosed for electronic filing please find The Pittsburgh Water and Sewer Authority's ("PWSA") Motion in Limine with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

/s/ Lauren M. Burge

Lauren M. Burge

Enclosure

Cc: Cert. of Service w/enc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave, IV,	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2020-3020714
	:	
The Pittsburgh Water and Sewer Authority,	:	
Respondent.	:	
	:	

NOTICE TO PLEAD

To: John Kerr Musgrave, IV
6059 Bunkerhill Street
Pittsburgh, PA 15206
jmusky@earthlink.net

You are hereby notified that a reply to the enclosed **Motion in Limine** of The Pittsburgh Water and Sewer Authority (“Authority”) must be filed within 20 days of the date of service.

All pleadings, such as a response to a Motion in Limine, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Authority and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

With electronic copies to:

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/s/ Lauren M. Burge

Lauren M. Burge, Esquire

Date: July 15, 2022

Counsel for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave, IV,	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2020-3020714
	:	
The Pittsburgh Water and Sewer Authority,	:	
Respondent.	:	
	:	

**THE PITTSBURGH WATER AND SEWER AUTHORITY’S
MOTION IN LIMINE**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE EMILY I. DEVOE:

Pursuant to 52 Pa. Code § 5.103 of the regulations of the Pennsylvania Public Utility Commission (“PUC” or “Commission”), 52 Pa. Code § 5.103, and the Interim Order Cancelling Evidentiary Hearing and Establishing Litigation Schedule issued on May 5, 2022 (“May 5, 2022 Interim Order”), The Pittsburgh Water and Sewer Authority (“PWSA” or the “Authority”) submits this Motion in Limine. The purpose of this Motion in Limine is to respectfully request that Administrative Law Judge Emily I. DeVoe (“ALJ DeVoe”) issue an Interim Order limiting and restricting the ability of John Kerr Musgrave, IV (“Mr. Musgrave or Complainant”) to present the witnesses and proposed testimony identified in his Witness List provided on May 13, 2022.

Through his Witness List, Mr. Musgrave largely ignores ALJ DeVoe’s Interim Order granting PWSA’s Motion to Dismiss in part and denying it in part (“March 18, 2022 Interim Order”) regarding the issues that are properly before the Commission in this proceeding. In addition, Mr. Musgrave seeks to present repetitious and cumulative evidence. Moreover, any probative value of much of the proposed testimony is outweighed by confusion of the issue and a

waste of the Commission's resources, as well as those of PWSA. In support of this Motion, PWSA avers as follows:

I. BACKGROUND

1. On July 8, 2020, the original Formal Complaint of Mr. Musgrave was served on PWSA.

2. On August 10, 2020, PWSA filed an Answer with New Matter and Preliminary Objections to the complaint.

3. The Complainant filed an Amended Formal Complaint on December 29, 2021. In response, on January 12, 2022, PWSA filed an Answer to the Amended Complaint as well as a Motion to Dismiss.

4. On March 18, 2022, ALJ DeVoe issued an Interim Order granting PWSA's Motion to Dismiss in part and denying it in part ("March 18, 2022 Interim Order"). A detailed procedural history of this matter is included in the March 18, 2022 Interim Order. That procedural history is incorporated herein by reference.

5. By hearing notice dated March 21, 2022, a telephonic evidentiary hearing was scheduled regarding the remaining matters in this Complaint for April 21, 2022 at 10:00 a.m. PWSA filed a Motion for Continuance, which was granted, and the evidentiary hearing was rescheduled for May 25, 2022 at 10:00 a.m.

6. A Prehearing Conference was held on April 28, 2022 at 10:00 a.m. After this conference, ALJ DeVoe issued an Interim Order dated May 5, 2022 cancelling the evidentiary hearing and establishing a litigation schedule ("May 5, 2022 Interim Order").

7. On May 13, 2022, in accordance with the May 5, 2022 Interim Order, PWSA and Mr. Musgrave exchanged proposed Witness Lists and provided copies to ALJ DeVoe.

8. Per the May 5, 2022 Interim Order, dispositive motions and motions in limine are due on July 15, 2022.

9. PWSA files this Motion in accordance with the May 5, 2022 Interim Order. In filing this Motion, PWSA reserves its right to object to testimony or documents presented at the hearing even if they were identified in the Witness List and not included as part of this Motion.

II. APPLICABLE LEGAL STANDARDS

10. Section 5.401 of the PUC's regulations provides that relevant and material evidence is admissible subject to objections on other grounds. This provision further states that evidence will be excluded if it is "repetitious or cumulative," or if its probative value is outweighed by the "danger of unfair prejudice," "[c]onfusion of the issues," or "[c]onsiderations of undue delay or waste of time." 52 Pa. Code § 5.401.

11. Section 5.403 authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence and confining the evidence to the issues in the proceeding. This provision further establishes the authority of the presiding officer to impose limitations on the number of witnesses, the time and scope of testimony, the production of further evidence and other necessary limitations. The regulation explains that these powers are necessary to direct and focus the proceedings consistent with due process. 52 Pa. Code § 5.403.

12. A motion in limine has been recognized as a valid means of requesting that the presiding officer control the receipt of evidence in the proceeding. *See e.g. Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015).

13. As a matter of policy, evidence that is irrelevant or immaterial to the issues presented in a proceeding must be excluded. 66 Pa. C.S. § 332(b); 52 Pa. Code § 5.401(a).

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 the existence of a material fact.” *EQT Prod. Co. v. Borough of Jefferson Hills*, 208 A.3d 1010, 1025 (Pa. 2019), *citing Commonwealth v. Johnson*, 160 A.3d 127, 146 (2017); *Commonwealth v. DeJesus*, 880 A.2d 608, 614-15 (Pa. 2005).

III. ARGUMENT

A. The Complainant’s Witness List Describes Proposed Testimony That Is Outside the Clear Boundaries Established by the March 18, 2022 Interim Order.

14. Through the March 18, 2022 Interim Order, ALJ DeVoe made abundantly clear which claims Mr. Musgrave may pursue in this proceeding and which claims are dismissed due to them being outside the Commission’s authority to address. Among the issues that the presiding officer has identified as being beyond the scope of this proceeding are private contractual disputes, the validity of the easement, PWSA’s compliance with the easement and claims for reimbursement of expenses.

15. The claims remaining for Mr. Musgrave to pursue are limited by the March 18, 2022 Interim Order to: (1) whether PWSA had maintenance and repair responsibilities for a service line running along Bunkerhill Street prior to November 11, 2020, which the Authority failed to perform and caused alleged breaks in January 2018, February 2020 and July 2020; and (2) whether PWSA violated Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, by failing to maintain proper levels of chlorine to the 6059 Bunkerhill property between May 2018 and October 2020. On the first claim identified by ALJ DeVoe, she emphasized that the issue is not related to ownership of the line but rather as to whether PWSA had “*maintenance and repair*

responsibilities” for the line. March 18, 2022 Interim Order at page 5, footnote 4 (emphasis in original).

16. Despite these clear limitations set forth by the March 18, 2022 Interim Order, the Complainant’s Witness List describes proposed testimony that goes well beyond the boundaries for this proceeding established by ALJ DeVoe.

17. The public interest is prejudiced by the wasteful use of the agency’s and the respondent’s time and resources in addressing a complaint. *See Mary Morrow v. PECO Energy Company*, Docket No. F-2022-3030427 (Order entered June 16, 2022, at p. 6). Although the *Morrow* Order involved a situation in which the complainant failed to appear at a hearing, the sentiment regarding the need to avoid wasteful use of the time and resources of the Commission and PWSA is equally applicable to a situation in which the presiding officer has issued clear rulings regarding the claims that may be pursued and many of the witnesses or proposed testimony of the Complainant exceeds those boundaries.

18. Similarly, it is well-settled that the Commission has discretion to dismiss a complaint without a hearing if a hearing is not in the public interest. 66 Pa.C.S. §703(b); 52 Pa. Code §5.21(d). A hearing is necessary only to resolve disputed questions of fact, and, when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v Pa. P.U.C.*, 563 A.2d 548 (Pa. Cmwlt. 1989); *Edan Transp. Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlt. 1993). While PWSA is not arguing that a hearing is unnecessary, these rules equally apply to issues that have been raised by the Complainant which should not consume valuable hearing time. As PWSA does not have investors, it should not be required to use ratepayer funds to defend many issues that have already been dismissed. Moreover, limiting the issues that are addressed during the hearing serves judicial economy.

19. The Complainant’s proposed Witness List identifies testimony on a variety of topics that are outside the limited remaining issues in this proceeding, such as expenses incurred for plumbing repairs, the location of the curb stop, the lack of information in property deeds regarding the water service line, as well as ownership of the line, and experiences of neighbors regarding water service to their individual properties. The chart below identifies the proposed testimony in the Complainant’s Witness List that should be excluded.

Witness	Topic	3/18/22 Order
Tracy Smith	<ul style="list-style-type: none"> ▪ Public vs. private nature of water line 	Pages 14-16
Judith Musgrave	<ul style="list-style-type: none"> ▪ Water line break repaired in 2007 ▪ Alleged break circa February 13, 2018 ▪ No mention of private water line in deed 	Pages 14-16, 18 and 20
	<ul style="list-style-type: none"> ▪ Expenses incurred for plumbing repairs, bottled water and clean ice 	Pages 19-20
	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
Dell and Kathy Ziegler	<ul style="list-style-type: none"> ▪ Water line break repaired in March 2017 ▪ Alleged incident circa March 14, 2018 ▪ No mention of private water line in deed 	Pages 14-16, 18 and 20
	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
Brooke McCartney and Justin Crowley	<ul style="list-style-type: none"> ▪ Water line break repaired in March 2017 ▪ Alleged incident circa February 13, 2018 ▪ Alleged incident circa March 14, 2022 ▪ No mention of private water line in deed 	Pages 14-16, 18 and 20
	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
Andrew McFarland and Rebecca Price	<ul style="list-style-type: none"> ▪ Water line break repaired circa winter/spring 2-15 ▪ Alleged incident circa March 14, 2020 ▪ No mention of private water line in deed 	Pages 14-16, 18 and 20
	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
Karen Toole	<ul style="list-style-type: none"> ▪ No mention of private water line in deed 	Pages 14-16
	<ul style="list-style-type: none"> ▪ Purchase of hose 	Pages 19-20
	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
Vivian Loftness and Volker Hartkopf	<ul style="list-style-type: none"> ▪ No mention of private water line in deed ▪ Public versus private nature of water line 	Pages 14-16
	<ul style="list-style-type: none"> ▪ Purchase of hose 	Pages 19-20
	<ul style="list-style-type: none"> ▪ Reduced consumption in Summer 	Pages 18 and 20

	<ul style="list-style-type: none"> ▪ Location of curb stop before and after work performed in Fall of 2020 	Page 21
John Musgrave	<ul style="list-style-type: none"> ▪ No mention of private water line in deed ▪ Records pertaining to public versus private nature of water line ▪ Water line break repaired in 2007 	Pages 14-16, 18 and 20
	<ul style="list-style-type: none"> ▪ Location of curb stop 	Page 21
	<ul style="list-style-type: none"> ▪ Purchase of hose 	Pages 19-20

20. The Complainant provides the names of six proposed witnesses who are representatives of the Pennsylvania Department of Environmental Protection (“PA DEP”), including Zachary Shoff; Jeff Allgyer; John Thomas; Renee Diehl; Tom McCaffrey; and Alan Eichler. In large part, the testimony of the PA DEP witnesses relates to water testing to determine if chlorine levels in the water complies with state regulatory requirements which PA DEP oversees. However, the question of whether chlorination levels in the water meets these standards has already been addressed and stricken from the Complaint. In an October 27, 2020 Order Granting Pittsburgh Water and Sewer Authority’s Preliminary Objection in Part and Denying in Part, ALJ Marta Guhl found that “specific chlorine readings are not in the Commission’s jurisdiction,” and ordered that “the Complainant’s allegations regarding specific chlorination levels as related to the Pennsylvania Safe Drinking Water Act and the Federal Safe Drinking Water Act are stricken from the Complaint.” October 27, 2020 Order at 4, Ordering Para. 3. The March 18, 2022 Interim Order notes that ALJ Guhl’s decision remains unchanged. March 18, 2022 Interim Order at 20. The Complainant’s Witness List ignores the October 27, 2020 Order and attempts to reintroduce issues related to specific chlorine levels. The Commonwealth Court has said that “[p]recedent makes clear the distinction between *water service*, which the Commission may regulate, and *water quality*, which may only be regulated by

the PADEP.”¹ (emphasis added). The testimony of these witnesses focuses on water quality rather than water service, which is outside the Commission’s jurisdiction and has previously been stricken from the Complaint. Therefore, the proposed testimony of these PA DEP witnesses should be excluded.

B. The Complainant’s Witness List and Proposed Testimony Should Be Limited Due to the Cumulative and Repetitious Nature of It.

21. The Complainant has identified approximately 40 lay and expert witnesses who he intends to present during the evidentiary hearing in this matter. Assuming that the direct examination and cross examination for each witness takes 60 minutes, the hearing would last 40 hours and need to span approximately 6-7 days before PWSA even presents its three designated witnesses. This estimate does not provide for the likelihood of disputes arising during the presentation of testimony, which would need to be addressed by the parties and ruled upon by the presiding officer.

22. While PWSA recognizes that the Commission is obligated to afford Mr. Musgrave due process, that obligation does not require the Commission to permit cumulative and repetitious testimony. To the contrary, due process is satisfied when the parties are afforded notice and an opportunity to be heard. *Schneider v. Pennsylvania Public Utility Commission*, 479 A.2d 10, 14 (1984). Undoubtedly, Mr. Musgrave will be given notice of the hearing, have an opportunity to testify in support of his Complaint and be afforded the option of cross-examining PWSA’s witnesses. He may also seek permission to make a closing argument and/or submit a brief in support of his position. These measures fully satisfy due process. To the extent that Mr. Musgrave proposes to present an additional witness or two to corroborate his testimony

¹ *Pickford v. PUC*, 4 A.3d 707, 713 (Pa.Cmwlth. Ct. 2010); *see also Rovin, D.D.S. v. PUC*, 502 A.2d 785 (Pa.Cmwlth. Ct. 1985).

on key points of relevance, PWSA would not view this approach as unreasonable. However, the Commission's obligation to afford him due process does not contemplate the cumulative presentation of several witnesses on the same issue. The interest in conserving resources and avoiding the wasteful use of time far outweighs the "bells and whistles" approach proposed by the Complainant.

23. In the Witness List, Mr. Musgrave identifies Dell and Kathy Ziegler; Brooke McCartney and Justin Crowley; Andrew McFarland and Rebecca Price; Karen Toole; Vivian Loftness and Volker Hartkopf; and John Musgrave as testifying that the fire hydrant on Bunkerhill was opened for days on end. Ten witnesses testifying as to the same factual averment is cumulative and repetitious. The Complainant should be required to limit the number of witnesses offering testimony about the fire hydrant on Bunkerhill to no more than three. In selecting such witnesses, Mr. Musgrave should be directed to elicit this testimony from witnesses who will be providing testimony on other issues so as to make for more efficient use of the hearing time.

24. The Complainant identifies several witnesses, including Michael Czipinski; Diana Szuch; three or more employees in PWSA Emergency Dispatch identified as "Melissa, Debra, Shannon, etc."; Julie Quigley; and John Musgrave, who are expected to provide testimony that Mr. Musgrave contacted various PWSA employees regarding chlorine levels in the water. It is cumulative and repetitious for a party to present 7 witnesses to testify as to an action taken by the Complainant regarding alleged chlorine levels. Rather, it is sufficient for Mr. Musgrave to testify that he made those contacts. If a PWSA witness refutes that testimony, the witness would be available for cross-examination.

25. The testimony of several witnesses, including Tracy Smith; Judith Musgrave; Dell and Kathy Ziegler; Brook McCartney and Justin Crowley; Andrew McFarland and Rebecca Price; Karen Toole; Vivian Loftness and Volker Hartkopf; and John Musgrave, is proposed to address issues relating to the private versus public nature of the water line. It is cumulative and repetitious for a party to present 12 witnesses to address the same issue.

C. The Complainant's Witness List and Proposed Testimony Should Be Limited So As to Avoid Confusion and Wasting Time.

26. Much of the proposed testimony would result in confusion and a waste of time. This is particularly true when the presiding officer has placed clear limitations on the issues that may be addressed in this proceeding.

27. Mr. Musgrave's Witness List identifies two witnesses from the Allegheny County Health Department's ("ACHD") Plumbing Division – Jeffrey Czochara and Ivo Miller – regarding permits and inspections for work performed on the Bunkerhill water line, replacement of party lines, and piping configurations as they relate to chlorine levels. However, ACHD plumbing regulations are not relevant to the limited issues in this proceeding and are outside the PUC's jurisdiction. Presentation of these witnesses would simply waste time and introduce extraneous evidence that may lead to confusion.

28. Similarly, the Complainant's Witness List identifies three general contractors or plumbers to testify about work done on the water line – RDN Plumbing, LLC, Beverly Services, and Michael Facchiano Contracting. It appears that these contractors were hired by homeowners at other properties served by the private party line, not by Mr. Musgrave. Based on the descriptions, testimony by these contractors is not relevant to the limited issues remaining in this proceeding. This testimony would only serve to waste time and resources and may lead to confusion on the issues.

29. The Complainant's Witness List also includes Tina Rhoades and Lloyd Steiner and Lathe Haynes, individuals who live on Sheridan Avenue. These witnesses live on a different street served by a different water line, but Mr. Musgrave proposes to introduce their testimony about flushing at the fire hydrant on their separate street and about Mr. Musgrave testing the chlorine concentrations in the water at their properties. This proposed testimony is entirely unrelated to the limited issues remaining in this proceeding and would only waste time and introduce confusion.

30. Generally, the testimony discussed in Section B above regarding cumulative and repetitive evidence would also lead to confusion and waste of limited time and resources. The testimony identified in Section B is incorporated herein and should be further excluded to avoid confusion and wasting time.

D. The Complainant's Witness List and Proposed Testimony Should Be Limited on the Basis That the Complainant May Not Represent the Interests of Other Customers.

31. It is well-settled that the Complainant may not represent the interests of other customers. *See* 52 Pa. Code § 1.21 *et seq.*; *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239556 (Interim Order dated Jan. 7, 2014); *Pettko v. Pa. American Water Co.*, Docket No. C-2011-2226096 (Interim Order dated Oct. 5, 2011). However, in many instances, the proposed testimony appears to be attempting to do just that.

32. The proposed testimonies of Dell and Kathy Ziegler, Brooke McCartney and Justin Crowley, Andrew McFarland and Rebecca Price, Karen Toole,² Vivian Loftness and Volker Hartkopf, Anne Massey, Tina Rhoades and Lloyd Steiner, and Lathe Haynes would provide testimony on various topics related to the water service to their individual homes,

² Note that Ms. Toole previously filed her own Formal Complaint with the Commission at Docket No. C-2020-3022232 regarding this same shared private water service line, which she subsequently withdrew.

including water line breaks on their properties, installation of a separate water service line to their properties, that the deeds to their properties do not mention a private water line, chlorine testing done at their homes, etc. These issues are not relevant to the remaining issues in this proceeding and appear to be allowing these neighbors to raise their individual concerns as part of Mr. Musgrave's complaint. Mr. Musgrave is not permitted to represent these customers as he is attempting to do here. Further, the subject of this Complaint is limited to the water service to the Musgrave property specifically, and this proposed testimony by his neighbors regarding service to their properties is outside the scope of this proceeding. This testimony is also cumulative and repetitious, as discussed above.

E. The Complainant's Witness List and Proposed Testimony Should Be Limited on the Basis That He Has the Burden of Proving His Claims and Should Not Be Permitted to Call PWSA Personnel as Witnesses.

33. It is well-established that a complainant has the burden of providing the allegations made in the complaint. 66 Pa. C.S. § 332(a). To satisfy this burden, Mr. Musgrave must demonstrate that PWSA violated either: (a) the Public Utility Code or another statute administered by the Commission; or (b) a regulation or order of the Commission. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990).

34. The Complainant seeks to call as witnesses at least 14 PWSA personnel, purportedly to prove his allegations. While Mr. Musgrave is certainly entitled to cross-examine the PWSA witnesses who present direct testimony, provided that the cross-examination is within the scope of that direct testimony, he should not be permitted to rely on PWSA personnel in an effort to prove the allegations he has made. However, in initiating this legal proceeding, the

Complainant assumed the burden of proving the allegations he made and should be prepared to do that without the assistance of PWSA's own employees.³

35. Further, PWSA is operating a very large water, wastewater and stormwater business, which provides essential services to customers on a daily basis. Parading 14 PWSA high-level employees with significant operational responsibilities into the evidentiary hearing, most of whom would have nothing of relevance to offer on the issues remaining in this proceeding and none of whom have been in contact with Mr. Musgrave regarding potential testimony, would be disruptive of PWSA's operations.

³ Of note, Mr. Musgrave has yet to follow the rules in the Commission's regulations pertaining to the subpoena of witnesses. 52 Pa. Code § 5.421. To the extent the Complaint later applies for the issuance of a subpoena, PWSA reserves the right to advance additional arguments opposing such a request.

IV. CONCLUSION

WHEREFORE, The Pittsburgh Water and Sewer Authority respectfully requests that Administrative Law Judge Emily I. DeVoe grant this Motion in Limine and any other relief deemed to be appropriate.

Respectfully submitted,

/s/ Lauren M. Burge

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Date: July 15, 2022

Counsel for
The Pittsburgh Water and Sewer Authority

Verification

I, Julie A. Mechling, am the Director of Customer Service for The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”), and I hereby state that the facts set forth in the foregoing **Motion in Limine** are true and correct to the best of my knowledge, information and belief and that I expect the Authority to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: July 15, 2022

/s/ Julie A. Mechling
Julie A. Mechling
Director of Customer Service
The Pittsburgh Water and Sewer Authority