Paul R. Sheridan
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September 22, 2014

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

03:30 PM SEP 22 2014 PSC EXEC

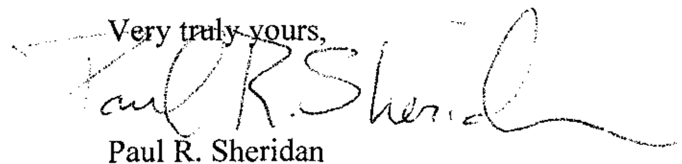
Re: 14-0872-W-GI

Dear Ms. Ferrell:

On behalf of Advocates for a Safe Water System, I enclose for filing in the above-captioned proceeding, the original and twelve copies of Supplemental Response of Advocates for a Safe Water System to the Company's Motion for a Protective Order.

Please call me if there are any questions regarding this filing.

Very truly yours,



Paul R. Sheridan

Enclosure

Cc: Service List

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

West Virginia American Water Company Case No. 14-0872-W-GI

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CHARLESTON
CASE NO. 14-0872-W-GI

SUPPLIMENTAL RESPONSE OF ADVOCATES FOR A SAFE WATER[1] SYSTEM TO THE COMPANY'S MOTION FOR A PROTECTIVE ORDER

In response to West Virginia American Water's (hereinafter "Company") *Motion for Protective Order* filed on September 10, 2014, and to the Commission's Order of September 12, 2014, Advocates for a Safe Water System ("Advocates") has joined the other parties to the Case in requesting a *Combined Motion to Compel Expedited Enforcement of Commission Order*. In addition, in order to address the public disclosure issues raised by the Company's *Motion for a Protective Order*, Advocates files this supplemental response.

I. Introduction

Through its illegitimate designations of confidentiality, the Company continues to improperly cloak information from the other parties to this case and, to an even greater extent, from the public in general.

In its effort to foreclose full participation by the parties to this case, the Company has defied the explicit August 22nd Order of the Commission and violated the Protective Agreement which it entered into with those parties.[2] This is addressed in the *Combined Motion to Compel*

[1] The Business Interveners join with the Advocates in this response.
[2] The Commission noted in its September 10th Order:

Expedited Enforcement of Commission Order. In addition, even where the Company has complied with the August 22nd Order of the Commission and its agreement with the parties by providing some of the requested information to the parties, the Company has nevertheless sought — via its *Motion for a Protective Order* — to inappropriately and unnecessarily seal portions of its disclosures from the public. The Company's gross over-use of the "confidential" designation inappropriately and unnecessarily inconveniencies the parties, and more significantly, keeps the public in the dark regarding matters of legitimate public concern.[3]

Accordingly, Advocates opposes the *Company's Motion for a Protective Order.*

II. Argument

A. The Company Has Violated The Order Of The Commission And Its Agreement With The Other Parties By Unilaterally Submitting Documents To The Commission Without Also Sharing Them With The Parties.

In its response to the Intervenor's discovery requests, in the 'Binder' assembled at the direction of the Commission, and at the hearing before the Commission, the Company articulated Homeland Security concerns about the disclosing of various material sought by the other parties.

> To that end, the Commission directed the parties to enter into a protective agreement that would prevent the party from publicly releasing the Sealed Documents and place restrictions upon its use in this Commission proceeding. Once a party had entered into the protective agreement, WVAWC was directed to provide the Sealed Documents to the party, file the Sealed Documents with the Executive Secretary's Office under seal, and file a motion for an order granting permanent protective treatment. If there were portions of the Sealed Documents that were part of an otherwise non-confidential response, WVAWC was told to provide and file a redacted response that will appear in the docket and a non-redacted copy will be retained under seal.

The redaction of documents was not intended by the Commission to prevent access by the parties.

[3] The Company's refusal to let Advocates to see some of these documents limits the ability of Advocates to comment specifically on their suitability for public viewing.

Indeed, the only confidentiality-based objection that the Company articulates in the Joint Discovery Binder is the oft-repeated phrase, "Materials responsive to this request, in whole or in part, may constitute sensitive information entitled to protection from public disclosure under Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002."

In its Order of August 22nd, the Commission recognized the asserted security concerns, and, with an abundance of caution, established a procedure which would allow the Company to cloak documents that it determined posed significant homeland security risks. That procedure involved the provision of the materials to the parties, under the terms of a protective agreement, which would allow for the collective consideration of the materials by the Commission and the parties, out of the public eye.

The Commission understandably assumed that the Company would follow the protection procedure that had been established specifically to address the Company's stated security concerns, and that the development of the case could move forward on its now re-established timeframe. The Response of the PSC's General Counsel to the FOIA request underscores the PSC's assumption that the Company would comply with the protection scheme. Regarding the Company's redacted filings, he wrote, "In the meantime, all the parties to the case have signed protective agreements, *have obtained the information they sought* and are presumably busy preparing testimony…" (Letter of Richard E. Hitt, General Counsel to Ken Ward, Jr., September 17, 2014).

Instead of following the information protection procedure set out in the Commission's Orders, however, the Company has now charted its own course, in violation of the Commission's ruling and of the Protective Agreement which it reached with the parties.

B. While The Company's Claim For Confidentiality, Made Prior To The Commission's Ruling, Was Exclusively On The Grounds Of Homeland Security Concerns, The Company Now Seeks To Withhold Documents Primarily Based On Alleged "Trade Secret" Concerns.

Homeland Security considerations are a legitimate and compelling basis for withholding some details of a public water operation from public view. Because it is such a viscerally compelling basis, it is also sometime abused by those who are inclined to keep secrets. Considering both these points, the Commission properly established a reasonable approach for examining which, if any, of the Company's documents deserve to be hidden from the public based on homeland security concerns. The Company's most recent effort to maintain secrecy, however, involves a significant "bait and switch." "Trade secret" concerns, and not homeland security, are the common theme that binds the fifteen documents that the Company now seeks to protect from public view.

In all of the objections that the Company initially made to the many discovery requests of the other parties to the investigation, the only "confidentiality" objection the Company made was based upon the Bioterrorism Act and 42 U.S.C. § 300i2(a). While the Company did make relevance and scope objections to discovery requests, which were largely rejected by the Commission, it made no reference to any other legal bases for cloaking discovery, in either its response to the initial discovery requests, or in its submissions in the "Binder" assembled at the direction of the Commission.[4]

The Company has now attempted a "bait and switch." Regarding half of the documents listed in the Company's Motion for Protective Order, for which the Company now asks to

[4] In addition, offered an opportunity at the hearing on the Motions to Compel to negotiate its concerns with the other parties, the Company declined, opting instead to stand upon the argument which it had asserted.

permanently shield from all public view, the Company makes no reference to homeland security concerns whatsoever. And only two of the listed documents are even arguably covered under the Bioterrorism Amendments which had previously been the sole basis for this protected treatment. Now, the only alleged ground that applies to all of the documents is "trade secrets."

In the Company's September 16th memorandum specifically addressing Mr. Ward's FOIA request, the Company continues to argue for confidentiality as if it is purely an issue of homeland security. In that document, the Company notes for the Commission that Mr. Ward had just recently reported on another state agency's reluctance to "go public" with detailed information which might facilitate terrorist attacks. But nothing in this memorandum addresses, or even acknowledges, that many of the documents the Company seeks to protect have, by the Company's own tacit admission, no connection at all to homeland security.

C. For The Documents Related To This Case There Is Limited If Any Application Of The Confidentiality Requirements Of The Bioterrorism Amendments To The Federal Safe Drinking Water Act

The Company begins its discussion of the legal basis for its protective order request with the "Bioterrorism Amendments" to the Federal Safe Drinking Water Act ("SDWA). [5] This statutory language, enacted by Congress and signed into law in 2002, requires community water systems to prepare a "Vulnerability Assessment," evaluating "the vulnerability of its system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe and reliable supply of water." 42 U.S.C. § 300i2(a). This Vulnerability Assessment is required to be submitted to the EPA. A "vulnerability assessment" submitted to the EPA is specifically excluded from the Federal Freedom of Information Act. *See* 42 U.S.C. §§ 300i2(a)(3)&(5).

[5] As of August 18, 2014 when the parties argued their positions before the Commission, this was the ONLY basis asserted for protection of its records.

Significantly, although the entire focus of the Company's previous efforts to maintain confidentiality have been on the requirements of this federal statute, the Company now invokes this statute in relation to only two of the fifteen documents that are the subject of this *Motion for Protective Order*. These two are the Risk-Based Vulnerability Assessment (003-0001) and WVAW Emergency Preparedness Manual (001-0001).[6] With regard to the first, Advocates recognizes that there may be some portions that should be permanently excluded, although we are concerned about the tendency of the Company to interpret such vast quantities of information as "fall[ing]under the rubric of preventing and responding to terroristic or *intentional subterfuge* [sic] [7]" (Company's *Motion for Protective Order*, September 10, 2014, p. 7, emphasis supplied.)

The Vulnerability Assessment (003-0001)

The Vulnerability Assessment (003-0001) would appear[8] to be the Assessment contemplated by 42 U.S.C. § 300i2(a) and provided to the EPA pursuant to that statute. It would seem that at least some of the contents of this document are legitimately withheld from public view. However, rather than address specifically vulnerability to "a terrorist attack or other intentional acts" as directed by the statute, the Company has chosen, without cited legal mandate and without explanation offered in this proceeding, to incorporate into this assessment ALL of the risk assessment that it has done. Whether or not this decision was made for the purpose of extending a shroud of secrecy, the Company now attempts to use it this way.

The Company has provided this document to the PSC in un-redacted form, while it has, in violation of the Commission's Order, redacted the versions it has given the parties. Since the

[6] Since the Company has denied the parties access to these documents, the Company certainly has not made its case in a fashion to which Advocates is able to assess or respond.
[7] While it is the assumption of the undersigned that this involves a spell-check error, and that the intended word was probably "sabotage," the irony here has a significance which should be noted.
[8] It should be noted that the Intervenors have seen only the Cover and the Table of Contents of this document, since it was provided to the Intervenors with 120 or 124 pages redacted.

document is responsive to the discovery requests, and since it has been provided to the Commission pursuant to the Commission's August 22nd Order, the Commission should order that it be provided to the parties in un-redacted form. It was the Commission's previous ruling that the parties would have the opportunity to address questions of permanent confidentiality having had the opportunity to review the documents in question.

While it is of no small consequence to withhold these documents from public view, as the Commission recognized in its orders, security concerns should not be ignored. This remains true, notwithstanding the Company's attempts to abuse the process. And accordingly it is Advocate's positon that the question of whether some portions of this document should be permanently withheld from public view should be deferred.

<u>WVAW Emergency Preparedness Manual (001-0001)</u>

The Company has also made an attempt to bootstrap its Emergency Preparedness Manual under the "Bioterrorism Amendments" by noting that the confidentiality provisions set out in subsections (3) and (5) of the Bioterrorism Act apply not only to the Vulnerability Assessment itself, but also to "all information derived therefrom."

It is clear from the context in which this language is used in the federal statute that it is intended to apply to the EPA, and to information that the EPA might derive from the terrorism vulnerability assessment, and is not meant to extend the cloak of confidentiality over everything which might be mentioned or referred to in the Assessment. That this was not Congress's intent is made even clearer by the next section in the "Bioterrorism Amendments," which mandates that water systems move from an assessment of terrorism risks, which must be kept confidential, to an "Emergency Response Plan" for addressing them, which is not confidential. 42 U.S.C. § 300i2(b). Instead, the Act specifically notes the importance of engaging the community in

emergency response planning. Not only is the Plan not subject to the confidentiality protections of 42 U.S.C. §§ 300i2(a)(3)&(5), but water systems are directed by the federal law, when preparing or revising their Emergency Response Plans, to "coordinate with existing Local Emergency Planning Committees established under the Emergency Planning and Community Right-to-Know Act."[9]

Accordingly, this plan document should not only be made available to the parties, in un-redacted form, but the Commission should hold that, unless it has been improperly constructed by the Company to contain otherwise sensitive information, it is not excludable from the public by virtue of any provision of the "Bioterrorism Amendments.

D. "Other" State Statutes Have Very Limited If Any Application To Render Confidential The Documents Which The Parties Have Sought In Discovery

The Company has also invoked W. Va. Code § 22-26-4 with regard to five of the fifteen documents for which it seeks protection. This is not a legal basis for pursuing confidentiality in this context.

W. Va. Code § 22-26-4 pertains to information submitted to the West Virginia Department of Environmental Protection (DEP), and provides for exemptions from the West Virginia Freedom of Information Act in certain instances where it is sought in writing from the DEP and specifically approved by the DEP Secretary.

This provision has no application in this context. There has been no representation by the Company, regarding any documents under consideration here, that such a designation has been sought or obtained from the DEP, or the basis of a claim of confidentiality made in that context.

E. Freedom Of Information Exclusions For Vulnerability Assessments, Security Plans, And Utility Plant Engineering Plans Have Narrow Application.

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[9] The Emergency Planning and Community Right-to-know Act (42 U.S.C. §§ 11001 & 11044) contains provisions for broad collaboration in their formulation of plans and broad public disclosure of the plans.

The Company has invoked three exemptions from the West Virginia Freedom of Information Act as authority to gain protection for nine of the fifteen documents that are the subject of this *Motion.*[10] The Company has failed to specifically set forth the application of these provisions to specific pieces of information, but instead has sought sweeping and general application of these provisions

The West Virginia Freedom of Information Act includes among the exemptions from disclosure:

> (10) Those portions of records containing specific or unique vulnerability assessments or specific or unique response plans, data, databases and inventories of goods or materials collected or assembled to respond to terrorist acts; and communication codes or deployment plans of law enforcement or emergency response personnel;
> ...
> (14) Security or disaster recovery plans, risk assessments, tests or the results of those tests;
> ...
> (17) Specific engineering plans and descriptions of existing public utility plants and equipment;

All three of these exemptions are post 9/11 amendments which are yet to be construed or interpreted by our West Virginia Supreme Court.

The exceptions of the FOIA are to be narrowly construed in order to carry out the important public policy objective of governmental openness. Our Court has repeatedly and consistently held that

> [t]he disclosure provisions of this State's Freedom of Information Act, W.Va.Code, 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va.Code, 29B-1-1 [1977].

[10] As the Commission already recognized in its previous Order, the Freedom of Information Act provides no basis at all to deny the parties access to these documents.

Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985).

In addition, our Court has been unwilling to interpret FOIA as permitting *"wholesale* exemption" of information from disclosure under FOIA merely because 'it includes some of these more narrowly-defined exemptions." *Hurlbert v. Matkovich*, Supreme Court of Appeals of West Virginia, No. 13-0217, filed June 5, 2014, p. 26.

Accordingly, while these provisions may apply to a narrow portion of the documents that are the subject of this Motion, it would be a gross over-application of these categories to apply them to the entirety of the documents for which they are invoked.

F. There Is No Legitimate Basis Established By The Company For Protecting Any Of This Information As A Trade Secret

With regard to seven of the fifteen documents that are subject of this *Motion*, no legal basis for confidentiality is asserted by the Company other than the trade secrets exemption to the West Virginia Freedom of Information Act.

The Company asserts that it meets the test of a "credible showing of likely harm (*State ex rel. Johnson v. Tsapis*, 419 S.E.2d 1, 187 W. Va. 337 (1992)) because with regard to each item it has repeated a conclusory mantra about "non-public, proprietary procedures, policies and technical descriptions." This does not meet the test for such a "showing." But more significantly, in its argument for the application of this "trade secrets" exemption, the Company neglects to discuss the language of the exemption, and moves too quickly to a discussion to of the applicable standards for a "credible showing of likely harm." While there is indeed a multi-part test for the consideration of harm, which is applicable to the determination of whether the trade secret is one which should be exempt from FOIA, there is <u>first</u> a requirement that the information <u>be a trade secret</u>. And pursuant to the statute, this requires that the information in question, among other things, have "commercial value," and most significantly, be such that

possession of it "gives its users an opportunity to obtain business advantage over competitors. W. Va. Code 29B-1-4(a) (emphasis supplied).

It is very significant that *AT&T v. Public Serv. Comm'n*, 423 S.E.2d 859 (W. Va. 1992), upon which the Company relies for the proposition that this trade secret exception can apply in the context of disclosures by utilities to the PSC, involved the regulation of "competitive industries." 188 W. Va. 252, 423 S.E.2d 861. While there may be aspects of the operation of even a water utility which involve competitive markets, it seems tremendously cavalier to imply that virtually all of its operations are somehow the subject of a closely guarded trade secret. In the case at hand there is no credible showing that anything that the Company seeks to hide would, if disclosed, give unwarranted business advantage to its competitors. Indeed, there is nothing that would even suggest this.

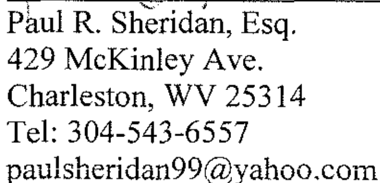
III. Conclusion

For all the reasons set forth above, Advocates respectfully requests that the West Virginia Public Service Commission deny the Company's *Motion for a Protective Order* and Order the Company to comply with the Commission's previous Orders.

Respectfully submitted,

ADVOCATES FOR A SAFE WATER SYSTEM

By Counsel



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PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

West Virginia American Water Company Case No. 14-0872-W-GI

CERTIFICATE OF SERVICE

I hereby certify that copies of the *Supplemental Response of Advocates for a Safe Water System to the Company's Motion for a Protective Order* were mailed, postage pre-paid, via the US Postal Service, this 22nd day of September, 2014 to the following persons:

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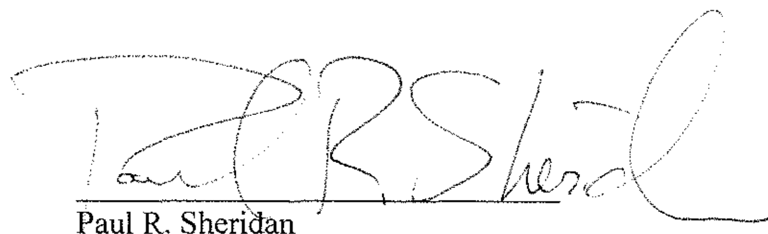

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