

**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 31st day of December 2015.

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 (i) reschedules a status conference in this matter and (ii) advises the parties regarding the issues they should be prepared to address at the status conference.

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.

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,

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.”

(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 (together, Intervenors). Commission Orders of June 4, 2014 and July 10, 2014.

On July 2, 2014, WVAWC filed its direct testimony, which addressed the specific questions identified by the Commission in its May 21, 2014 Order. The parties engaged vigorously in discovery, followed by motions practice concerning both the discoverability and confidential treatment of various documents. On November 6, 2014, Staff and the Intervenors filed their respective direct testimony, as well as a joint motion to modify the procedural schedule. In response to the joint motion, the Commission cancelled the remainder of the procedural schedule, including the dates for filing rebuttal testimony. Commission Order of November 25, 2014.

On November 26, 2014, WVAWC filed a motion to preclude certain evidence, which sought to strike portions of Staff and Intervenor testimony on the ground that it addressed matters outside the scope of the General Investigation. The Intervenors and Staff subsequently filed responses opposing the motion, and WVAWC filed its reply brief. On December 15, 2014, CAD filed a motion requesting a hearing on the WVAWC motion to preclude.

On November 20, 2015, the Commission issued an Order (i) identifying the various motions and requests pending for decision, (ii) notifying the parties that all such motions and requests were under active consideration following the appointment of a third Commissioner, (iii) granting the motion by CAD for a status conference, which was set for December 15, 2015, and (iv) advising the parties that one or more further orders would be forthcoming to identify the issues they should be prepared to address at the status conference.

On November 25, 2015, ASWS filed (i) a motion to reschedule the status conference and (ii) a motion to re-open discovery.

On December 11, 2015, the Commission issued an Order granting the ASWS motion to reschedule the status conference, and addressing certain issues related to the confidential treatment of documents sought from WVAWC in discovery. The Commission directed ASWS to confer with the other parties and to file a list of proposed new dates for the status conference. ASWS did so on December 23, 2015.

DISCUSSION

As noted in recent Commission orders, several motions and requests are pending related to the discoverability and confidential treatment of various documents, the scope of this proceeding, and certain procedural matters. The Commission has been actively and thoroughly considering all such motions and requests in order to evaluate not only the specific issues raised therein, but also the appropriate scope and course for this proceeding overall. The motions and responses filed by the parties have informed the Commission's view on the latter, and we appreciate the effort the parties have devoted to them. After careful examination, however, we have concluded that an issue the Commission itself has identified looms the largest in terms of the potential impact on this proceeding, and must be addressed before going forward.

That issue is the effect of Senate Bill No. 373 (S.B. 373), considered and enacted in 2014 as a result of the spill, on the Commission's ability to grant relief pursuant to W.Va. Code §24-2-7.² The Commission first expressed concern regarding the intersection between §24-2-7 and S.B. 373 in its August 22, 2014 Order. It has now become apparent that in order for this case to progress in an orderly and meaningful manner, that issue must be resolved, because of its potential impact upon the scope of this proceeding.

As we explained in our earlier order, the Commission will not – and indeed, may not – make a finding pursuant to §24-2-7(a) that “a particular practice, act or service [i]s unreasonable without also fixing a reasonable practice, act or service for the utility to follow in the future.” Commission Order of August 22, 2014 at 2 (footnote omitted). See also, Wetzel Co. Solid Waste Auth. v. Public Serv. Comm'n, 219 W.Va. 341, 346, 633 S.E.2d 286, 291 (2006) (*per curiam*). We therefore alerted the parties to our concern regarding whether and/or to what extent it would be appropriate for the Commission to enter a final order establishing future practices, acts or services relating to matters that also may be the subject of S.B. 373. See Commission Order of August 22, 2014 at 2 n.1.

That concern has heightened over time as the implementation of S.B. 373 has unfolded, and has come to a head upon our review of the testimony that has been filed in this matter to date. Specifically, witnesses for Staff and the Intervenors have submitted testimony regarding the future practices they contend the Commission should order WVAWC to follow. Those future practices appear to track closely the matters WVAWC must address in the source water protection plan that S.B. 373 requires it to submit to the Bureau of Public Health by July 1, 2016. See W.Va. Code §16-1-9c(a)-(b); W.Va. C.S.R. §64-3-14.6; see also “West Virginia Source Water Assessment and Wellhead

² S.B. 373 is codified in pertinent part at W.Va. Code §§16-1-9c and 24-2G-1 and -2. West Virginia Code §24-2-7 is the statutory basis under which the Commission initiated this General Investigation. See Commission Order of May 21, 2014.

Protection Programs,” available at <http://www.wvdhhr.org/oehs/eed/swap/> (guidance and templates developed by Bureau of Public Health to assist water utilities in preparing source water protection plans).

The Legislature has conferred on the Bureau of Public Health the authority to approve, modify or reject source water protection plans. Further, the failure to comply with an approved source water protection plan is a violation of W.Va. Code Chapter 16, Article 1. W.Va. Code §§16-1-9c(d). See also, 64 C.S.R. 3, Rules 14.8, 17. While the Commission is not, of course, bound to accept the particular recommendations of any party, we are troubled by what has developed into a close convergence of subject matter between this proceeding and S.B. 373, and the resulting potential for conflict.

We are cognizant that the Legislature created the Public Service Commission “for the purpose of exercising regulatory authority over public utilities,” and that our “function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. . . .” Syl. pt. 1, in part, West Virginia-Citizen Action Group v. Public Serv. Comm'n, 175 W.Va. 39, 330 S.E.2d 849 (1985) (citation omitted). As we have previously noted, however, in this instance the Legislature has specifically spoken, in response to the spill, concerning the prevention of and response to water supply source contamination. Moreover, this Commission exercises delegated legislative authority in conducting proceedings pursuant to W.Va. Code §24-2-7. We therefore cannot simply disregard S.B. 373, but must be mindful of potential actions here that might conflict with the process and procedure established by the Legislature in that bill.

While some of the parties’ filings have referenced the intersection between S.B. 373 and this proceeding, the issue has not been addressed comprehensively or in detail. Now is the time for that to occur, so that the Commission may determine the proper course of this proceeding. The parties accordingly will be required to file written statements addressing the following matters related to S.B. 373 on or before January 19, 2016:

- (i) Specific areas of overlap between witness testimony and S.B. 373, including in particular the required source water protection plan;
- (ii) Any areas addressed in witness testimony, including without limitation recommended future practices, that do not overlap with S.B. 373;
- (iii) The legal implications of S.B. 373 upon the Commission’s ability to take action pursuant to W.Va. Code §24-2-7; and
- (iv) The impact of S.B. 373 on the scope and timing of this proceeding.

The parties should be prepared to discuss those matters at the status conference, which will take place on January 22, 2016, beginning at 9:30 a.m. WVAWC and the Business

Intervenors also should be prepared to update the Commission at the status conference on any developments related to the treatment of the Sealed Documents in the Federal Cases, as outlined in the Commission's November 20, 2015 Order.

Except for the WVAWC motion for protective order and corresponding FOIA request, which we will continue to address separately, the Commission will hold the remaining motions in abeyance pending a determination of the effect of S.B. 373 on this proceeding, as that may impact our resolution of those motions.

FINDINGS OF FACT

1. ASWS has filed with the Commission a list of proposed dates for the rescheduled status conference.
2. In response to the spill, the Legislature addressed in 2014 Senate Bill No. 373 the prevention of and response to water supply source contamination.
3. Testimony filed by Staff and the Intervenors regarding the future practices that they contend the Commission should order WVAWC to follow appears to track closely the matters that WVAWC must address in the source water protection plan that S.B. 373 requires it to submit to the Bureau of Public Health by July 1, 2016.
4. The impact of S.B. 373 on the appropriate scope of this proceeding and the Commission's ability to grant relief pursuant to W.Va. Code §24-2-7 has not been addressed comprehensively or in detail.

CONCLUSIONS OF LAW

1. It is appropriate to reschedule the status conference for January 22, 2016, beginning at 9:30 a.m.
2. The impact of S.B. 373 on the appropriate scope of this proceeding and the Commission's ability to grant relief pursuant to W.Va. Code §24-2-7 may affect the course of future proceedings here, including the resolution of pending motions.
3. It is necessary and reasonable to require the parties to address the impact of S.B. 373 on the Commission's ability to grant relief in this proceeding pursuant to W.Va. Code §24-2-7.

ORDER

IT IS THEREFORE ORDERED that the parties shall appear for a status conference to be held in the Howard M. Cunningham Hearing Room, PSC Commission Building, Charleston, WV, on January 22, 2016, beginning at 9:30 a.m.

IT IS FURTHER ORDERED that on or before 4:00 p.m. on January 19, 2016, the parties file written statements addressing the following matters related to S.B. 373:

- (i) Specific areas of overlap between witness testimony and S.B. 373, including in particular the required source water protection plan;
- (ii) Any areas addressed in witness testimony, including without limitation recommended future practices, that do not overlap with S.B. 373;
- (iii) The legal implications of S.B. 373 upon the Commission's ability to take action pursuant to W.Va. Code §24-2-7; and
- (iv) The impact of S.B. 373 on the scope and timing of this proceeding.

IT IS FURTHER ORDERED that the parties be prepared to discuss those matters fully at the status conference.

IT IS FURTHER ORDERED that West Virginia-American Water Company and the Business Intervenors also should be prepared to update the Commission at the status conference on any developments related to the treatment of the Sealed Documents in the Federal Cases, as outlined in the Commission's November 20, 2015 Order.

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.

Chairman Michael A. Albert is recused.

A True Copy, Teste,



Ingrid Ferrell
Executive Secretary

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