

**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 20th day of July 2016.

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.

COMMISSION ORDER

The Commission denies the June 2, 2016 petition for reconsideration filed by the Advocates for a Safe Water System.

INTRODUCTION

The Commission takes its responsibilities seriously. We also are cognizant of the high level of public interest in this matter. Consequently, when intervenor Advocates for a Safe Water System (ASWS) filed its petition for reconsideration, urging that the Commission would be “willfully blind” if it did not re-open discovery to accommodate “new information,” we naturally took note. We undertook a comprehensive review of the issues raised in the ASWS petition, but at the end of the day found that the “new information” was not new at all and did not otherwise justify re-opening discovery. We therefore decline to delay the general investigation and will deny the ASWS petition.

BACKGROUND

The Commission has described on numerous occasions the issue to be addressed in this general investigation, initiated following a leak of crude 4-methylcyclohexane methanol (MCHM) from Freedom Industries, Inc. that made its way into the raw water intake system and finished water supply of West Virginia-American Water (WVAWC) at its Kanawha Valley Treatment Plant. Commission Orders of May 21, 2014; July 10, 2014; August 5, 2014; August 22, 2014; May 23, 2016.¹ Without repeating the substance yet again, our orders have identified the areas that will and will not be addressed in the general investigation. Specifically, the Commission has emphasized that the investigation will focus on the WVAWC reaction to the spill and that it will not address,

¹ Without characterizing what happened as a “spill,” for ease of reference we have referred to the leak as the “spill.”

among other things (i) determinations of fault, liability or damages, which are the province of the courts, or (ii) whether prior WVAWC certificate projects might have been designed differently. Id. Nor will (or may) the Commission make a determination that a particular practice, act or service by WVAWC was unreasonable without also fixing a reasonable practice, act or service for WVAWC to follow in the future. Commission Orders of August 22, 2014; December 31, 2015. We also recently confirmed that the scope of the general investigation has not changed. Commission Order of May 23, 2016.

The relevant procedural history pertains to the discovery process. The parties engaged in extensive written discovery, which resulted in the production of reams of documents and information. See generally discovery requests and discovery responses, filings June 16, 2014 – January 16, 2015. The parties also brought discovery disputes to the Commission for resolution. The Commission modified the procedural schedule on several occasions to accommodate those disputes, including by extending the discovery period and giving the parties the opportunity to supplement previously filed testimony. See Commission Orders of May 21, 2014; August 5, 2014; August 27, 2014; November 25, 2014; May 23, 2016. The deadline for issuing discovery requests passed on November 20, 2014. See Commission Orders of August 27, 2014; November 25, 2014.

On November 25, 2015, intervenor Advocates for a Safe Water System (ASWS) filed a motion to re-open discovery. ASWS asserted that discovery should be re-opened for two reasons: (i) to permit “follow up discovery” based on the outcome of discovery motions pending before the Commission, and (ii) because new information had emerged from the related federal litigation and other sources over the past year. No party filed a response to that motion.

On May 23, 2016, the Commission issued an Order addressing several pending issues, and specifically denying the ASWS motion to re-open discovery. Therein, the Commission noted that (i) it had already extended the deadline for discovery requests once due to the parties’ discovery disputes, (ii) granting the motion to compel production of an additional document did not necessitate additional discovery, (iii) the remedy sought and received in an earlier joint motion (in which ASWS participated) was sufficient to redress any asserted prejudice arising from the late production of that document, and (iv) ASWS had not identified any new information or provided any other justification for re-opening discovery.

On June 2, 2016, ASWS filed a petition to reconsider denial of its motion to re-open discovery. ASWS acknowledged that it had failed to identify in its motion any specific “new information” as grounds for re-opening discovery or what additional discovery it proposed to conduct. ASWS then identified three areas of “new information” that it asserted would justify re-opening discovery: (i) the installation of new monitoring equipment at the Kanawha Valley Treatment plant after the spill, (ii) a

paint spill on November 13, 2014 that resulted in closure of the intake valve at the Kanawha Valley Treatment plant, and (iii) discovery produced in federal cases that were filed in response to the spill.

On June 14, 2016, WVAWC filed its response to the ASWS petition for reconsideration. WVAWC stated that the petition should be denied because (i) the petition does not satisfy the standard for reconsideration, (ii) re-opening discovery would conflict with and disrupt the current procedural schedule and (iii) the federal cases differ substantively from this proceeding and re-opening discovery is not necessary in any event since ASWS could seek to use relevant information from any source developed outside the general investigation, including those cases, at the evidentiary hearing in this proceeding.

DISCUSSION

We will deny the ASWS petition for reconsideration.

We do not disagree with WVAWC's assertion that the petition fails to satisfy the standard for reconsideration. WVAWC Response at 1. ASWS concedes that it did not include in its underlying motion the "new information" or additional discovery on which it now relies to support the petition for reconsideration. ASWS Petition at 3-4.² As we have explained, "[r]econsideration offers an opportunity to point out matters which the Commission overlooked, but is not for the purpose of presenting new arguments or evidence not in the record." Beech Ridge Energy, LLC, Case No. 05-1590-E-CS, Commission Order of January 11, 2007 at 52, Conclusion of Law ¶1.

We do not rest denial of the ASWS petition on procedural shortcomings, however, but on the substantive basis that the information identified by ASWS in its petition is not "new" and otherwise fails to support the request to re-open discovery.

The primary ground for denying the petition is that almost none of the information ASWS identifies in its petition is actually "new." The most obvious example is the paint spill that resulted in closure of the intake valve at the Kanawha Valley Treatment plant. ASWS argues that the paint spill supports re-opening discovery because "[q]uestions related to why" the intake valve could be closed for that event, but could not be closed at the time of the spill, "have not been developed in the record of this case." ASWS Petition at 4-5.

² ASWS justifies the decision not to provide that information in its original motion based on its assumption that the motion "was for the purpose of putting the question on the table" and that the Commission would consider the motion at a subsequent hearing. ASWS Petition at 2-3. That assumption is not consistent with Commission practice generally or with Commission Rules of Practice and Procedure 150 C.S.R. 1 (Procedural Rules). Motions should set forth not only the relief the moving party requests, but also a complete explanation of the basis therefor.

As ASWS points out, the paint spill occurred on November 13, 2014, and was reported by news media in stories published the next day. Id. The deadline for issuing discovery requests was November 20, 2014. Commission Order of August 27, 2014. The paint spill therefore occurred before, not after, “the point ASWS was in a position to explore its significance through discovery. . . .” Id. at 4.

The discovery requests ASWS posed to WVAWC earlier in the discovery period concerning two other intake closures underscore that conclusion. ASWS asked the same types of questions about those events that it asserts are pertinent with respect to the paint spill. Specifically, ASWS asked what differences in conditions existed on the dates of those events that allowed closure of the intake valve then, but not on the date of the spill at issue here. ASWS First Request for Information, Request Nos. 10-11, July 11, 2014; ASWS Second Request for Information, Request Nos. 16-18, September 25, 2014; ASWS Third Request for Information, Request Nos. 3-4, October 14, 2014. ASWS witness Stottlemeyer considered the WVAWC responses significant enough to address one of those closures in his pre-filed testimony, which ASWS submitted just a week before the paint spill. Stottlemeyer Direct Testimony at 9-10 & n.15.

ASWS’ failure to pose the same requests to WVAWC concerning the paint spill before discovery closed, or to seek relief from the Commission shortly thereafter based on proximity to the discovery deadline, therefore cannot be explained satisfactorily on the basis that ASWS lacked sufficient time to do so. It would be inappropriate to re-open discovery simply because a party changes its mind and later desires to investigate additional areas. We decline to do so here.

The information ASWS identifies from the federal cases suffers from a similar problem. Although some of the federal case documents cited by ASWS bear dates after discovery closed in this proceeding, the information discussed in those documents was neither unavailable nor unexplored during discovery here. The pre-filed testimony and discovery in this case are replete with references to the same subjects.

The decision to continue to operate the Kanawha Valley Treatment Plant on the date of the spill, rather than to close the intake valve, again presents a prime example. ASWS attaches to its petition a one-page excerpt from a deposition taken in the federal cases in January 2016, where the deponent discussed his involvement in that decision. ASWS asserts that the deposition supports re-opening discovery because the deponent did not submit pre-filed testimony in this case and provided “further detail on these decision points than has been provided” in WVAWC’s direct testimony here. ASWS Petition at 6-7 & Exhibit 1.

The decision not to close the intake valve was one of the areas the Commission required WVAWC to address in its pre-filed direct testimony.

A narrative describing the process and factors used to decide whether to close the intake structure. The testimony should include which, if any, outside agencies were consulted or otherwise had a role in making the decision, the factors contemplated in making the decision, and who ultimately made the decision regarding the continued intake of raw water from the Elk River.

Commission Order of May 21, 2014, at 10. See also McIntyre Direct Testimony at 10-16, 41; Suder Direct Testimony at 4-10.

Consequently, both the decision not to close the intake valve and the pre-filed testimony concerning that decision were the subject of numerous discovery requests, including a number from ASWS. E.g., Business Intervenors First Requests for Information, June 27, 2014; ASWS First Requests for Information, July 11, 2014; ASWS Second Requests for Information, September 25, 2014. WVAWC's responses to the ASWS requests identified the individual who gave the deposition testimony attached to the ASWS petition. Responses to ASWS First Requests For Information, July 22, 2014, Request No. 7. ASWS issued two further requests concerning his involvement in the decision, to which WVAWC responded. WVAWC Responses to ASWS Second Requests for Information, October 6, 2014, Request Nos. 14-15. Any lack of "further detail" therefore does not arise because such information is "new," i.e., because it was unavailable during the discovery period.

The same is true of the issues ASWS identifies concerning standards for water production at the Kanawha Valley Treatment Plant and the alleged development of a plan for a second intake for that plant. ASWS Petition at 7-8. Storage levels and WVAWC management of water supply are the subject of pre-filed testimony, including in particular by ASWS witness Stottlemeyer. E.g., Stottlemeyer Direct Testimony at 7-10 (testimony captioned "WVAWC did not operate its system in the days prior to January 9th to maintain adequate storage levels in accordance with standard industry practice"). The specific information that ASWS contends was newly developed in the federal case, operational standards for water production,³ also was the subject of discovery in this case. Business Intervenors First Requests for Information, June 27, 2014, Interrogatory Nos. 28-29.

³ ASWS describes the information as "statements by KVTP treatment plant operators. . .that there are no written procedures or formal training outlining when operators should increase water production at the plant," but does not cite to any document in the federal cases. ASWS Petition at 7. WVAWC provided the names of employees working at the treatment plant at various times during this proceeding. E.g., McIntyre Direct Testimony at 11, 41; Suder Direct Testimony at 7-9; WVAWC Responses to ASWS First Requests for Information, July 22, 2014; WVAWC Supplemental Responses, September 2, 2014; WVAWC Responses to ASWS Second Requests for Information, October 6, 2014.

With regard to the secondary intake, several witnesses, including witness Stottlemeyer, recommended the development of backup water supply or an alternate intake as a potential future remedy. Stottlemeyer Direct Testimony at 14-15; Mazyck Direct Testimony at 17. ASWS acknowledges that this investigation will not re-litigate past certificate proceedings regarding the intake, but asserts that the relevant question is “why plans for a second intake were never completed and whether this has any implication for potential remedies in the current proceeding involving construction of a second intake.” ASWS Petition at 8. Without addressing the accuracy of that assertion, the plans to which ASWS refers were discussed at length in several federal court filings.⁴ Those filings make clear that the plans are publicly available documents related to construction of the Kanawha Valley Treatment Plant, which WVAWC submitted to this Commission and the Bureau for Public Health in 1969. See Good v. American Water Works Co., Inc., C.A. No. 2:14-01374 (S.D.W.Va.), Document Nos. 227, 238, 362, 372-1. They accordingly do not constitute “new information.”

We also will address the ASWS suggestion that the Commission should incorporate into this general investigation all depositions and discovery answers provided by WVAWC in the federal cases. ASWS Petition at 5. That suggestion is devoid of merit. Procedural Rule 13.6.b requires that discovery requests must be “pertinent to substantial issues in the proceeding.” ASWS has not come close to making that showing for the entirety of the discovery taken from WVAWC in the federal cases. Even a cursory review of the docket, which currently lists over 900 entries, reveals that it would encompass tens of thousands of pages on subjects ranging far afield from the issues to be addressed in this proceeding. See generally Good v. American Water Works Co., Inc., C.A. No. 2:14-01374 (S.D.W.Va.).

Furthermore, as we have repeatedly explained, while there naturally is some overlap between the subject matter of the federal cases and this general investigation since both concern the spill, the two are not substantively co-extensive. In particular, unlike the courts, the role of the Commission is not to determine liability or fault or to assess damages. Commission Orders of May 21, 2014; August 22, 2014. We have emphasized that distinction with an example from a prior discovery dispute:

The Commission is compelled to continue to stress the difference between its function and mission contrasted to that of a trial court. Some of the parties seem to blur that distinction. For example, during the [August 18, 2014] discovery hearing, counsel for Business Intervenors stated it was

⁴ We again note that to the extent the Commission determines that WVAWC engaged in unreasonable acts or practices, the Commission’s ability to enter a final order establishing future acts or practices as required by W.Va. Code §24-2-7 could be affected by actions the West Virginia Bureau for Public Health may take pursuant to the authority conferred on it by the Legislature in 2014 Senate Bill No. 373 (S.B. 373). See Commission Orders of August 22, 2014; December 31, 2015; May 23, 2016. See also W.Va. Code §§16-1-9c and 24-2G-1 and -2 (codification of S.B. 373).

important for the Commission to get involved with the planning issues and the question was simple: did WVAWC have plans and, if so, did they follow them. August 18, 2014 hearing, transcript at 19-20. That statement illustrates what a trial court and jury would consider in determining whether possible acts or inactions constituted negligence and what were [the] resulting damages.

Commission Order of August 22, 2014 at 2 n.2.

The discovery excerpts ASWS cites from the federal cases illustrate the same point. The fact that the parties to this general investigation and the parties to the federal cases examined some of the same subject matter but chose to develop the evidence differently, is largely reflective of the different roles of the two tribunals and the different legal standards governing the respective proceedings. Thus, while ASWS may utilize pertinent information from any source (including the federal cases) for any proper purpose during the evidentiary hearing in this proceeding, the fact that information developed outside this investigation may not be identical to what the parties developed here simply does not justify a wholesale re-opening of discovery, on the grounds that it is “new information” or otherwise.⁵

Finally, we also address the ASWS assertion that installation of new monitoring equipment at the Kanawha Valley Treatment Plant supports re-opening discovery.

⁵ We caution, however, that not only must the information be pertinent and offered for a proper purpose, but also that the parties must comply with the Commission’s Procedural Rules in presenting it. As we recently explained,

[T]he Commission requires that all parties who wish to present factual information on the issues in this case must do so through written, pre-filed direct and rebuttal testimony. See Rule 13.3. January 13, 2016 Order at 2. That requirement arises from the complex, technical and financial nature of much of the testimony filed at the Commission. It provides all parties with prior notice and knowledge of the positions of the other parties, affords the opportunity to prepare appropriate cross-examination, and allows for a more efficient and expedited presentation of evidence at the hearing.

Pre-filed testimony and any related exhibits therefore must contain the entirety of a party’s affirmative, evidentiary case. Parties should not attempt to supplement the record by submitting new information for the Commission’s consideration at the hearing. Specifically, it is improper for a party to submit documents, articles, or other written materials that they wish the Commission to treat as evidence, except (i) as part of the pre-filed testimony of a witness sponsored by that party, (ii) as part of cross-examination of an opposing party’s witness, or (iii) as otherwise ordered by the Commission.

Jefferson County Public Service District, Case No. 15-1338-PSD-42R-PC, Commission Order of April 8, 2016, at 4-5.

ASWS asserts that WVAWC announced the installation of that equipment publicly after the close of discovery and that since the new equipment may affect previously-filed testimony of ASWS witness Stottlemyer, "ASWS should have the ability to discover the details regarding any new monitoring [sic] equipment. . . ." ASWS Petition at 4.

WVAWC provided details regarding the new monitoring equipment in a report to the West Virginia Legislature due on January 1, 2015, publicly available at http://www.legis.state.wv.us/legisdocs/reports/agency/W19_CY_2014_2676.pdf (Report). WVAWC also correctly observed in the Report that it was required to install the new equipment by W.Va. Code §§24-2G-1 and 24-2G-2, both enacted as part of S.B. 373 and applicable only to WVAWC. Report at 2. Again noting that the Commission's ability to enter a final order establishing future acts or practices as required by W.Va. Code §24-2-7 may be affected by the requirements of S.B. 373, we conclude that it is not appropriate to re-open discovery based on the installation of such equipment.

FINDINGS OF FACT

1. ASWS seeks Commission reconsideration of the May 23, 2016 Commission decision to deny the ASWS motion to re-open discovery.
2. ASWS did not provide support for its motion to re-open discovery until after the Commission denied the motion. ASWS Motion; ASWS Petition at 3-4.
3. Information regarding the paint spill that led to closure of the intake valve at the Kanawha Valley Treatment Plant in November 2014 was available to ASWS prior to the close of discovery. ASWS Petition at 4-5 & n.6.
4. ASWS issued discovery requests and submitted pre-filed testimony concerning other intake closures. ASWS First Request for Information, Request Nos. 10-11, July 11, 2014; ASWS Second Request for Information, Request Nos. 16-18, September 25, 2014; ASWS Third Request for Information, Request Nos. 3-4, October 14, 2014; Stottlemyer Direct Testimony at 9-10.
5. Discovery in this proceeding closed November 20, 2014.
6. The areas identified by ASWS in the discovery materials it cited from the federal cases were the subject of discovery and pre-filed testimony in this proceeding.
7. The alleged "plans for a second intake" cited by ASWS in its petition are publicly available documents concerning construction of the Kanawha Valley Treatment Plant, submitted by WVAWC to the Commission and the West Virginia Bureau for Public Health in 1969. Good v. American Water Works Co., Inc., C.A. No. 2:14-01374 (S.D.W.Va.), Document Nos. 227, 238, 362, 372-1.

8. WVAWC provided details regarding the new monitoring equipment referenced in the ASWS petition, in a report to the West Virginia Legislature due on January 1, 2015. The report is publicly available at:
[http://www.legis.state.wv.us/legisdocs/reports/agency/W19 CY 2014 2676.pdf](http://www.legis.state.wv.us/legisdocs/reports/agency/W19_CY_2014_2676.pdf).

9. WVAWC was required to install the new monitoring equipment by W.Va. Code §§24-2G-1 and 24-2G-2, enacted as part of 2014 Senate Bill No. 373 and applicable only to WVAWC.

CONCLUSIONS OF LAW

1. Although some of the materials identified by ASWS in support of its petition to reconsider may be appropriate for use during the evidentiary hearing in this proceeding, they do not support re-opening discovery.

2. The ASWS petition for reconsideration of the Commission decision to deny the ASWS motion to re-open discovery should be denied.

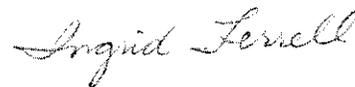
ORDER

IT IS THEREFORE ORDERED that the June 2, 2016 petition for reconsideration filed by Advocates for a Safe Water System is denied.

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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