**Before the**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave IV :

:

v. : C-2020-3020714

:

Pittsburgh Water and Sewer Authority :

:

**INTERIM ORDER**

**DENYING IN PART AND GRANTING IN PART APPLICATION FOR**

**ISSUANCE OF SUBPOENAS**

On November 8, 2022, I issued an Interim Order in the above-captioned matter setting a deadline of November 28, 2022, for John Kerr Musgrave IV (Complainant or Mr. Musgrave) to file and serve applications for issuance of subpoenas. The Interim Order also established a deadline of November 28, 2022, for responses or objections to the applications.

Consistent with the November 8, 2022, Order, Mr. Musgrave filed an application for the issuance of subpoenas for nine individuals, including six lay/fact witnesses and three expert witnesses, and one company, who Mr. Musgrave intends to call as an expert.

Objections to the application were filed by Pittsburgh Water and Sewer Authority (PWSA, Company, or Respondent) and Dell and Kathy Ziegler.

Lay/Fact Witnesses

PWSA had no objection to the subpoenas requested for Andrew McFarland and Rebecca Prince, Brooke McCartney and Justin Crowley, and Dell and Kathy Zigler. PWSA noted my decision in the November 9, 2022 Order, however, limiting Mr. Musgrave to calling no more than three fact or lay witnesses in addition to himself and his mother, Judith Musgrave. PWSA also noted it was not conceding that these witnesses’ testimony was relevant and was reserving the right to object to testimony and/or exhibits presented during the hearing.

Dell and Kathy Ziegler filed an objection to the subpoenas issued for their own testimony. Mr. Ziegler explained he and his wife are in their late seventies and a trip downtown in Pittsburgh and an expenditure of a day’s time would be a burden and inconvenience. He explained he offered to put his testimony in a written statement for Complainant, but Complainant refused that offer. Mr. Ziegler also objected to the subpoenas on the basis that Mr. Musgrave has requested subpoenas for other lay witnesses, and Mr. Ziegler and his wife are the fifth and sixth witnesses listed, well beyond the three witness maximum I have already established for Complainant.

Mr. Ziegler also explained that his wife Kathy has far less knowledge than himself of the event Mr. Musgrave intends to have them testify about. Finally, Mr. Ziegler argues the other witnesses, including Complainant and his mother, can discuss “the one incident in March 2017.” Mr. Ziegler argues, “my ten minutes of testimony can be covered by [Complainant and his mother] many times over and is merely repetition.” Mr. and Mrs. Ziegler request that the subpoena application for them be denied.

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.”[[1]](#footnote-1)

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.[[2]](#footnote-2)

Mr. and Ms. Zigler object to the subpoena application for their testimony on the basis they have limited knowledge of the events Mr. Musgrave would have them testify about and their testimony would be cumulative in light of the testimony Mr. Musgrave and his mother would provide. Complainant will be able to present his own testimony and that of his mother during the hearing. Based on Mr. Zigler’s representations in his objection, it appears any testimony he or his wife could provide would be redundant to the testimony of Mr. Musgrave and his mother. In exercising my discretion and authority under the Commission’s rules, I find the application for issuance of subpoenas for Dell and Kathy Ziegler is denied.

As for the other witnesses, Andrew McFarland and Rebecca Prince, and Brooke McCartney and Justin Crowley, these subpoenas shall be granted. However, Mr. Musgrave is limited to calling three *individuals* during the evidentiary hearing in addition to providing the testimony of himself and his mother. Although this Order grants subpoenas for these four individuals, Mr. Musgrave is limited to only presenting the testimony of three of them during the evidentiary hearing to testify.

Expert Witnesses

Tracy Smith, PWSA Open Records Officer

The Application requests a subpoena for Tracy Smith, PWSA’s Open Records Officer, to provide testimony that “[d]ocuments pertaining to the public vs. private nature of the water line at the end of Bunkerhill were mailed to John Musgrave in 2018.” The Application further requests that Ms. Smith be directed to supply a variety of documents.

PWSA opposes this subpoena on a number of grounds. First, it argues Complainant appears to be using this subpoena application to inappropriately circumvent the discovery process in this proceeding. Mr. Musgrave was advised repeatedly during this proceeding that he could engage in discovery to obtain documents from PWSA. PWSA notes I set a litigation schedule that included a discovery period, and Complainant did not issue a single discovery request on PWSA. PWSA argues that now, at this late date over two years after the Complaint was first filed, Complainant is attempting to subpoena documents to be provided during the hearing, presumably to fish for information to support his claims. PWSA argues this is impermissible under the Commission’s regulations and would violate PWSA’s due process rights.

Additionally, the Company argues that, as Open Records Officer, Ms. Smith does not have substantive knowledge about the documents Complainant seeks to obtain. PWSA argues there is no relevant information that would be gained by requiring Ms. Smith to testify beyond simply stating that PWSA previously provided copies of certain documents to the Complainant. PWSA maintains that Mr. Musgrave already has copies of these documents and can offer them into evidence himself. Any concerns about exhibits can be addressed during the hearing without the extremely limited testimony requested from Ms. Smith.

Finally, PWSA argues this request seeks information that is irrelevant to the limited scope of this proceeding. The Application seeks information and documents “pertaining to the private vs. public nature of the water line.” PWSA maintains that, as specified in the March 18, 2022 Interim Order, the specific question being addressed here is “whether PWSA had maintenance/repair responsibilities over the service line running along the private portion of Bunkerhill Street prior to November 11, 2020.” PWSA argues the subpoena request seeks information that is beyond the scope of this limited question and therefore irrelevant. For these reasons, PWSA argues the subpoena application, as it applies to Tracy Smith, should be denied.

I agree with PWSA that the portion of the application for subpoena requesting documents is improper. Mr. Musgrave had an opportunity to engage in discovery with the Company, and he failed to do so. Mr. Musgrave will have an opportunity to offer exhibits already in his possession into evidence at the hearing, subject to objection by the Company.

Furthermore, Complainant does not establish that Ms. Smith has any technical expertise that would allow her to testify as an expert witness on the technical issues involved in this case. Ms. Smith could perhaps authenticate and/or lay an appropriate foundation to admit documents Mr. Musgrave previously obtained from PWSA. The Application as it pertains to Ms. Smith is denied. However, to the extent PWSA raises an objection based on hearsay or authenticity in response to Mr. Musgrave offering into evidence an exhibit he testifies he obtained directly from PWSA, I may reconsider my ruling on the portion of the subpoena application seeking Ms. Smith’s testimony.

Rick Obermeier, former PWSA Chief of Operations

The Application requests a subpoena for Rick Obermeier, PWSA’s former Chief of Operations, to testify that “John Musgrave, upon [Mr. Obermeier’s] request, bought and connected hoses from the hydrant at the end of Bunkerhill…” PWSA argues this request should be denied as it seeks a subpoena for testimony that is unnecessary as it can be provided by Mr. Musgrave himself. The Company submits that Mr. Musgrave can provide his own testimony regarding his purchase and use of any hoses, to the extent such testimony is relevant. PWSA argues it is unnecessary for Mr. Obermeier to be subpoenaed to provide this testimony.

PWSA further argues that, while Mr. Obermeier retired from PWSA as of January 2022, it intends to call its current Director of Operations – William “BJ” McFaddin – as a witness during the hearing. PWSA notes Complainant will have the opportunity to cross-examine Mr. McFaddin as relevant and appropriate and can direct any necessary questions to him. For these reasons, PWSA argues the subpoena application as it applies to Rick Obermeier should be denied.

I agree that Mr. Musgrave has the personal knowledge to testify on the topics he indicated he would have Mr. Obermeier testify about. Mr. Musgrave even listed these topics in his own anticipated testimony. Mr. Obermeier’s testimony would be redundant and repetitive to that of Mr. Musgrave, and perhaps his mother, too. Therefore, the application for issuance of subpoena for Mr. Obermeier is denied.

Jeff Czochara, Plumbing Inspector, Allegheny County Health Department

The Application requests a subpoena for Jeffrey Czochara, Plumbing Inspector for the Allegheny County Health Department (ACHD) to provide testimony regarding his inspection of the party water line at 6059 Bunkerhill Street, and whether permits were filed and inspections completed by ACHD for work done on the water lines. The Application also requests that Mr. Czochara provide documentation concerning work performed on the water line in Bunkerhill Street from the year 1700 to present.

PWSA argues this request should be denied, as the requested testimony and documentation raise issues that are outside the Commission’s jurisdiction and that are irrelevant to this proceeding. PWSA argues that the Commission, as a creation of the General Assembly, only has the power and authority granted to it by the General Assembly and contained in the Public Utility Code. PWSA submits that the Commission has no authority over ACHD or to enforce or interpret any ACHD regulations or other standards. PWSA argues that any ACHD permits or inspections were obtained and the results of any ACHD inspections are therefore irrelevant to this proceeding.

Additionally, PWSA argues that the request that Mr. Czochara bring to the hearing all records related to the water line from the year 1700 to the present is “truly absurd,” and presenting such records covering over three hundred years for the first time during the hearing would violate PWSA’s due process rights. For these reasons, PWSA maintains the subpoena application as it applies to Mr. Czochara should be denied.

As discussed in the March 18, 2022, Order, one of the issues in this case is “whether PWSA had maintenance/repair responsibilities over the service line running along the private portion of Bunkerhill Street prior to November 11, 2020.” Whether PWSA sought permits or requested inspections for repair projects on the water main or service line(s) on Bunkerhill may be relevant to this issue.

However, it is not clear whether Mr. Czochara is the records custodian of the documents Mr. Musgrave is seeking. I agree with PWSA that it would be unreasonably burdensome for Mr. Czochara or the ACHD records custodian to provide documents or testimony regarding “all records related to the water line from the year 1700 to the present.” Therefore, the application for subpoena with regard to Mr. Czochara is granted for Mr. Czochara’ s testimony. Additionally, it is appropriate to issue a separate subpoena for the ACHD records beginning November 11, 2000 (a twenty-year period dating back from Ms. Musgraves’ signing of the TEA and LSLRA on or about November 11, 2020), directed to the Records Custodian of those records, in the event Mr. Czochara is not the records custodian. Any testimony or documents Mr. Musgraves offers into evidence from or through Mr. Czochara or the ACHD Records Custodian, if Mr. Czochara is not the Records Custodian, is subject to any appropriate objection from PWSA.

Beverly Services (Plumbing)

The Application generically requests a subpoena for Beverly Services (Plumbing) without specifying exactly who would provide the requested expert witness testimony. The Application states that an unidentified Beverly Services representative would testify that “they tried to repair the water line break under the street at 6041 Bunkerhill on 7/27/20, but that they had to abandon the project due to the deteriorated condition of the water line,” as well as claims that repairs of prior breaks on the water main “may have hastened the demise of the party line.”

PWSA argues the Beverly Services subpoena request should be denied because: (1) the requested testimony has no relevance to the remaining limited issues in this proceeding; and (2) the expected testimony raises new claims that have not been previously raised at any other point in this proceeding.

PWSA argues the application for subpoenas implies that PWSA’s repairs to the nearby water main in some way compromised the party service line. PWSA argues this allegation is not relevant to the question of whether PWSA had maintenance/repair responsibilities over the service line running along the private portion of Bunkerhill Street prior to November 11, 2020, or whether PWSA failed to maintain proper levels of chlorine in its water between May 2018 through October 2020. Since this testimony is not relevant to the remaining issues in this proceeding as identified in the March 18, 2022 Interim Order, PWSA submits that the Application should be denied.

Further, PWSA argues the testimony described in the Application raises entirely new claims that have not previously been raised in this proceeding. PWSA argues Mr. Musgrave filed both his original Complaint and an Amended Complaint, but never previously included a claim that PWSA repairs on the water main in some way contributed to the deterioration of the party line serving the property. PWSA argues it has not had an opportunity to fully investigate and respond to this claim, and to raise an entirely new issue at this late stage would violate PWSA’s due process rights. For these reasons, PWSA requests that the subpoena application as it applies to Beverly Services should be denied.

The Commission’s rules clearly indicate how applications for issuance of subpoenas must be addressed to “a party, person, or individual.”[[3]](#footnote-3) Mr. Musgrave’s application for subpoena names only “Beverly Services” and identifies them as an “expert.”

A presiding officer may waive a requirement of the Commission’s regulations when necessary or appropriate, as long as the waiver does not adversely affect a substantive right of a party.[[4]](#footnote-4) In this case, listing only the company name, rather than an individual, is too vague and does not put the Company on sufficient notice of the identity of the individual (or his or her expert qualifications) who would be testifying. Furthermore, it should not be left up to Beverly Services to decide who to send, if anyone, to testify on Mr. Musgraves’ behalf at the evidentiary hearing, and there is no guarantee any individual sent by Beverly Services would have any personal knowledge of this matter or sufficient expertise to provide relevant testimony. Mr. Musgrave could have discovered that identity of an appropriate individual with a simple phone call.

For these reasons, the application for subpoena for Beverly Services is denied. I note, however, Mr. Musgrave has the option of securing the presence of a representative of Beverly Services, without the issuance of a subpoena, for the evidentiary hearing and calling that individual to testify.

Steve Anderjack, Project Manager, Michael Facchiano Contracting

The Application requests a subpoena for Steve Anderjack, Project Manager for Michael Facchiano Contracting, to provide testimony regarding alleged damage to the curb, street, and rock garden when the water service line serving the 6059 Bunkerhill Street property was replaced, and regarding costs to re-pave the street. PWSA argues that such issues have already been addressed and dismissed in this proceeding, and therefore this subpoena request should be denied.

PWSA argues the March 18, 2022 Interim Order granted PWSA’s Motion to Dismiss “such that John Musgrave’s Claim that Pittsburgh Water and Sewer Authority is responsible for repaving the trench dug along Bunkerhill Street and restoring the curb of Bunkerhill Street bordering Ms. Musgraves’ property is dismissed for lack of jurisdiction.” The testimony sought from Mr. Anderjack would only be relevant to address these claims that have already dismissed. Therefore, PWSA argues the subpoena application as it applies to Steve Anderjack should be denied.

As I explained in my March 18, 2022 Order, there is no dispute that Ms. Musgrave signed the Lead Service Line Replacement Agreement (LSLRA) with PWSA and had it returned to them on November 11, 2020. Complainant also admits that Ms. Musgrave signed a Temporary Easement Agreement (TEA) on November 16, 2020. Complainant admits that the TEA identifies the portion of Ms. Musgraves’ line running along the private portion of Bunkerhill Street to the curb box as being privately owned. Complainant admits in the Amended Complaint that the LSLRA provides PWSA is not responsible for restoring private property, such as laws and driveways, and does not argue that this term of the LSLRA is invalid. His argument is that the LSLRA is silent as to the responsibility for restoration of private streets, and as such, PWSA should be deemed responsible.

Complainant avers PWSA subsequently completed a line replacement project along Bunkerhill Road, resulting in damage to his Mother’s private property and the private road. As already discussed in the March 18, 2022, Order, this claim depends upon the validity, application, and interpretation of the TEA and LSLRA, issues the Commission lacks jurisdiction to decide. This claim has already been dismissed from this case.

Mr. Musgraves proposes to present the testimony of Mr. Anderjack so Mr. Anderjack can testify about the alleged damage to the curb, street, and rock garden when the water service line serving the 6059 Bunkerhill Street property was replaced, and regarding costs to re-pave the street. I agree with PWSA that these issues have already been dismissed from the case. The application for subpoena is denied with respect to Mr. Anderjack.

THEREFORE,

IT IS ORDERED:

1. That the application for subpoenas with regard to Mr. Czochara is granted, and a subpoena shall be issued for his testimony.
2. That the application for subpoenas with regard to the ACHD records is granted such that a subpoena shall be issued for: (1) the production of any and all documents dating back to November 11, 2000 related to (a) any permits sought by or on behalf of PWSA for work to be performed by or on behalf of PWSA on water lines on Bunkerhill Street, Pittsburgh, PA, and (b) inspections performed or requested by or on behalf of PWSA for work performed by or on behalf of PWSA on water lines on Bunkerhill Street, Pittsburgh, PA; and (2) the testimony of the Records Custodian of these records.
3. That the application for issuance of subpoenas for Andrew McFarland, Rebecca Prince, Brooke McCartney, and Justin Crowley is granted, and subpoenas shall be issued for the testimony of these individuals. Complainant remains limited to calling three fact/lay witnesses (in addition to himself and his mother) to testify at the evidentiary hearing.
4. That the application for issuance of subpoenas is otherwise denied.
5. That any objections to the testimony or any portions thereof shall be timely made at the evidentiary hearing in this proceeding.

Date: January 4, 2023 /s/

Emily I. DeVoe

Administrative Law Judge

**C-2020-3020714 - JOHN KERR MUSGRAVE IV v. THE PITTSBURGH WATER AND SEWER AUTHORITY**JOHN KERR MUSGRAVE IV 6059 BUNKERHILL STREETPITTSBURGH PA 15206-1155**412.661.2374**jmusky@earthlink.netAccepts eServiceSHANNON BARKLEY ESQUIREPWSAPENN LIBERTY PLAZA I1200 PENN AVENUE 2ND FLOORPITTSBURGH PA 15222**412.676.6685**sbarkley@pgh2o.comAccepts eServiceLAUREN M BURGE ESQUIREECKERT SEAMANS CHERIN & MELLOTT LLC600 GRANT STREET 44TH FLOORPITTSBURGH PA 15219**412.566.2146**lburge@eckertseamans.comAccepts eService  
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1. 52 Pa. Code § 5.401. [↑](#footnote-ref-1)
2. 52 Pa. Code § 5.403. [↑](#footnote-ref-2)
3. 52 Pa Code § 5.421. [↑](#footnote-ref-3)
4. 52 Pa. Code § 1.2. [↑](#footnote-ref-4)