

**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 30<sup>th</sup> day of December 2016.

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 denies the motion by West Virginia-American Water Company to exclude certain testimony and constrain the scope of evidence.

**BACKGROUND**

This general investigation concerns the reaction by West Virginia-American Water Company (WVAWC) to a January 9, 2014 leak of crude 4-methylcyclohexane methanol (MCHM) from Freedom Industries, Inc. that made its way into the raw water intake and ultimately, the finished water supply of WVAWC.<sup>1</sup> Commission Order of May 21, 2014. The parties to this proceeding are WVAWC, Commission Staff, and intervenors the Consumer Advocate Division (CAD), Advocates for a Safe Water System (ASWS), and a group of businesses we refer to as “Business Intervenors.”

The full procedural history of this case is available in previously issued Commission Orders. The procedural history pertinent to the matters addressed herein follows.

On May 21, 2014, the Commission entered an Order that among other things, initiated a focused general investigation into this matter. The Commission identified the issue to be addressed in the general investigation as follows:

...[A]t the time of and under the circumstances that existed with the spill, did the actions of WVAWC in reacting to the spill and the presence of MCHM in its raw water or finished water supply constitute unreasonable or inadequate practices, acts, or services as provided under the provisions of W.Va. Code §24-2-7 or other pertinent provision of Chapter 24 of the West

---

<sup>1</sup> 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.”

Virginia Code. It should be understood that the purpose of this general investigation is limited to the WVAWC reaction to the spill and is not intended to re-litigate past certificate proceedings regarding the intake, treatment, storage, distribution, or transmission plant that was in place in the Kanawha Valley System.

\* \* \*

Our examination of the issues in this general investigation will focus on the actions and activities of WVAWC following the spill, not on whether, in 20/20 hindsight, prior WVAWC certificate projects might have been designed differently.

In addition, we wish to make it clear that this general investigation is not intended, and cannot be used, to evaluate or develop quality standards for public drinking water supplies. That jurisdiction is reserved to what is currently the Bureau for Public Health of the West Virginia Department of Health and Human Resources. With regard to the quality of water, the Commission is required, pursuant to W.Va. Code §24-2-5 to use the quality standards established in the regulations governing water supplies by the state Board of Health (current the Bureau for Public Health).

Commission Order of May 21, 2014 at 6-8. The Commission specifically noted that it was not a court of general jurisdiction, could not award damages, and unlike the courts, was not charged with determining fault or liability. Id. at 7.

In the May 21, 2014 Order, the Commission required WVAWC to file direct testimony responsive to five specific questions of the Commission, “[i]n addition to any testimony that WVAWC believes is responsive to the scope.” Order at 10. The five questions listed by the Commission all pertained to actions taken or occurring beginning on the date of the spill, January 9, 2014. Id. at 10-11.

The Commission has reiterated the parameters of the general investigation on several occasions. E.g., Commission Orders of July 10, 2014, August 5, 2014, August 22, 2014. More recently, the Commission has confirmed that the scope of this proceeding has not changed. Commission Order of May 23, 2016, at 10; Commission Order of July 20, 2016, at 2.

On July 2, 2014, WVAWC filed its direct testimony, which addressed the five questions posed by the Commission in its May 21, 2014 Order. On September 25, 2014, WVAWC filed supplemental direct testimony. On November 6, 2014, Staff and the Intervenor filed their direct testimony.

On November 26, 2014, WVAWC filed a motion to preclude certain evidence proffered by Staff and the Intervenors. According to WVAWC, all or part of the pre-filed direct testimonies of CAD witness Hansen, Business Intervenors witnesses Mazyck and Cotruvo, ASWS witness Stottlemeyer, and Staff witnesses Dove and Weimer, should be stricken because they exceeded the scope of the general investigation. Staff and the intervenors subsequently filed responses opposing the motion, and WVAWC filed a reply in support. See filings December 2 - 12, 2014.

In its May 23, 2016 Order, the Commission denied the WVAWC motion to preclude. Commission Order at 1, 9-11, 17.

On August 1, 2016 and August 8, 2016, CAD, Business Intervenors and Staff filed supplemental direct testimony. On September 9, 2016, ASWS, Business Intervenors and WVAWC filed rebuttal testimony.

On October 3, 2016, WVAWC filed a series of pre-hearing motions, including a motion to exclude certain testimony and constrain the scope of evidence in this general investigation (Motion to Exclude and Constrain). That motion incorporated and essentially renewed the November 26, 2014, WVAWC motion to preclude certain evidence (Motion to Preclude). CAD, Business Intervenors and ASWS each filed responses opposing the Motion to Exclude and Constrain. See filings of October 5, 2016 (CAD), and October 17, 2016 (Business Intervenors, ASWS).

On December 21, 2016, the Commission conducted a pre-hearing conference at which it took argument on the WVAWC pre-hearing motions and addressed various matters related to an upcoming site visit at the WVAWC Kanawha Valley Treatment Plant and the evidentiary hearing.

On December 22, 2016, the Commission issued an Order elaborating on and memorializing rulings made from the bench during the pre-hearing conference. The Order addressed all pending matters except the Motion to Exclude and Constrain, and noted that the Commission would rule on that motion in a forthcoming order. Commission Order of December 22, 2016 at 2.

### **DISCUSSION**

The remaining pre-hearing motion filed by WVAWC asks that the Commission exclude certain pre-filed testimony submitted by Staff and intervenors and constrain the scope of the evidence. This motion is essentially a renewal of the WVAWC November 26, 2014 Motion to Preclude, which sought to exclude those portions of the Staff and intervenor direct testimony that addressed pre-spill activities, pre-spill system design and characteristics, and alleged pre-spill obligations.

In the Motion to Exclude and Constrain, WVAWC acknowledged the general arguments raised in its earlier Motion to Preclude, but focused on the chief argument, namely that the challenged testimony was improper because it exceeded the scope of the general investigation by addressing pre-spill circumstances. Quoting from the Motion to Exclude and Constrain:

Just as the Commission began its August 22, 2014 order with a restatement of the GI's limited scope, the Company's first argument in the Motion to Preclude was that the Commission's primary scope limitation – that the GI would focus on the Company's *reaction* to the spill “at the time of and under the circumstances that existed with the spill” – was ignored by much of the opposing testimony (and all of CAD witness Hansen's, which solely addressed source water protection planning efforts before the spill). Motion to Preclude Certain Evidence at 3 (primary argument) and 6-8 (address of Hansen testimony). Arguing for the exclusion of Mr. Hansen's testimony on this ground alone, the Company observed:

If this proceeding is to address, as the Commission has said over and again, how the Company “responded ... at the time of and under the circumstances that existed” on January 9, 2014, then Mr. Hansen's testimony, which only addresses what he claims the Company should or could have done before the Spill, has no place in it.

*Id.* at 7-8. The GI scope argument was also apparent in the Company's advocacy for exclusion of David Dove's testimony about the Company's options if the Company had been adequately prepared (*id.* at 5-6), David Mazyck's options about prespill planning (*id.* at 8), Fred Stottlemeyer's allegations that pre-spill storage practices were not in accordance with BPH design standards (*id.*), and James Weimer's opinions on the Company's “glaring failure” to inspect the Freedom Industries tanks before the spill (*id.*). Although the Company did advance other arguments to justify preclusion of these witnesses' testimony, failure to comply with the Commission's expressed GI scope was the predominant rationale.

WVAWC Motion to Exclude and Constrain at 5-6 (emphasis in original).

WVAWC acknowledged the Commission Order of May 23, 2016, but suggested that the Commission had deferred ruling on the November 26, 2014 Motion to Preclude. Motion to Exclude and Constrain at 7-8. See also Transcript, December 21, 2016 Pre-hearing Conference at 64-65 (“12/21/16 Tr. at \_\_\_”).<sup>2</sup> WVAWC concluded by stating:

---

<sup>2</sup> The Commission in fact denied the Motion to Preclude. See May 23, 2016 Order at 1 and at 17, Conclusion of Law No. 4 and Ordering Paragraph No. 2.

All that remains is the adjudication of pre-hearing motions and the presentation of evidence at hearing. If the Commission truly intends to constrain the GI's scope as it has held since the very first order in May 2014, the time has come for it to do so.

The Commission's inquiry should focus on the Company's reaction to the spill, at the time and under the circumstances that prevailed when the Company was first alerted to the spill on January 9, 2014. It is uncontestable that the evidence the Company seeks to preclude aims to replace those actual circumstances with hypothetical ones – circumstances their proponents contend would have existed if the Company's pre-spill actions and facilities had produced a reality more beneficial to the Company's spill response. Staff and the intervenors want to evaluate the Company's spill response under a parallel but altered universe – one in which their hindsight recommendations are imputed to the Company.

This is exactly the situation the Commission said it would not tolerate when it limited the GI's focus to the situation "at the time and under the circumstances" presented by the spill, and when it repeated this admonition time after time since May 2014. If this consistent constraint on the GI's scope is to mean anything at all, then the Commission must give it practical effect by granting the Motion to Preclude, and doing so well before the evidentiary hearing begins.

Id.

The reasoning the Commission applied in denying the initial WVAWC Motion to Preclude continues to be instructive in the context of the WVAWC Motion to Exclude and Constrain.

The focus of the WVAWC motion to preclude is on evidence concerning operations or practices that either did or did not occur prior to the chemical spill, including such matters as equipment usage and emergency planning. The company self-describes its position on admissibility as temporal, and asserts that any evidence concerning operations or practices prior to the date of the chemical spill is outside the scope of the proceeding and should be stricken.

WVAWC's position is too restrictive. As observed earlier in the context of a discovery dispute, not "all, any and every discovery effort directed at events or situations occurring before the date of January 9, 2014 is inappropriate or improper." Transcript, August 18, 2014 Hearing at 10. That observation applies to the submission of testimony as well, particularly at this juncture when the record has not yet closed.

The Commission is not without appreciation, however, for WVAWC's concern that some of the proffered evidence could stray outside the articulated scope of the proceeding. For example, WVAWC reads certain testimony to suggest that the company should have made different design or construction decisions at the Kanawha Valley Treatment Plant. WVAWC also identifies testimony that may purport to address conduct or decisions of other governmental bodies.

The sponsoring parties have disputed WVAWC's characterizations of the testimony at issue. In response to Commission questioning, they also have specifically disavowed any intention to seek Commission investigation or oversight of the actions of other agencies. Transcript, January 22, 2016 Status Conference at 52-56.

At this stage of the general investigation and given the parties' competing interpretations of the proffered evidence, it is simply too early to make determinations about the exclusion of testimony. The Commission is establishing a procedural schedule that provides for the filing of additional testimony, including simultaneous rebuttal testimony by all parties. WVAWC thereby will have the opportunity to respond to all areas addressed in Staff and intervenor testimony.

Commission Order of May 23, 2016 at 10-11 (footnote omitted).<sup>3</sup>

Oral argument during the pre-hearing conference underscored the continued adherence of the parties to the positions described in the quotation above. WVAWC argued that the testimony at issue is objectionable not only because it addresses circumstances arising before January 9, 2014, but also because it asks the Commission to "address circumstances that did not exist . . . [and to] pretend that different circumstances existed on January 9." 12/21/16 Tr. at 43. Staff and intervenors appeared to agree in concept that actions WVAWC did or did not take prior to January 9, 2014 should be considered only for purposes of establishing reasonable practices prospectively, in the event the Commission found that WVAWC acted unreasonably in responding to the spill. They were less willing to concede, however, that any specific testimony – e.g., concerning decisions about testing equipment or system design – should be considered exclusively for purposes of determining reasonable future practices, and disregarded for

---

<sup>3</sup> WVAWC agrees that it has had, and has taken, the opportunity to file rebuttal testimony in response to the pre-filed direct testimonies that engendered the initial Motion to Preclude. 12/21/16 Tr. at 48-49. The Commission also has given WVAWC the opportunity to file surrebuttal testimony in response to certain rebuttal testimony submitted by ASWS and Business Intervenor witnesses. See Commission Order of December 22, 2016 at 3-4.

purposes of determining whether WVAWC acted unreasonably in responding to the spill. E.g., id. at 53-57.

In resolving the WVAWC motion, the nature of this proceeding is an important consideration. This matter is a general investigation, focused on gathering evidence to assist the Commission in making a reasoned decision. By the same token, however, W.Va. Code §24-2-7 supplies the governing framework for this general investigation. As we have explained, that statute includes two important components.

The Commission does not make a determination regarding the reasonableness or unreasonableness of practices, acts or services under W.Va. Code §24-2-7 for the mere purpose of making a determination regarding reasonableness. The statute instructs that if the Commission finds practices, acts or services of a public utility to be unreasonable, then the Commission must order reasonable practices, acts or services to be followed in the future.

August 22, 2014 Order at 1.

The objections raised by WVAWC may turn largely on the purpose for which Staff and intervenors offer the evidence in question, particularly with respect to the component parts of W.Va. Code §24-2-7. We have stated that we appreciate WVAWC's concerns in that regard, and our own concerns frankly have not been fully abated by either the responses filed to the WVAWC motion or the oral argument at the pre-hearing conference. At this juncture, however, the testimony identified by WVAWC still does not cross the line to such an extent that the proper remedy is to exclude it from the record entirely.

Ultimately, it will be up to the Commission to determine whether the purpose for which Staff and intervenors offer particular evidence is proper. Depending on those determinations, we will give the evidence the weight to which it is entitled, which could range from full to none. We are best positioned to do that in the context of a full record, as further developed at the evidentiary hearing. We therefore will deny the WVAWC Motion to Exclude and Constrain.

### **FINDINGS OF FACT**

1. WVAWC has had, and has taken, the opportunity to file rebuttal testimony responsive to the pre-filed direct testimony of Staff and intervenors that WVAWC seeks to exclude. 12/21/16 Tr. at 48-49.

2. WVAWC has been provided the opportunity to file surrebuttal testimony in response to certain pre-filed rebuttal testimony submitted by ASWS and Business Intervenor witnesses. Commission Order of December 22, 2016, at 3-4.

### CONCLUSION OF LAW

It is reasonable to deny the WVAWC Motion to Exclude and Constrain because WVAWC has been afforded the opportunity to respond fully to the pre-filed testimony that it seeks to exclude, and because the propriety and weight of the evidence to which WVAWC objects can best be determined in the context of a full record, as further developed at the evidentiary hearing.

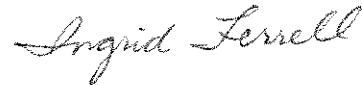
### ORDER

IT IS THEREFORE ORDERED that the West Virginia-American Water Company Motion to Exclude Certain Testimony/Constrain Scope of Evidence 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, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

Chairman Michael A. Albert is recused.

A True Copy, Teste,



Ingrid Ferrell  
Executive Secretary

JJW/sm  
140872caa.docx