

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 5th day of August 2014.

CASE NO. 14-0872-W-GI
GENERAL INVESTIGATION PURSUANT TO W.VA. CODE §24-2-7 INTO THE ACTIONS OF WVAWC IN REACTING TO THE JANUARY 9, 2014 CHEMICAL SPILL.

COMMISSION ORDER

The Commission holds the current procedural schedule in abeyance and schedules a conference to address discovery.

INTRODUCTION

In our May 21, 2014 Order fixing this matter for general investigation we set forth what we perceived as the natural and needed focus of that General Investigation:

[A]t the time of and under the circumstances that existed with the spill, did the actions of WVAWC in reacting to the spill and the presence of MCHM in its raw water or finished water supply constitute unreasonable or inadequate practices, acts, or services as provided under the provisions of W.Va. Code §24-2-7 or other pertinent provision of Chapter 24 of the West Virginia Code.

The Commission had hoped that, by more specifically identifying the key issue in this proceeding, we could shorten discovery, avoid untold discovery disputes and streamline the preparation and prosecution of this case.

Even (reasonably) tough-minded administrative bodies can be naïve.

As indicated at the time of the 10-K filed by the American Water Works Company (filed February 27, 2014), this spill incident is now the subject of at least sixty civil actions in the federal courts of West Virginia seeking monetary damages or other equitable relief and a related bankruptcy proceeding.

This Commission proceeding does not, cannot and will not involve claims for money damages or some of the other types of claims and requests for relief asserted in

the civil proceedings (such as medical monitoring). The Commission has no statutory authority to hear or resolve money damage claims; nor do we, in this proceeding, believe that we should, with the infallibility of 20/20 hindsight, undertake prudence reviews of prior construction projects certificated by this Commission. We have also made it clear that we are not assessing the reasonableness of any rate recovery or expense reimbursement through the cost of service of West Virginia-American Water Company (WVAWC) in this case.

We are not a court of law, but we do have extensive legislative responsibilities under W.Va. Code §24-1-1(b):

The Legislature creates the Public Service Commission to exercise the legislative powers delegated to it. The Public Service Commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

We are extremely concerned about this proceeding.

Given what we viewed as the fairly narrow scope of our "key issue" and the heavy fall calendar that the Commission faces, the Commission fixed a fairly aggressive procedural schedule for the filing of testimony and the completion of discovery and hearings.

We are now in the middle of a serious discovery dispute that will require additional time to unravel. While some discovery has been delivered or agreed to among the parties, WVAWC objects to some of the other discovery on the basis that the discovery

- Is requested for use in civil litigation filed against WVAWC in the United States District Court for the Southern District of West Virginia;
- Seeks information that is outside the scope of the general investigation, i.e., relates to actions, activities or omissions that were not done "at the time of and under the circumstances that existed with the spill;" and
- Is burdensome and needless in light of testimony filed by WVAWC in this case.

This case is also complicated by claims that some of the discovery materials that are being requested are also entitled to protection from public disclosure under Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Act). In an era of sensitivity to the safety and protection of utility

infrastructure and the need to protect the nature and location of that infrastructure from public disclosure and possible terrorist attack, WVAWC has raised objections and concerns to disclosure of this type of information as well. We do not make light of those concerns.

BACKGROUND

On January 9, 2014, Freedom Industries, Inc., suffered a significant leak in its storage tank facility allowing the unpermitted discharge of crude 4-methylcyclohexane methanol (MCHM) into the Elk River. This leak occurred about one mile from the raw water intake of the West Virginia-American Water Company (WVAWC).¹ That MCHM found its way into the raw water intake structure and ultimately into the finished water supply of WVAWC produced at its Kanawha Valley Treatment Plant. The finished water went into the WVAWC transmission, distribution, and storage systems and into the systems of some sale for resale customers of WVAWC (for ease of convenience we will refer to the affected water systems collectively as the Kanawha Valley System). After detection of the MCHM, WVAWC entered a “do not use” notice for WVAWC customers that ran from January 9, 2014, and was lifted by zones throughout the Kanawha Valley System beginning January 13, 2014. While it was in place, the “do not use” notice impacted all or a portion of over 100,000 customers of WVAWC served from the Kanawha Valley System.

WVAWC continued to produce and pump water into its transmission, distribution, and storage facilities after the beginning of the “do not use” notice, but the water provided was designated to be used only for flushing toilets and to provide fire protection. The health concerns generated by the MCHM and the resulting “do not use” notice resulted in many restaurants, schools and some other business customers of WVAWC, closing their doors. During the “do not use” notice, residential customers suffered significant inconvenience and uncertainty and were forced to resort to using containers and bottles of fresh water obtained from relief centers, friends, family members, and commercial vendors.

The Commission received a significant number of informal and formal complaints from WVAWC customers regarding the consequences of the chemical spill. The complaints were wide-ranging and alleged a number of unreasonable or faulty practices by WVAWC or others, but generally focused on the difficulties created by the inability of customers to use the water supplied by WVAWC during the “do not use” period. Many of these complaints requested full or partial relief from paying for the water contaminated by the spill during the “do not use” period and in some instances beyond.

¹ The leak has most commonly been referred to as the “spill.” We will use that term to identify this event in this Order without attempting to characterize what happened as a “spill.”

On May 21, 2014, the Commission entered an Order (i) initiating a focused general investigation into this matter, (ii) holding the formal complaint cases related to the chemical spill in abeyance, (iii) setting a procedural schedule, including a hearing scheduled for October 7-9, 2014, (iv) requiring WVAWC to file direct testimony responsive to specific questions of the Commission, (v) requiring WVAWC to provide public notice of the focused general investigation, and (vi) providing a brief overview of the rules of practice before the Commission.

The Commission granted petitions to intervene by the Consumer Advocate Division (CAD), Advocates for a Safe Water System (ASWS), and the Business Intervenors. Commission orders of June 4 and June 10, 2014.

Motions to Compel and Objections filed by the Parties

Business Intervenors

On June 27, 2014, Business Intervenors filed its first set of combined discovery requests on WVAWC.

On July 7, 2014, WVAWC filed in response to the Business Intervenors discovery. WVAWC objected (i) that the requests are designed, at least in part, to develop information to be used in civil litigation and will frustrate and evade the orderly development of discovery and other pretrial litigation under the Local Rules of the District Court and place the Company at an unfair tactical disadvantage in the civil litigation, (ii) to discovery beyond the scope of this general investigation, (iii) to discovery of information subject to attorney work product, (iv) to the discovery to the extent it purports to impose discovery obligations on American Water Works Company, Inc., (v) that some of the questions related to material addressed by direct testimony, (vi) to the burdensome nature of some questions and (vii) to general vagueness in some of the questions.

On July 18, 2014, WVAWC filed responses and objections to select interrogatories filed by Business Intervenors. Although some of the specific objections raised additional points, the WVAWC objections focused in the main on three areas:

Objection A. Requests for the Purposes of Civil Litigation. Several requests are designed to develop information to be used in civil litigation that counsel for the Business Intervenors has filed against the Company, now pending in the United States District Court for the Southern District of West Virginia. Counsel seeks in that civil action to represent members of one or more plaintiff classes, which would include the Business Intervenors, and to recover, among other relief, claimed business interruption and property damages, losses which are substantially similar to

those alleged as the basis for the Business Intervenors' intervention in this proceeding. Allowing the Business Intervenors to develop in this general investigation evidence for claims in pending civil litigation would frustrate and evade the orderly development of discovery and other pretrial litigation under the Federal Rules of Civil Procedure and the Local Rules of the District Court and place the Company at an unfair tactical disadvantage in the civil litigation. See generally the Company's July 7 objections at 1-2. In addition, the Commission observed in its May 21 Order that it is not a court of general jurisdiction, cannot award damages of the kind Business Intervenors' counsel seeks in the pending civil litigation, and is limited to exercising only that authority granted to it by the Legislature. (May 21 Order at 7.) The Commission should not permit its processes to be used to garner discovery responses to support civil claims that would be outside the Commission's own jurisdiction.

Objection B. Requests Outside the Scope of the General Investigation. Several requests elicit information about the Company's facilities, operations, and/or compliance with applicable regulatory standards at the Kanawha Valley Treatment Plant prior to the Company's first notification of the Freedom Industries spill on January 9, 2014. In its Orders of May 21, 2014 and June 10, 2014, the Commission stressed that the general investigation would be "focused" in scope. The Commission's investigation would evaluate the Company's actions:

- **In reaction** to the spill (May 21 Order at 7);
- **At the time** of the spill (*id.* at 6); and
- **Under the circumstances** presented by the spill (*id.*).

In the same discussion, the Commission emphasized that the investigation's purpose would be "limited to the WVAWC reaction to the spill . . ." (*id.* at 7) and then, on the next page, that its examination would "focus on the actions and activities of WVAWC **following the spill . . .**" (*id.* at 8) (emphasis added). The Commission also made clear that it did not intend to permit the general investigation to be used to "evaluate" quality standards for public drinking water supplies, the jurisdiction over which is vested in the statutory and regulatory authority of the Bureau for Public Health of the West Virginia Department of Health and Human Resources. (*Id.*) The five specific topics the Commission directed the Company to address in its prefiled direct testimony all related to the Company's response to the spill, at and after the time it occurred and under the circumstances it presented. (*Id.* at 17-18, ordering paragraph 6.) The Commission reiterated these limitations in its July 10 Order (July 10 Order at 4-5) and cautioned the Business Intervenors that the Commission's

decision to grant their petition to intervene “does not expand the scope of this proceeding” as described in the May 21 Order (*id.* at 5). These limitations are appropriate and constrain the scope of the general investigation and, in consequence, all discovery efforts undertaken in this case. See the Company’s July 7 objections at 2-3.

Several requests violate these Commission limitations on the scope of this proceeding by seeking information about (i) the Company’s facilities, operations, activities, practices, and/or compliance with applicable regulatory standards in respect of the Company’s treatment of water at the Plant before the spill and/or (ii) the adequacy of those regulatory standards before the spill. These requests do not inquire about the Company’s activities in reaction to the spill, are not limited to the time at or after the spill, and do not relate to the circumstances presented by the spill; they are outside the scope of the general investigation, irrelevant to the purposes of the general investigation, and thus objectionable.

Objection C: Requests that are burdensome or needless in light of Company testimony. Requiring the Company to respond further to several of the requests would be needless and/or unduly burdensome, especially in view of the limited scope of the general investigation and the 100+ pages of direct testimony the Company filed a few days after the requests were propounded. [Emphasis in original.]

On July 30, 2014, Business Intervenors filed a motion to compel responses to Interrogatory Nos. 8-13, 16, 31, 43, 45, 47, and 48, and Requests for Production Nos. 1-3, 5-18, 20-27, 29-30, and 35. In response to the general objections of WVAWC (outlined above), the Business Intervenors asserted that (i) the dispositive question is whether the discovery requests meet the standard for discovery as set by the Commission rules, not whether the interrogatories at issue might also be used in civil litigation, (ii) materials created prior to January 9, 2014, are within the scope of this investigation insofar as those materials will provide the Commission with essential information about the operating conditions at the water treatment plant as of January 9, 2014, (iii) if WVAWC has already provided a full response to a discovery request through its testimony, identifying that response would comply with the discovery request, and (iv) the Bioterrorism Act exempts only a narrow category of materials from disclosure, and Business Intervenors do not seek those materials. Business Intervenors also provided specific arguments in support of each of its interrogatories that are subject to its motion.

CAD

On July 11, 2014, CAD filed its second request for information on WVAWC.

On July 24, 2014, WVAWC filed its objections and responses to the CAD second request for information. In addition to specific objections, WVAWC asserted general objections similar to those in its July 18, 2014 objection to discovery by Business Intervenors.

On July 28, 2014, CAD filed a motion to compel asking that the Commission require WVAWC to respond to questions A-2, A-3, A-4, A-5, A-6, A-11, A-12, A-14, A-17, A-21, A-25, and A-26 of its second data request. In response to the general WVAWC objections CAD asserted (i) use is made of this General Investigation in follow-on civil litigation is irrelevant to the CAD discovery requests, (ii) the CAD inquiry into how planning, if any, could or did affect the WVAWC spill response is directly relevant to the Commission inquiry in this case, (iii) its questions do not pose undue burden on the Company, (iv) this Commission has long held that broad discovery should be allowed in all proceedings and that the test per Rule 26 of the W.Va. Rules of Civil Procedure is not limited to whether the material requested is admissible but whether it is reasonably calculated to lead to discovery of admissible evidence.

On July 29, 2014, WVAWC filed a response to the CAD motion to compel. WVAWC argued that CAD (i) ignored the scope of this general investigation, (ii) ignored the substance of the WVAWC objections, and (iii) has the opportunity to address the reasonableness WVAWC actions in a rate-making context through an appropriate rate-making proceeding. WVAWC asked that the Commission deny the CAD motion to compel.

On July 30, 2014, CAD filed a reply to the WVAWC response.

ASWS

On July 11, 2014, ASWS filed its first interrogatories on WVAWC.

On July 22, 2014, WVAWC filed responses and objections to select interrogatories filed by ASWS. In addition to specific objections, WVAWC asserted general objections similar to those in its July 18, 2014 objection to discovery by Business Intervenors.

On August 1, 2014, ASWS filed a motion to compel responses to Information Request Nos. 1-4, 6, 8, 13, 17, and 18. In response to the general objections of WVAWC (outlined above), ASWS asserted that (i) there is no legal doctrine supporting the assertion of a civil litigation privilege, (ii) in order to understand what happened, and what did not happen, during the chemical spill, it is important for the Commission to understand the context in which decisions were made, (iii) the WVAWC pre-filed direct testimony is short on specifics and details, and raises as many questions as it answers,

and (iv) objections regarding burden should be specific. ASWS also provided specific arguments in support of each of its interrogatories that are subject to its motion.

DISCUSSION

The current procedural schedule in this case requires direct testimony from Staff and intervenors by August 20 and completion of discovery by September 10, 2014. In consideration of the breadth and depth of the discovery disputes amassing in this case, we realize that the current procedural schedule may be overly ambitious. Accordingly, the Commission will hold the current procedural schedule in abeyance to allow time to untangle the discovery disputes currently before us.

The Commission will schedule a discovery conference to address the discovery disputes described in the CAD, ASWS, and Business Intervenors respective motions to compel. Because WVAWC has alleged that some of the information sought is subject to protection under the Bioterrorism Act, the Commission may hold some of this conference *in camera*.

To ensure that the Commission and the parties are able to proceed through the list of disputed interrogatories at the discovery conference as efficiently as possible, the Commission will require that the parties collaborate to develop a consolidated discovery binder. The discovery binder should address individually each disputed interrogatory as follows:

1. State the interrogatory.
2. State the objection by WVAWC.
3. Statement by the intervenor as to the specific factual or legal reasons as to why the Commission should require anything further of WVAWC.
4. A response by WVAWC.

Each disputed request should be presented as a separate entry in the discovery binder. Where, however, the same or substantially similar interrogatories were submitted by separate intervenors, the disputed interrogatory may be combined into a single entry.

It is not sufficient for the parties to make conclusory statements regarding, for example, relevance or that complying with the request would be burdensome. The parties should, instead, provide the factual and legal bases that would support a conclusion by the Commission that the information requested is or is not (i) needless or unduly burdensome, (ii) pertinent to substantial issues in the proceeding and (iii) reasonably calculated to lead to discovery of admissible evidence. Further, the supporting factual and legal bases should be specific to the individual disputed interrogatory, and parts thereof, as appropriate. For example, if all or part of a response to an interrogatory is barred by federal or state statute, regulation, or case law, the party

making that claim should specify the authority and specify with particularity the part or parts of the response so covered.

The parties should understand that simply because a response may be subject to a Freedom of Information Act exemption does not render that response necessarily barred from discovery. The parties may, however, indicate whether any specific portions of a response, should the Commission grant a motion to compel regarding that interrogatory, would be submitted under seal.

The parties must file the joint discovery binder on or before August 13, 2014.

Finally, we note that the May 21, 2014 Order stated, in part:

In this case, the Commission is not inclined to spend the limited resources of the parties, or of the Commission, engaged in discovery disputes. To that end, the Commission expects the parties to fully cooperate in the discovery process and respond to all discovery requests that fall within the scope, as described above, of this general investigation. Only the most intractable discovery issues should be brought to the attention of the Commission.

The Commission is not convinced that the parties have held to that standard. To that end, in developing the discovery binder, the Commission recommends that the parties seek to settle these disputes among themselves during discussions among themselves this week.

FINDING OF FACT

WVAWC, CAD, ASWS, and Business Intervenors are engaged in discovery disputes.

CONCLUSIONS OF LAW

1. Because of the broad nature of the discovery disputes, and the limited time available under the procedural schedule promulgated in the May 21, 2014 Order, it is reasonable to (i) hold the current procedural schedule in abeyance and (ii) schedule a discovery conference to address the motions to compel filed by CAD, ASWS, and Business Intervenors.

2. A discovery binder, developed by the parties, will assist in reviewing the disputed interrogatories.

ORDER

IT IS THEREFORE ORDERED that the procedural schedule promulgated by the May 21, 2014 Commission Order is held in abeyance until further Commission Order.

IT IS FURTHER ORDERED that on or before 4:00 p.m., August 13, 2014 the parties file a discovery binder, as described herein.

IT IS FURTHER ORDERED that a discovery conference is scheduled for 9:30 a.m., August 18, 2014 in the Howard M. Cunningham Hearing Room, 201 Brooks Street, Charleston, West Virginia.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,



Ingrid Ferrell
Executive Secretary

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