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May 20, 2024

**Via Electronic Email**

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

Re: SCH USA, LLC v. Aqua Pennsylvania Wastewater, Inc.  
Docket No. C-2022-3036893 and C-2022-3037118

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Dear Secretary Chiavetta:

Enclosed for electronic filing please find SCH USA, LLC's Motion in Limine for Limiting Instruction Pursuant to the January 11, 2024 Order and 52 Pa. Code § 5.243(e) or, alternatively, Motion to Modify the Procedural Schedule and Request for Expedited Response in regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*/s/ Bryce R. Beard*

Bryce R. Beard

BRB/red

Enclosure

cc: Hon. John M. Coogan w/enc. (via email)  
Cert. of Service w/enc.

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of SCH USA, LLC's Motion in Limine for Limiting Instruction Pursuant to the January 11, 2024 Order and 52 Pa. Code § 5.243(e) or, alternatively, Motion to Modify the Procedural Schedule and Request for Expedited Response upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Email Only**

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Date: May 20, 2024

*/s/ Bryce R. Beard*

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Bryce R. Beard, Esq.  
Attorney for SCH USA, LLC

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SCH USA, LLC	:	
	:	Docket Nos. C-2022-3036893
v.	:	C-2022-3037118
	:	
Aqua Pennsylvania Wastewater, Inc.	:	

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**SCH USA, LLC’S MOTION IN LIMINE FOR LIMITING INSTRUCTION PURSUANT  
YOUR HONOR’S JANUARY 11, 2024 ORDER AND 52 PA. CODE § 5.243(E) OR,  
ALTERNATIVELY, MOTION TO MODIFY THE PROCEDURAL SCHEDULE AND  
REQUEST FOR EXPEDITED RESPONSE**

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Pursuant to 52 Pa. Code § 5.103 and the Scheduling Order issued on January 11, 2024 by Administrative Law Judge John M. Coogan (“ALJ” or “Judge Coogan”), SCH USA LLC (“SCH USA” or the “Complainant”), by and through its undersigned counsel, submits this Motion in Limine for Limiting Instruction Pursuant to 52 Pa. Code § 5.243(e) or, alternatively, to amend the procedural schedule as due process requires. Additionally, this Motion requests that Your Honor order, pursuant to 52 Pa. Code 5.103(c), that any response to this Motion be submitted on an expedited, ten (10) day basis so that any response be submitted no later than 4:30 PM on Thursday, May 30, 2024 to resolve this matter prior to SCH USA’s current June 7, 2024, rebuttal testimony deadline.

**I. BACKGROUND AND PROCEDURAL HISTORY**

1. On November 21 and 29, 2022, SCH USA filed two Formal Complaints regarding unjust and unreasonable bills for wastewater service provided by Aqua Pennsylvania Wastewater, Inc. (“Aqua”) for four (4) of SCH USA’s accounts related to the Lodge, Willowbrook, the Galleria, and Laundry. The Formal Complaints docketed as captioned above.

2. Aqua filed separate Answers with New Matter to both of the Formal Complaints.

In response, SCH USA filed separate Replies to Aqua's New Matter.

3. On January 6, 2023, the Formal Complaints were consolidated by the ALJ.

4. The initial call-in hearing scheduled for March 17, 2023 was converted to a prehearing conference on March 10, 2023 in accordance with a joint request from the parties.

5. On March 15, 2023, both SCH USA<sup>1</sup> and Aqua<sup>2</sup> filed Prehearing Memoranda. *Importantly*, Aqua's Prehearing Memorandum proposed a litigation schedule whereby this proceeding would be conducted through the use of written testimony where Complainant would first submit its case-in-chief direct testimony, followed by Respondents responsive case-in-chief direct testimony 30 days after, with a similar cadence for rebuttal testimony prior to an evidentiary hearing convening.

6. On March 17, 2023, the Prehearing Conference was held with counsel for both parties in attendance.

7. On March 10, 2023, Judge Coogan issued a Scheduling Order directing Aqua to file a Motion regarding issues it stated it seeks to resolve prior to the scheduling of an evidentiary hearing no later than April 17, 2023.

8. On April 17, 2023, Aqua filed its Motion for Judgment on the Pleadings, seeking dismissal of the Complaints.

9. On May 8, 2023, SCH USA filed its a response to Aqua's Motion.

10. By Order entered May 22, 2023, Judge Coogan denied Aqua's Motion for Judgment on the Pleadings.

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<sup>1</sup> <https://www.puc.pa.gov/pcdocs/1777413.pdf>

<sup>2</sup> <https://www.puc.pa.gov/pcdocs/1777434.pdf>

11. Following the above referenced Orders, SCH USA and Aqua jointly requested that the scheduling of this matter be held in abeyance while the parties undertook good-faith settlement negotiations.

12. After various status updates were provided to Judge Coogan throughout 2023 on the progress of settlement negotiations, the parties informed Judge Coogan on December 4, 2023 that settlement negotiations were not successful and that the matter should be scheduled for litigation. By order entered January 11, 2024, a procedural schedule was adopted as proposed by the parties as follows:

SCH Written Direct: April 3, 2024  
Aqua Written Direct: May 15, 2024  
SCH Written Rebuttal: June 7, 2024  
Aqua Written Rebuttal: June 18, 2024  
Hearings: June 26, 27, 2024

13. On April 3, 2024, SCH USA submitted its case-in-chief written direct in compliance with the January 11, 2024 order including: SCH USA Statement No. 1 – the Direct Testimony of Carlos Padilla consisting of eight (8) pages of testimony and two (2) exhibits in both PUBLIC and CONFIDENTIAL format; SCH Statement No. 2 – the Direct Testimony of Ronald Carrier consisting of eleven (11) pages, two (2) appendices, and two (2) exhibits in both PUBLIC and CONFIDENTIAL format; and SCH Statement No. 3 – the Direct Testimony of Frank Lacey consisting of eleven (11) pages, two (2) appendices, and two (2) exhibits in both PUBLIC and CONFIDENTIAL format.

14. On May 15 & 16, 2024,<sup>3</sup> Aqua provided its case-in-chief written direct testimony including: Aqua St. No. 1 – the Direct Testimony of Christopher E. Manning consisting of five

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<sup>3</sup> By email, Counsel for Aqua requested additional time until 12:00 PM on May 16, 2024 to prepare and submit the testimony of one of its witnesses. SCH USA indicated it did not object to the requested extension, and by email, Judge Coogan granted Aqua's request. At 12:20 PM on May 16, 2024, Aqua served the written direct testimony of its witness Steve Clark.

(5) pages and four (4) exhibits; and Aqua St. No. 2 – the Direct Testimony of Steve Clark consisting of three (3) pages and no exhibits.

## II. LEGAL STANDARDS

15. A Motion in Limine<sup>4</sup> is an appropriate vehicle to make rulings on evidentiary matters before the evidence is offered to assist in producing just determinations. Section 5.403(a)(2) of the Commission’s regulations authorizes the presiding officer to control the receipt of evidence, expressly granting authority to confine the evidence to the issues in the proceeding and to impose other necessary limitations.<sup>5</sup>

16. Additionally, Section 5.403(b) of the Commission’s regulations requires the presiding officer to “actively employ these powers to direct and focus the proceedings consistent with due process.”<sup>6</sup>

17. A Motion in Limine has been recognized as a valid means of requesting that the presiding officer control the receipt of evidence in proceedings as an exercise of authority granted under 52 Pa. Code § 5.483 (regarding authority of presiding officer).<sup>7</sup>

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<sup>4</sup> PA. R.E. 103 allows trial courts to make rulings on evidence prior to trial or at trial but before the evidence is offered through Motions in Limine as such motions can expedite the trial and assist in producing just determinations. *See* Pa. R.E. 103, Comment No. 2 (“Pa.R.E. 103(a)(1) specifically refers to motions in limine. These motions are not mentioned in the Federal rule. Motions in limine permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations.”) While the Commission is not strictly bound by the Pennsylvania Rules of Evidence, the Commission has not abandoned all evidentiary rules, and essential principles must be observed. *See Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602, Opinion and Order at 14-15 (Order entered May 3, 2018);

<sup>5</sup> 52 Pa. Code § 5.403(a)(2).

<sup>6</sup> 52 Pa. Code § 5.403(b).

<sup>7</sup> *See Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015)(Link: <https://www.puc.pa.gov/pcdocs/1371278.docx>); *Dwayne Ackie et al v. Philadelphia Gas Works*, Docket No. C-2019-3013993, Opinion and Order (Order entered September 15, 2022)(recognizing ALJ Heep’s ruling on PGW’s motion in limine to exclude evidence)(Link: <https://www.puc.pa.gov/pcdocs/1758778.pdf>); *Glen Riddle Station L.P. v. Sunoco Pipeline, L.P.*, Docket No. C-2020-3023129, Order 1) Denying Motion In Limine Of Glen Riddle Station, L.P., 2) Granting In Part And Denying In Part Motion To Strike Of Glen Riddle Station, L.P., 3) Denying Motion In Limine Of Sunoco Pipeline, L.P. And 4) Granting Joint Stipulation Filed By Sunoco Pipeline, L.P. (Order entered August 4, 2021)(Recognizing the presiding officer’s authority to rule on Motions in Limine under 52 Pa. Code §§5.403 & 5.483)(Link: <https://www.puc.pa.gov/pcdocs/1714495.docx>).

18. Consistent with prior Commission practice, a Motion in Limine is appropriate in this circumstance to determine and limit the production of further evidence to be presented in this proceeding prior to it being offered into the record.<sup>8</sup>

### **III. SUMMARY OF THE ARGUMENT**

19. SCH USA requests that Your Honor: (a) issue a limiting instruction to ensure that Aqua does not violate Your Honor's January 11, 2024 Order and the Commission's regulations by presenting testimony in rebuttal which should have been presented in Aqua's May 15, 2024 case-in-chief testimony response to SCH USA's April 3, 2024 case-in-chief testimony; or (b) in the alternative, modify and extend the procedural schedule (as provided herein) to allow SCH USA to present written surrebuttal testimony addressing Aqua's likely late submitted case-in-chief testimony which should have been presented in Aqua's May 15, 2024 case-in-chief. The Commission's regulations allow for each of these forms of relief.

20. First, the Commission's regulations and Your Honor's Order described above bar the introduction of evidence in rebuttal that should have been included in the party's direct case:

(e) A party **will not be permitted to introduce evidence during a rebuttal phase** which:

- (1) Is repetitive.
- (2) Should have been included in the party's case-in-chief.**
- (3) Substantially varies from the party's case-in-chief.

52 Pa. Code § 5.243(e)(emphasis added). See also Your Honor's January 11, 2024 Order at Ordering Paragraph No. 4 which states:

4. That all parties shall comply with the provisions of 52 Pa. Code § 5.243(e) which prohibits the introduction of evidence during rebuttal which should have been included in the party's case-in-chief or which

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<sup>8</sup> See e.g. *Neil Touchet v. Frontier Comm. of Pa., Inc.*, Docket No. C-2023-3038895, Order Granting Motion in Limine (Order entered April 3, 2024)(By Administrative Law Judge Gail M. Chiodo)(Link: <https://www.puc.pa.gov/pcdocs/1823174.pdf>)

substantially varies from the party's case-in-chief, unless the party is introducing evidence in support of a proposed settlement.

See January 11, 2024 Order at 4.<sup>9</sup>

21. The purpose of the rule is to protect due process rights to avoid trial by ambush and prevent surprise. “The clear purpose of [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.” *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, \*85; *Pennsylvania Pub. Util. Comm'n v Total Environmental Solutions, Inc.*, 103 Pa. P.U.C. 110 (July 30, 2008) (parties here were “ambushed” by the new information contained in rebuttal testimony that “corrected” information provided in direct testimony and discovery responses.); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at \*114-116 (Pa PUC May 23, 2008) (“...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case.”), *aff'd*, Opinion and Order at 89 (July 30, 2008) (“*TESP*”); *City of Lancaster (Sewer Fund) v. Pennsylvania Pub. Util. Comm'n*, 793 A.2d 978 (Pa. Cmwlth. 2002) (Commonwealth Court affirmed the PUC’s ruling that the City improperly proffered direct evidence during a rebuttal phase of the proceeding, citing 52 Pa. Code § 5.243(e)) (“*City of Lancaster*”).

22. Alternatively, if Your Honor does not issue a limiting instruction that Aqua must adhere to the January 11, 2024 Order and 52 Pa. Code § 5.243(e), SCH USA requests that, pursuant to 52 Pa. Code § 5.223(a) and the January 11, 2024 Order Ordering Paragraph 8 that Your Honor modify the procedural schedule as provided herein to allow SCH USA to submit surrebuttal testimony to what SCH USA’ believes to be Aqua’s forthcoming June 18, 2024

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<sup>9</sup> <https://www.puc.pa.gov/pcdocs/1812115.docx>

“case-in-chief” response to SCH USA’s April 3, 2024. The modified schedule will provide SCH USA with an opportunity to respond to Aqua’s late-submitted “case-in-chief” in compliance with fundamental due process and the Commission’s regulations on Order of procedure of proceedings where Complainants bear the burden of proof and both open and close the proceeding. 52 Pa. Code § 5.242.

23. Lastly, due to the impending deadlines under the current procedural schedule setting SCH USA’s “rebuttal” testimony to be submitted on June 7, 2024, pursuant to 52 Pa. Code § 5.103(c), SCH USA respectfully requests that Your Honor shorten the response period for this motion from twenty (20) days to ten (10) days, or by 4:30 PM on Thursday, May 30, 2024 so that the issue of Aqua’s failure to respond to SCH USA’s direct testimony in its case-in-chief can be resolved sufficiently in advance of SCH USA’s June 7, 2024 deadline and in advance of the hearings. Unless the answering period is shortened, Aqua’s answer would not be due until June 10, 2024. This motion contains significant procedural and due process concerns which need to be addressed as soon as possible for both the parties and Your Honor’s availability.

#### IV. ARGUMENT

- a. **A limiting instruction that Aqua comply with Your Honor’s January 11, 2024, Order and 52 Pa. Code § 5.243(e) is required to avoid trial by ambush, prevent surprise, and protect SCH USA’s fundamental due process where Aqua is barred from introducing evidence during a rebuttal phase which should have been included in its case-in-chief testimony.**

24. It is without doubt that a party before the Pennsylvania Public Utility Commission is not permitted to introduce evidence during a rebuttal phase which should have been included in the party’s case-in-chief. *See* 52 Pa. Code § 5.243(e); *TESI*; *City of Lancaster*. This rule cannot simply be waived or ignored – it is a rule that protects the due process rights of litigants

before the Commission by expressly barring trial by ambush tactics by keeping the parties confined to the scope of their direct testimony. As the Commonwealth Court affirmed in the *City of Lancaster*, parties cannot proffer direct evidence to support their case-in-chief in a rebuttal phase as provided in 52 Pa. Code § 5.243(e). Further, as the Commission has explained, “the clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.” *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, \*85 (“*UGI Utilities, Inc.*”).

25. As established by Your Honor’s January 11, 2024 Order, the procedural schedule sets Aqua’s responsive case-in-chief to have been submitted on May 15, 2024. This date – jointly agreed to by all parties – allowed Aqua 42 days to respond to SCH USA’s case-in-chief in a sequential format as requested by Aqua. *Supra* Paragraph 4.

26. On April 3, 2024, SCH USA submitted its above-described direct testimony providing its case-in-chief on topics including, *inter alia*:

- 1) Background of SCH USA and the Complaint (SCH USA St. No. 1 at 2-4);
- 2) SCH USA’s testimony that Aqua’s EDU based rates are unreasonable as applied to SCH USA (SCH USA St. No. 1 at 4-6);
- 3) Aqua’s inadequate communications and service regarding Aqua’s billing leading up to the Complaints (SCH USA St. No. 1 at 6-7);
- 4) Wastewater Measurement and Billing and Aqua’s EDU base charges (SCH USA St. No. 2 at 2-9);
- 5) Analysis of Actual Wastewater Usage by SCH USA (SCH USA St. No. 2 at 9-11); and
- 6) the unreasonableness of Aqua’s billing method as applied to SCH USA (SCH USA St. No. 3 at 3-11).

27. Rather than responding to SCH USA's above summarized testimony in its case-in-chief testimony *as it was required to do in this Complaint proceeding*, Aqua presented a total of eight (8) pages of testimony which did not reference SCH USA's April 3, 2024 testimony. Aqua's May 15, 2024 testimony simply provided basic information on: 1) Aqua's acquisition of Township of Kidder Wastewater System (Aqua St. No. 1 at 3); 2) Aqua's Compliance Tariff post-acquisition (Aqua St. No. 1 at 3-4); 3) Aqua's current Tariff (Aqua St. No. 1 at 4-5); and 4) a brief description of the Wastewater Service provided to SCH USA (Aqua St. No. 2 at 2-3).

28. Based on this, SCH USA believes and avers that Aqua is withholding its case-in-chief testimony responsive to the topics contained in Complainant's April 3, 2024 testimony so that Aqua will submit this responsive testimony outside its case-in-chief under the procedural schedule (i.e. in Aqua's June 18, 2024 rebuttal) whereby SCH USA will have no opportunity for its witnesses and experts to respond further.

29. Fundamental fairness requires that Aqua's substantively unresponsive case-in-chief (which fails to even reference to SCH USA's April 3, 2024 case-in-chief) must be taken as the entire scope of Aqua's responsive case-in-chief in this Complaint. Simply put, Aqua must not be permitted to take "a second bite" at its case-in-chief apple responding to SCH USA's testimony at a later date in order to shore up its eight (8) page direct testimony which failed to address SCH USA's April 3, 2024 case-in-chief. If Aqua intends to act as SCH USA believes it will, Aqua's late submitted case-in-chief response to SCH USA's testimony is simply not allowed under well settled law. *See 52 Pa Code § 5.243(e); TESI; City of Lancaster; UGI Utilities, Inc.*

30. Therefore, SCH USA requests that Your Honor issue a limiting instruction that Aqua is prohibited from introducing evidence during rebuttal which should have been included in Aqua's case-in-chief response to Complainant's April 3, 2024 testimony. Without such

limiting instruction, nothing will stop Aqua from committing trial by ambush on June 18, 2024, just days before the currently scheduled hearings, where SCH USA has no opportunity to prepare and submit a suitable response. Prior Commission decisions, the Commission's Regulations, and Your Honor's Orders placed Aqua on notice that such conduct and inclusion of case-in-chief testimony in rebuttal will not be tolerated. Therefore, consistent with these regulations and Orders, SCH USA respectfully requests that Your Honor issue a limiting instruction prohibiting Aqua from presenting additional case-in-chief testimony into the record responding to SCH USA's April 3, 2024 case in chief because doing so violates 52 Pa. Code § 5.243(e).

**b. In the Alternative, Your Honor should modify the procedural schedule to protect SCH USA's due process, prevent Aqua's trial-by-ambush tactics, and allow SCH USA to present responsive testimony to Aqua's late submitted case-in-chief.**

31. While SCH USA avers the Aqua must be appropriately prohibited from substantively supplementing its May 15, 2024 case-in-chief testimony where it failed to respond to SCH USA's April 3, 2024 case-in-chief – a fact which Aqua's answer to the Motion will necessarily shine light on - SCH USA alternatively proposes that to remedy Aqua's attempt to violate SCH USA's due process rights and proceed by trial by ambush tactics, the procedural schedule be amended to allow SCH USA to respond to Aqua's likely late-filed case-in-chief response to SCH USA's April 3, 2024 testimony.

32. As the Party with the Burden of Proof, SCH USA shall both open and close the proceeding. *See* 52 Pa. Code § 5.242. Had Aqua complied with Your Honor's January 11, 2024, order and the 52 Pa. Code § 5.243(e) and presented its responsive case-in-chief evidence on May 15, 2024, SCH USA would have had the opportunity to respond to Aqua's case-in-chief in SCH USA's June 7, 2024 rebuttal testimony. However, under the current procedural schedule, SCH

USA will be afforded no opportunity to respond to Aqua’s likely response to SCH USA’s April 3, 2024 direct testimony.

33. Indeed, under the current schedule, SCH USA is only permitted to provide further testimony to respond in “rebuttal” to the eight (8) pages of testimony served by Aqua on May 15, 2024 – none of which is responsive or referencing SCH USA’s April 3, 2024 direct testimony.

34. Not allowing SCH USA, the party with the burden of proof, to respond to Aqua’s response to its case-in-chief would be a fatal error to SCH USA’s due process rights and would violate the Commission’s order of procedure as stated at 52 Pa. Code § 5.242.

35. Worse, Aqua’s tactics to not present its case-in-chief on May 15, 2024, as it was required deprives SCH USA of any ability to conduct discovery on Aqua’s case-in-chief testimony where Aqua will be submitting its case-in-chief response just eight (8) days before the scheduled hearings in this matter. This affords SCH USA no ability to probe the veracity of Aqua’s case-in-chief through discovery – a compounding violation by Aqua against SCH USA’s due process rights.

36. Therefore, if Your Honor is not inclined to limit Aqua’s testimony going forward to its May 15, 2024, case-in-chief consistent with the January 11, 2024 Order and 52 Pa. Code § 5.243(e), SCH USA requests that the following procedural schedule be adopted for this proceeding:

SCH Written Direct (served)	April 3, 2024
Aqua Written Direct (served)	May 15 & 16, 2024
Aqua Written Rebuttal in Response to SCH’s April 3, 2024 Direct	June 18, 2024
SCH Written Surrebuttal to Aqua’s May 15 & 16 Direct and June 18 Rebuttal Testimony	August 9, 2024
Telephonic Hearings	August 27-28, 2024

V. **REQUEST FOR EXPEDITED TEN (10) DAY RESPONSE PERIOD AND REQUEST FOR EXPEDITED TREATMENT.**

37. Pursuant to 52 Pa. Code § 5.103(c), SCH USA respectfully requests that Your Honor shorten the response period for this motion from twenty (20) days to ten (10) days, or that Aqua be ordered to submit a response no later than 4:30 PM on Thursday, May 30, 2024 so that the issues involved with Aqua's failure to present its case-in-chief response on May 15, 2024 to SCH USA's April 3, 2024 case-in-chief can be resolved sufficiently in advance of the SCH USA's rebuttal testimony deadline currently set for June 7, 2024. Unless the answering period is shortened, Aqua's answer would not be due until June 10, 2024 – after SCH USA's current rebuttal deadline. This motion contains significant procedural issues which must be addressed as soon as possible for both the parties and Your Honor's availability.

Respectfully submitted,

/s/ Bryce R. Beard

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Date: May 20, 2024

*Counsel for SCH USA, LLC*