

**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 23rd day of December 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 requires revised redaction of documents filed under seal by West Virginia-American Water Company.

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 most of the 100,000 customers of WVAWC served from the Kanawha Valley System.

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, (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, 2014 and July 10, 2014.

On August 5, 2014, and in the wake of motions to compel responses to discovery responses filed by several of the intervenors, the Commission issued an order holding the then current procedural schedule in abeyance and scheduling a discovery conference. The discovery conference was held on August 18, 2014.

On August 20, 2014, WVAWC filed a document titled Supplemental Memorandum on Dissemination of Certain Documents wherein the WVAWC described the sensitive nature of some of the data responses addressed during the discovery conference.

On August 22, 2014, the Commission issued an Order ruling on the motions to compel. Therein, the Commission described the asserted sensitive nature of certain of the documents, noting “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,” and that “the issue of confidential and sensitive material has been raised by WVAWC. This is a significant issue, involving critical utility infrastructure. That issue must be taken seriously by the Commission and the parties.” Order at 8 and 9.

To that end, the Commission directed the parties to enter into a protective agreement that would prevent a party from publicly releasing the sensitive documents and place restrictions on use of the documents in this Commission proceeding. After a party had entered into the protective agreement, WVAWC was directed to provide the

documents to the party, file the documents with the Executive Secretary's Office under seal, and file a motion for an order granting permanent protective treatment. If there were confidential portions of the documents that were part of an otherwise non-confidential response, WVAWC was told to provide and file a redacted response that would appear in the public docket and a non-redacted copy to be retained under seal. Regarding Freedom of Information Act (WV FOIA) requests pursuant to the West Virginia Freedom of Information Act, W.Va. Code §§29B-1-1 et seq., the Commission stated:

In the event that a Freedom of Information Act request or other similar request is made for disclosure of any of the Confidential Information provided pursuant to this Protective Agreement, the Commission will provide the Disclosing Party with prompt notice of such request, in sufficient time for the Disclosing Party to take steps to respond to the requested disclosure.

* * *

As discussed above, WVAWC has argued that some of the information and data requested should be protected from public disclosure in the interest of security of its system. The Commission agrees with WVAWC that information that falls into that category must be protected and the receiving party must enter into a Protective Agreement. We direct WVAWC to determine which responses it believes should be protected and WVAWC may mark those responses as confidential. Final determination of the confidentiality of any information so marked will be made by the Commission as discussed above.

Order at 9 and 10.

On August 29, 2014, the parties to this proceeding submitted an agreed-to protective agreement.

On September 2, 2014, WVAWC filed supplemental responses to several data requests, as required by the August 22, 2014 Order. Fifteen of those documents were filed under seal (Sealed Documents).

On September 10, 2014, WVAWC filed a motion for protective order applicable to the Sealed Documents, asking that the Commission “maintain the confidentiality of the Confidential Information and rule it is exempt from public disclosure under WV FOIA and applicable federal law.” Motion at 22. Further, because of asserted federal statutory protections, WVAWC fully redacted one, and partially redacted three, of the Sealed Documents provided to the other parties through the Protective Agreement; specifically,

- a. the Risk-Based Vulnerability Assessment West Virginia-American Water Company Kanawha Valley District System Report March 2003 (document ID GI0000003),
- b. the West Virginia American Water Emergency Preparedness Manual (document ID GI0000001),
- c. the Finished Water Storage Security Practice (document ID GI0000289), and
- d. the Treatment Chemical Receiving Practice (document ID GI0000295).

(These four Sealed Documents will be referred to collectively as the Sealed Documents-Highly Sensitive Confidential Information, or Sealed Documents-HSCI.) Only the Commission was given fully unredacted copies of the Sealed Documents-HSCI. The remaining eleven Sealed Documents were given in unredacted format to the parties in this case pursuant to the Protective Agreement. (The remaining eleven Sealed Documents will be referred to herein as Sealed Documents-Confidential, or Sealed Documents-C.) Additionally, WVAWC sought permanent protective treatment of blueprints of its Kanawha Valley Treatment Plant (herein, Blueprints), requested by CAD data request A-5.

On September 11, 2014, Ken Ward, Jr., a reporter for the *Charleston Gazette* newspaper, filed a FOIA request seeking “any and all materials submitted to the commission by West Virginia American Water Company as part of their filing on Sept. 2 of records responding to the commission’s Aug. 22 procedural order.” Effectively, Mr. Ward requested the Sealed Documents and the Blueprints through the WV FOIA that were covered by the September 10, 2014 motion for protective order.

On September 12, 2014, the Commission issued an Order citing the August 22, 2014 Order regarding WV FOIA filings, and allowing WVAWC the opportunity to submit supplemental support for its September 10, 2014 motion for protective order. The parties to this case were given the opportunity to respond to the WVAWC filings.

On September 16, 2014, WVAWC filed in response to the September 12, 2014 Order. WVAWC cited State ex rel. Garden State Newspapers, Inc., v. Hoke, 205 W. Va. 611, 520 S.E.2d 186 (1999) in support for its position that the press does not enjoy *greater access to confidential information than that afforded to the general public*. Citing State ex rel. Brooks v. Zakaib, 214 W.Va. 253, 588 S.E.2d 418, 430-431 (2003), WVAWC argued that both the sealing of records and FOIA requests are contemplated in West Virginia's Trial Court Rules 10.03 and 10.04, and that this Commission adopted Rule 26(c) of the West Virginia Rules of Civil Procedure as the basis for issuing protective orders exempting documents from public disclosure under FOIA. WVAWC asserted that its September 10, 2014 motion satisfies the Commission's requirements, providing sufficient basis for the relief requested and, by consequence, the denial of Mr. Ward's request.

On September 17, 2014, by its General Counsel, the Commission responded to Mr. Ward, noting that owing to the resignation of one Commissioner and recusal from this case of the Chairman leaving only one voting Commissioner, the Commission was unable to rule on the WVAWC motion to protect and Mr. Ward's FOIA filing until a Commissioner was appointed.

On September 22, 2014, CAD, ASWS, Business Intervenors, and Staff (Advocates) filed a combined motion to compel expedited enforcement of the August 22, 2014 Commission Order and response to the WVAWC motion for protective order. The Advocates noted that the redactions of the Sealed Documents-HSCI comprised approximately 160 of 298 pages.

The Advocates requested that the Commission order that WVAWC produce to the Advocates the Sealed Documents-HSCI, in their entirety. The Advocates further requested 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.

On September 22, 2014, ASWS, joined by the Business Intervenors, filed a supplemental response to the WVAWC motion for a protective order. ASWS asserted that WVAWC had defied the August 22, 2014 Commission Order and the Protective Agreement entered into by the parties by redacting portions of the Sealed Documents-HSCI.

On September 25, 2014, WVAWC filed the Supplemental Direct Testimony of Jeffrey L. McIntyre, noting that several attached exhibits were subject to the September 10, 2014 WVAWC motion for protective treatment and were accordingly submitted under seal.

On September 26, 2014, WVAWC filed a reply brief in support of its motion for a protective order.

On September 30, 2014, the Advocates filed comments in response to the WVAWC reply brief in support of its motion for protective treatment.

On October 1, 2014, WVAWC filed a letter responding to the timing of discussions among the parties regarding redactions to the Sealed Documents-HSCI.

On November 6, 2014, Staff and the intervenors filed testimony.

On November 6, 2014, all parties except WVAWC filed a joint motion to modify the procedural schedule.

On November 25, 2014, the Commission (i) required WVAWC to provide redacted versions of certain documents, (ii) permanently protected the Vulnerability Assessment and the blueprints, and (iii) cancelled the current procedural schedule.

On December 5, 2014, WVAWC filed public, redacted versions of six of the documents required by the November 25, 2014 Order. WVAWC submitted a motion to modify the deadline for filing the balance of the documents until Friday, December 12, 2014. As cause, WVAWC cited the volume of the material and the intricacy of redacting the documents.

On December 10, 2014, the Commission issued an Order granting the motion to

extend the deadline for filing the redacted documents and required that WVAWC file the balance of the documents by December 12, 2014.

On December 12, 2014, WVAWC filed the remaining redacted documents.

DISCUSSION

The November 25, 2014 Order noted that WVAWC, by failing to file redacted public versions, had not followed established Commission procedure for the submission of information that is claimed to be confidential. The Order quoted from the legislative charge set forth in W.Va. Code §29B-1-1 that declares that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. To that end, the Commission cautioned:

In light of this, WVAWC should use a light hand in redacting its documents. The Commission will not hesitate to require WVAWC to perform a subsequent redaction if it appears to the Commission that WVAWC has redacted more than is necessary.

November 25, 2014 Order at 14.

After an initial review of the documents filed December 5 and 12, 2014, (the Redacted Documents) it is apparent that WVAWC has ignored the warning of the Commission and significantly over-redacted the documents, in some instances even redacting information that currently exists in the public domain. This Order provides the Commission's initial reaction regarding a more appropriate level of redaction, attached to this Order as a Confidential Attachment, and as described below. Because the Confidential Attachment contains unredacted content, including unredacted Highly Sensitive Confidential Information, the Commission will provide the Confidential Attachment only to WVAWC, and will require that the Executive Secretary maintain the Confidential Attachment under seal and separate and apart from the remainder of the file.

The Confidential Attachment does not represent a final ruling by the Commission regarding the WVAWC motion for protective order. Instead, it represents what the Commission views as a more appropriate level of redaction of the Sealed Documents.

The Commission will require WVAWC to perform a revised redaction of the Sealed Documents and submit those documents on or before January 16, 2015. The Commission strongly recommends that WVAWC pay careful and close attention to the descriptions and examples contained below and in the Confidential Attachment when performing its revised redactions.

Additionally, the November 25, 2014 Order, in addition to requiring redacted public copies, required WVAWC to file a confidential version of the documents indicating by typographical symbols such as brackets, braces or other markings that are clearly not part of the original text, the portions of the confidential documents that are redacted in the public documents. WVAWC should make that filing on January 16, 2014 as well.

General instructions regarding more appropriate redaction

1. Unredacted content as filed by WVAWC on December 5 and 12, 2014, should remain unredacted.
2. The highlighted portions of the Confidential Attachment indicate where the Commission believes WVAWC over-redacted the Sealed Documents. Note: highlighting may consist of either words or entire lines covered by yellow highlighting or by the areas that are blocked out and covered with yellow diagonal highlighting.
3. Portions of the same document, and of other documents, that are similar to highlighted content, should also be considered as over-redacted.
4. Information marked as "Highly Sensitive Confidential Information" in the December 5 and 12, 2014 filings, should not be made public, except as noted in point 5 below.
5. The Resource Sections of the Emergency Preparedness Manual contain names, addresses, and phone numbers, among other information. Those sections have not been highlighted, but the Commission considers that over redaction occurred in those sections in the following particulars:

- A. The names of elected and appointed government officials.
- B. The names of corporate officers.
- C. Telephone numbers for public and private businesses and governmental agencies. This includes publically available telephone numbers that were labeled as "Highly Sensitive Confidential Information" in the December 5 and 12, 2014 filings. For example, the 1-800 number for the Public Service Commission was inexplicably labeled as "Highly Sensitive Confidential Information."

FINDING OF FACT

WVAWC filed redacted versions of its Sealed Documents on December 5 and 12, 2014.

CONCLUSIONS OF LAW

1. The documents filed by WVAWC on December 5 and 12, 2014, were significantly over-redacted.
2. WVAWC should be required to perform a revised redaction of the Sealed Documents, in accord with the descriptions and examples contained in the Confidential Attachment.

ORDER

IT IS THEREFORE ORDERED that on or before 4:00 p.m., Friday, January 16, 2015 West Virginia-American Water Company shall file public, redacted versions of all of the Sealed Documents except for the Vulnerability Assessment and the Blueprints, with such redactions in accord with the descriptions and examples contained in the Confidential Attachment.

IT IS FURTHER ORDERED that on or before 4:00 p.m., Friday, January 16, 2015 West Virginia-American Water Company shall file revised confidential versions indicating by typographical symbols such as brackets, braces or other markings that are

clearly not part of the original text, the portions of the confidential documents that are redacted in the public documents.

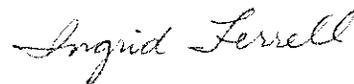
IT IS FURTHER ORDERED that the Executive Secretary of the Commission provide a copy of the Confidential Attachment to West Virginia-American Water Company by courier. The Confidential Attachment is not to be provided to any other party in this case.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission keep the Confidential Attachment separate and apart from the remainder of the file, until further order of the Commission.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order, except for the Confidential Attachment, 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.

Chairman Michael A. Albert is recused.

A True Copy, Teste,



Ingrid Ferrell
Executive Secretary

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