



CONSUMER ADVOCATE DIVISION
STATE OF WEST VIRGINIA
PUBLIC SERVICE COMMISSION
700 Union Building
723 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 558-0526

September 22, 2014

Ingrid Ferrell
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

12:54 PM SEP 22 2014 PSC EXEC SEC DIV

RE: WEST VIRGINIA-AMERICAN WATER COMPANY
CASE NO. 14-0872-W-GI

Dear Ms. Ferrell:

Enclosed for filing in the above-styled and numbered case, please find the original and twelve (12) copies of the *Parties' Combined Motion to Compel Expedited Enforcement of Commission Order and Response to Motion for Protective Order*.

This *Combined Motion* is submitted jointly by the Consumer Advocate Division, Commission Staff, Business Intervenors and Advocates for a Safe Water System and represents the positions of each Party. It should be filed as if each of the previously mentioned Parties had submitted its own brief.

A copy has been served upon all parties of record.

Sincerely,

A handwritten signature in black ink that reads "Heather B. Osborn".

Heather B. Osborn
Counsel for Consumer Advocate
State Bar No. 6393

Enclosures

cc: Parties of record

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

Case No. 14-0872-W-GI

GENERAL INVESTIGATION PURSUANT TO W.V.A.
CODE §24-2-7 INTO THE ACTIONS OF WVAWC IN
REACTING TO THE JANUARY 9, 2014 CHEMICAL SPILL

**PARTIES' COMBINED MOTION TO
COMPEL EXPEDITED ENFORCEMENT OF COMMISSION ORDER
AND RESPONSE TO MOTION FOR PROTECTIVE ORDER**

Now come the Consumer Advocate Division (CAD), Business Intervenors (BI), and Advocates for a Safe Water System (ASWS) (collectively the Intervenors), together with Staff of the Public Service Commission (Staff) pursuant to the Commission Order issued September 12, 2014. Herein, the parties address not only West Virginia American Water Company's (WVAWC) Motion for Protective Order but, further, the parties seek expedited relief from the Commission regarding WVAWC's unilateral decision to withhold responses to the Intervenors' collective data requests which the Commission previously ordered WVAWC to produce. The parties seek an expedited Order compelling WVAWC to abide by the terms of the Commission's August 22, 2014, Order and the Protective Agreement between the parties, by requiring WVAWC to produce to the parties complete, unredacted copies of all discoverable documents. Among those documents that the Company was required to produce to the parties, the Company has redacted approximately 160 of 298 pages, comprising four separate documents.

MOTION TO ENFORCE COMMISSION ORDER OF AUGUST 22, 2014

WVAWC has failed to comply with the terms of the Commission's August 22, 2014, Order by making the unilateral decision, wholly unsupported by the Commission's ruling, to

produce four redacted documents¹ to the parties. The Commission has ruled that these documents are discoverable, and there is absolutely nothing in the Commission's Order that instructs or permits the Company to redact any portions of those documents prior to producing them to the parties once the parties have entered into a Protective Agreement with WVAWC. The parties seek an expedited Order requiring WVAWC to immediately produce unredacted versions of the four documents to all parties of record.

As the Commission is aware, the parties were previously engaged in a discovery dispute with respect to data requests served upon WVAWC by the Intervenors and Staff, and WVAWC's objections to and refusal to respond to many of those data requests. Following a hearing on August 18, 2014, the Commission entered an Order on August 22, 2014, granting in part the Intervenors' Motion to Compel. The Order, in part, required WVAWC to provide to the parties allegedly highly confidential information, without limitation, pursuant to a Protective Agreement. Nothing in the Commission Order permits WVAWC to redact any portion of discoverable documents prior to producing those documents to the parties.

In this regard, the Order provides, in relevant part:

However, we have established a procedure that is both cautious and preserves the other parties' right to respond. This Commission Order will allow such information to be provided pursuant to protective agreement and filed under seal. WVAWC will also file a motion for protective treatment to which the other parties may respond.

See August 22, 2014, Order at 8.

Later in this order, the Commission will rule that WVAWC should provide information to parties that WVAWC believes may be sensitive and protected by either state or federal law. In order to obtain the information, the parties must enter into a protective agreement that will prevent the party from publicly releasing the information and place restrictions upon its use in this Commission proceeding. When a party has signed the protective agreement, WVAWC will provide the information to the party...

¹ WVAW Emergency Preparedness Manual; 2003 Vulnerability Assessment; Finished Water Storage Security Practice; and Treatment Chemical Receiving Practice

Id. at 9.

The parties subsequently entered into an agreement, as directed by the Commission.

Notably, the Protective Agreement entered into by the parties and filed with the Commission on August 29, 2014, was prepared by counsel for WVAWC, with minor edits by Intervenors and Staff. The language contained therein regarding documents designated as “Confidential” and those designated as “Highly Sensitive Confidential Information” is language that WVAWC sought to include. According to the express terms of the Protective Agreement, both Confidential Information and Highly Sensitive Confidential Information would be produced to the parties to this litigation. In that regard, the Protective Agreement provides as follows:

WHEREAS, information the Disclosing Party regards as confidential (“Confidential Information”) and certain highly sensitive confidential information relating to the Disclosing Party’s critical utility infrastructure, plans, assessments or operations (“Highly Sensitive Confidential Information,” and with the Confidential Information, the “Protected Materials”) is expected to be sought from and provided by the Disclosing Party in this proceeding;

* * *

THEREFORE, the Parties agree as follows:

- A. The Disclosing Party will make responsive Protected Materials available to Qualified Persons (as defined below) and will clearly identify and label them as “Confidential Information” or “Highly Sensitive Confidential Information” before doing so.

* * *

“Qualified Persons” means

(1) for information designated as “Confidential Information,” (i) the Receiving Party’s counsel identified on this Agreement’s signature page (in each case, “Counsel”) and any lawyer, paralegal or clerical employee employed by Counsel and assisting Counsel in this case (each a “Counsel Representative”); (ii) a single representative of each Receiving Party designated in advance to Disclosing Party’s counsel, whose access will be limited to review in Counsel’s offices; (iii) any outside consultant or expert of the Receiving Party (a “Consultant”) and the Consultant’s principals, agents, or employees who have a need to review the

Confidential Information in connection with the Consultant's role in this case (each a "Consultant Representative"); and (iv) any court reporter engaged by the Commission for purposes of this case ("Reporter"); and
(2) for information designated as "Highly Sensitive Confidential Information," Counsel and Counsel Representatives, Consultants and Consultant Representatives, and Reporters.

See August 29, 2014, Protective Agreement at pp. 1-2, 4.

Notwithstanding the Commission's Order entered on August 22, 2014, and the Protective Agreement executed by all parties to this instant Motion, the Company has refused to provide the discoverable documents to the parties as required. The Company provided the parties with highly redacted versions of four documents – a vulnerability assessment, an emergency preparedness manual, a finished water storage security practice, and a treatment chemical receiving practice. Unredacted versions of these documents were provided to the Commission alone. The Company did not provide these unredacted documents to any of the other parties, and apparently has no intention of doing so, a fact confirmed by counsel for the Company. *See* Exhibit A.

The Company's failure to provide these four documents to the parties, as required by the Commission and in accordance with the terms of the Protective Agreement, constitutes a blatant violation of the Commission's August 22, 2014, Order and the Protective Agreement executed by the parties' regarding the handling of purportedly confidential information. The Company's ongoing resistance to discovery in the proceeding has already resulted in one scheduling order being vacated. Now, the Company continues to withhold from the parties documents it has been ordered to produce without restriction.²

² The parties note that, on page 3 of the its September 12, 2014, Order, the Commission stated, "[t]hrough that protective agreement, the parties to this case have been able to access the Sealed Documents and move forward in developing their respective positions in this case." Similarly, in his September 17, 2014, response to Ken Ward's FOIA request, General Counsel for the Commission stated, "[i]n the meanwhile, all the parties to the case have signed protective agreements, have obtained the information they sought, and are presumably busy preparing their

Wherefore, the parties move for an expedited Order compelling the Company to fully comply with the August 22, 2014, Order, and with the terms of the Protective Agreement entered into by the parties on August 29, 2014, such that the Company is required to immediately produce the four redacted documents in their entirety.

RESPONSE TO MOTION FOR PROTECTIVE ORDER

The parties hereto acknowledge that the Commission, in its August 22, 2014, Order, contemplated that WVAWC would seek confidential treatment of some of those documents the Commission ordered the Company to produce. The parties further acknowledge that, per that Order, the Commission advised WVAWC to file a Motion for Protective Order. *See* Rule 4.1f, *Rules of Practice and Procedure*. The parties do not take issue with that procedure, itself. However, the Intervenors and Staff object to WVAWC's unilateral decision to act beyond the scope of the Commission's August 22, 2014, Order, and in violation of the Protective Agreement to which all parties in this case are bound, by redacting certain portions of four documents produced during discovery.

As noted above, the Company has provided unredacted versions of those documents to the Commission, only.³ The Commission's Order granting, in part, the motions to compel does not allow for redaction of discoverable documents and, likewise, the parties' Protective Agreement does not allow the Company to produce redacted documents to the parties. To the

testimony that is due in the general investigation case on November 6, 2014." Both statements recognize that the parties are entitled, by virtue of having signed a protective agreement, to obtain the entirety of those documents the Commission previously ruled are discoverable. *However, the parties disagree with the conclusion that they have received all of the information they sought. The redacted information remains outstanding and the parties cannot, in fact, proceed to prepare their cases without access to complete copies of all documents they have requested and are entitled to receive.*

³ The parties' prepared and were at the Commission on September 5, 2014 to file a *Parties' Combined Motion To Compel Expedited Enforcement of Commission Order* when attorneys for WVAWC represented complete copies of the unredacted documents would be provided to parties. Subsequently, WVAWC provided only redacted copies of documents parties.

contrary, both the Commission's Order and the Protective Agreement contain specific provisions for the handling of purported confidential documents. The Company has not followed the Commission's ruling nor the terms of the Protective Agreement that the Company itself prepared.

i. Commission Order

With respect to concerns raised by the Company regarding the production of documents that may contain "sensitive" or "protected" information, in its August 22, 2014, Order, the Commission addressed those concerns and clearly defined how such documents would be treated in this case, stating:

On August 21, 2014, counsel for WVAWC filed a supplemental memorandum regarding the sensitive and protected nature of information regarding emergency preparedness. The Commission has previously recognized the need to proceed cautiously in this area. The Commission also realizes that other parties may have not had the opportunity to respond to the WVAWC filing. However, we have established a procedure that is both cautious and preserves the other parties' right to respond. ***This Commission Order will allow such information to be provided pursuant to protective agreement*** and filed under seal. WVAWC will also file a motion for protective treatment to which the other parties may respond.

See August 22, 2014, Order at 8 (emphasis added).

Later in this order, the Commission will rule that ***WVAWC should provide information to parties that WVAWC believes may be sensitive and protected by either state or federal law. In order to obtain the information, the parties must enter into a protective agreement that will prevent the party from publicly releasing the information and place restrictions upon its use in this Commission proceeding. When a party has signed the protective agreement, WVAWC will provide the information to the party,*** file it with the Secretary's Office under seal, and file a motion for an order granting permanent protective treatment. If the alleged confidential information is part of an otherwise non-confidential response, WVAWC will provide and file a redacted response that will appear in the docket and a non-redacted copy will be retained under seal. The Commission will then rule on permanent protection of the information. In order to avoid future disputes, the Commission has attached as Appendix B a form of protective agreement that the Commission has recognized in other proceedings and one that the parties can use as a template in this proceeding (or vary as necessary).

Id. at 9 (emphasis added).

The Commission's August 22, 2014, Order is clear in that the Commission has analyzed the Company's concerns regarding "sensitive" and/or "protected" information and has devised a procedure for both the production, and protection of, that information. The Order requires the Company to produce such documents to the parties, without limitation, pursuant to a protective agreement. The documents were further to be filed under seal, with a motion by the Company for protective treatment thereof. Nothing in the Commission Order permits WVAWC to redact any portion of discoverable documents prior to producing those documents to the parties.

ii. Protective Agreement

As discussed above, by entering into the Protective Agreement, the parties agreed that WVAWC could designate some discoverable documents as "Confidential" and other documents as "Highly Sensitive Confidential Information." However, the parties have not agreed that WVAWC could redact portions of those documents it considers "Highly Sensitive Confidential Information." The Protective Agreement provides no mechanism whatsoever for the Company to redact those documents that the Commission has ordered it to produce to the parties. To the contrary, the Protective Agreement plainly states that all discoverable documents – whether "Confidential" or "Highly Sensitive Confidential Information" – would be provided to "Qualified Persons."

By making the unilateral decision to redact discoverable documents, WVAWC has violated both the Commission's August 22 Order and the parties' August 29 Protective Agreement. Thus, the Commission should prevent WVAWC from acting beyond the scope of the Commission's Order and the Protective Agreement by disallowing any redaction of discoverable documents that the Company must produce to the parties.

iii. Other Concerns

Regarding the Company's production of unredacted documents to the Commission, only, the parties would also note two important aspects of the Company's conduct.

First, the Company has engaged in an impermissible *ex parte* communication with the Commission by providing it with documents that none of the parties to this litigation have seen in their entirety. Second, the parties have not been advised by the Company regarding how redactions were made and who, specifically, has seen the unredacted versions of the four documents at issue. The Company seems to contend that special security clearance is necessary to view some or all of these documents. Therefore, the parties question whether the Company's attorneys at Jackson Kelly have the purportedly requisite security clearance and, if not, whether those attorneys have seen the unredacted documents. Similarly, the parties note the Company provided the unredacted documents to the Commission, without any known assurance the alleged security clearance has been satisfied.

Wherefore, the parties respectfully request that any confidential treatment the Commission may require with respect to documents produced by WVAWC, the Commission order that WVAWC must produce to the parties those four documents, in their entirety, that were previously redacted. The parties further request that they be permitted to view, in their entirety, any and all blueprints or other similar documents, regardless of whether these documents are afforded confidential treatment by the Commission. If the Commission deems them confidential, they will be protected by the Protective Agreement parties have executed and the pending Motion for Protective Order.

Respectfully Submitted,

CONSUMER ADVOCATE DIVISION

By Counsel



Heather B. Osborn (WVSB 9074)

Counsel for Consumer Advocate

Consumer Advocate Division

Public Service Commission

700 Union Building

723 Kanawha Blvd., East

Charleston, WV 25301

BUSINESS INTERVENORS

By Counsel


_____ *HBO w/ permission*

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Bailey & Glasser LLP

209 Capitol Street

Charleston, WV 25301

Anthony J. Majestro (WVSB 5165)

Powell & Majestro PLLC

405 Capitol Street, Suite P1200

Charleston, WV 25301

Timothy C. Bailey (WVSB 5839)

Bucci Bailey & Javins, LC

213 Hale Street

Charleston, WV 25301

ADVOCATES FOR A SAFE WATER SYSTEM

By Counsel

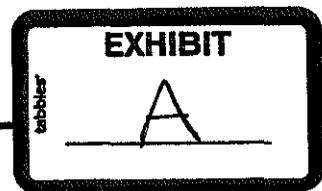
Paul R. Sheridan / HBO w/ permission
Paul R. Sheridan (WVSB 3373)
429 McKinley Avenue
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William V. DePaulo (WVSB 995)
179 Summers Street, Suite 232
Charleston, WV 25301-2163

**STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA**

By Counsel

David A. Sade / HBO w/ permission
David A. Sade (WVSB 3229)
201 Brooks Street
P.O. Box 812
Charleston, West Virginia 25323



Osborn, Heather

From: Melick, Phil [PMELICK@jacksonkelly.com]
Sent: Friday, September 05, 2014 4:24 PM
To: Majestro, Anthony J.
Cc: Sade, Tony; White, Thomas; Short, Caryn; Osborn, Heather; Jonathan R. Marshall; Bailey, Timothy C.; Paula Moore; Roberts, Jackie; Debbie.Albrecht@amwater.com; Callas, Christopher L.; William V. DePaulo, Esq.; pauisheridan99@yahoo.com
Subject: RE: Water -- WVAW

For those who haven't yet done so, please use the instructions below to access the four redacted documents (GI0000001_001, GI0000003_001, GI0000295_001, and GI0000289_001) that were provided in their entirety to the Commission. (I'm told that some Windows computers' default .tiff readers won't open a multi-page .tiff, but that a good, free .tiff reader is IrfanView (http://www.irfanview.com/). If you still can't access the documents from the disk, then we can print copies and arrange to get them to you.

We produced the cover page and TOC of the FOIA-exempt Vulnerability Assessment ("VA") required by 42 USC §300-i2 to demonstrate that it exists and that its content is not pertinent to the GI. We redacted from the VA and three other documents - the Emergency Preparedness Manual, the Finished Water Storage Security Practice, and the Treatment Chemical Receiving Practice - only sensitive Vulnerability Assessment Information (see Protocol to Secure Vulnerability Assessments Submitted by Community Water Systems to EPA at 6; "Information contained in or derived by EPA from a submitted vulnerability assessment is called 'vulnerability assessment information.'"). We left unredacted portions of these documents that relate to emergency preparedness for a source water contamination event. The redacted information is not only irrelevant to the General Investigation, but should not be made public for reasons of national and state security and public policy.

However, if there are particular, redacted portions of these documents that you believe are needful to the case, we will consider your position.

As stated at the outset of our supplemented responses, we have produced everything that we intend to pursuant to the August 22 Commission Order. But this, too, is something we can consider further if there are particular concerns or questions.

Instructions for opening files

- Put disc in computer and open it.
Find the folder called Confidential and Highly Sensitive Confidential.

Table with 2 columns: File Name and Date/Time. Rows include Confidential and Highly Sensitive Confidential (9/2/2014 11:59 AM), Native files (9/3/2014 11:03 AM), and WVAWC's Cross Reference Index for 9_2_2014 Production (C29433... (9/2/2014 2:09 PM).

- Double click on the folder called Confidential and Highly Sensitive Confidential.
Find the folder called Images.

Table with 2 columns: File Name and Date/Time. Rows include IMAGES (9/2/2014 1:16 PM) and TEXT (9/2/2014 1:17 PM).

- Double click on the folder called Images.
Find the files that are named GI0000001_001, GI0000003_001, GI0000295_001, and GI0000289_001.

GI0000001_0001.tif	9/1/2014 12:17 AM
GI0000003_0001.tif	9/1/2014 12:20 AM
GI0000237_0001.tif	9/1/2014 12:20 AM
GI0000245_0001.tif	9/1/2014 12:20 AM
GI0000247_0001.tif	9/1/2014 12:20 AM
GI0000263_0001.tif	9/1/2014 12:20 AM
GI0000264_0001.tif	9/1/2014 12:21 AM
GI0000269_0001.tif	9/1/2014 12:21 AM
GI0000270_0001.tif	9/1/2014 12:21 AM
GI0000277_0001.tif	9/1/2014 12:21 AM
GI0000281_0001.tif	9/1/2014 12:21 AM
GI0000288_0001.tif	9/1/2014 12:21 AM
GI0000289_0001.tif	9/2/2014 12:52 PM
GI0000290_0001.tif	9/1/2014 12:21 AM
GI0000291_0001.tif	9/1/2014 12:22 AM
GI0000292_0001.tif	9/1/2014 12:23 AM
GI0000293_0001.tif	9/1/2014 12:23 AM
GI0000294_0001.tif	9/1/2014 12:23 AM
GI0000295_0001.tif	9/2/2014 12:53 PM
GI0000296_0001.tif	9/1/2014 12:23 AM
GI0000297_0001.tif	9/1/2014 12:23 AM
GI0000333_0001.tif	9/1/2014 12:23 AM
GI0000335_0001.tif	9/1/2014 12:23 AM
GI0000336_0001.tif	9/1/2014 12:24 AM

- Double click on each of these files to view the four images we produced to you in a redacted form.

John Philip Melick | Member | Jackson Kelly PLLC

500 Lee Street East, Suite 1600, Charleston, WV 25301-3202 | P. O. Box 553, Charleston, WV 25322-0553

Office: (304) 340-1289 | Mobile: (304) 539-9289 | Fax: (304) 340-1080 | pmelick@JacksonKelly.com | V-card | **BIO**

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From: Anthony Majestro [mailto:amajestro@powellmajestro.com]

Sent: Friday, September 05, 2014 12:09 PM

To: Melick, Phil; William V. DePaulo, Esq.

Cc: paulsheridan99@yahoo.com; Sade, Tony; Tom White; Short, Caryn; Osborn, Heather; Jonathan R. Marshall; Bailey, Timothy C.; Paula Moore; Roberts, Jackie; Debbie.Albrecht@amwater.com; Callas, Christopher L.

Subject: RE: Water -- WVAW

What is the basis for not providing as ordered pursuant to the protective agreement?

Have you produced everything that was ordered to be produced that you intend to produce?

Anthony J. Majestro, Esq.
Powell & Majestro, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
304-346-2889 / 304-346-2895 (f)
amajestro@powellmajestro.com

From: Melick, Phil [<mailto:PMELICK@jacksonkelly.com>]
Sent: Friday, September 05, 2014 12:05 PM
To: Anthony Majestro; William V. DePaulo, Esq.
Cc: paulsheridan99@yahoo.com; Sade, Tony; Tom White; Short, Caryn; Osborn, Heather; Jonathan R. Marshall; Bailey, Timothy C.; Paula Moore; Roberts, Jackie; Debbie.Albrecht@amwater.com; Callas, Christopher L.
Subject: RE: Water -- WVAW

Yes, as stated in our filing Tuesday, unredacted copies of a vulnerability assessment, an emergency preparedness manual, a finished water storage security practice, and a treatment chemical receiving practice.

John Philip Melick | Member | Jackson Kelly PLLC

500 Lee Street East, Suite 1600, Charleston, WV 25301-3202 | P. O. Box 553, Charleston, WV 25322-0553
Office: (304) 340-1289 | Mobile: (304) 539-9289 | Fax: (304) 340-1080 | pmelick@JacksonKelly.com | V-card | **BIO**

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From: Anthony Majestro [<mailto:amajestro@powellmajestro.com>]
Sent: Friday, September 05, 2014 11:52 AM
To: Callas, Christopher L.; William V. DePaulo, Esq.
Cc: paulsheridan99@yahoo.com; Sade, Tony; Tom White; Short, Caryn; Osborn, Heather; Jonathan R. Marshall; Bailey, Timothy C.; Paula Moore; Roberts, Jackie; Melick, Phil; Debbie.Albrecht@amwater.com
Subject: Water -- WVAW
Importance: High

Phil/Chris,

Did WVAWC produce anything in camera to the Commission that was not produced to the parties?

---AJM

Anthony J. Majestro, Esq.
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amajestro@powellmajestro.com

CERTIFICATE OF SERVICE

I, Heather B. Osborn, counsel for the Consumer Advocate Division of the Public Service Commission of West Virginia, hereby certify that I have served a copy of the foregoing *Parties' Combined Motion to Compel Expedited Enforcement of Commission Order and Response to Motion for Protective Order* upon all parties of record by First Class, U.S. Mail, postage pre-paid.


Heather B. Osborn
Counsel for Consumer Advocate
State Bar No. 9074

Dated: September 22, 2014