

**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 29<sup>th</sup> day of June 2015.

CASE NO. 15-0674-WS-D  
WEST VIRGINIA-AMERICAN WATER COMPANY  
Application to change depreciation rates.

CASE NO. 15-0675-S-42T  
WEST VIRGINIA-AMERICAN WATER COMPANY  
Rule 42T tariff filing to increase sewer rates and charges.

and

CASE NO. 15-0676-W-42T  
WEST VIRGINIA-AMERICAN WATER COMPANY  
Rule 42T tariff filing to increase water rates and charges.

**COMMISSION ORDER**

The Commission adopts a procedural schedule for the processing of these cases.

**BACKGROUND**

On April 30, 2015, West Virginia-American Water Company (WVAWC) tendered for filing revised tariff sheets reflecting increased water rates and charges of approximately \$35,472,154 annually (a 28.18 percent increase) for furnishing potable water to approximately 168,000 customers in Boone, Braxton, Cabell, Clay, Fayette, Harrison, Jackson, Kanawha, Lewis, Lincoln, Logan, Mason, Mercer, Putnam, Raleigh, Roane, Summers, Wayne and Webster Counties, to become effective on May 30, 2015.

On the same date, WVAWC filed revised tariff sheets reflecting increased sewer rates and charges of \$176,895 annually (a 22.3 percent increase) for furnishing sewer utility service to 1,050 customers in Fayette County, to become effective on May 30, 2015, and an application to increase depreciation rates effective on the same date that its revised water and sewer rates go into effect.

On April 30, 2015, WVAWC also filed a Motion for Protective Order. WVAWC seeks protective treatment for:

- a) information derived from American Water tax returns provided as a component of i) the water rate case workpapers, in response to the requirements of Statement A, Schedule 5 Supplemental Information under Tariff Rule 19.3.e; and ii) Exhibit RPN-3 of Mr. Nevirauskas' direct testimony (Tax Return Data); and
- b) portions of Exhibit RPN-2 of Mr. Nevirauskas' direct testimony, that include data on the pension and OPEB actuarial calculations prepared by American Water's actuary (Pension/OPEB Data).

The Motion for protective treatment argued that the information satisfies the Tsapis test and is exempt from Freedom of Information Act (FOIA) disclosure under either the "trade secret" or the "invasion of privacy" exemptions in W.Va. Code § 29B-1-4(a) and (2). WVAWC urged the Commission not to require WVAWC to file redacted information because most of the confidential material is in tabular form, and consists of dollar amounts. WVAWC stated that when the material is redacted, virtually nothing would remain, and certainly nothing of public interest. WVAWC argued that redaction would be time-consuming and wasteful.

On May 1, 2015, the Consumer Advocate Division (CAD) petitioned to intervene in these cases to represent the interests of residential water and sewer customers. CAD asserted that this matter has the potential for adverse effects on the interests of ratepayers that it is required to represent.

On May 22, 2015, the Kanawha County Commission and the Regional Development Authority of Charleston, Kanawha County (RDA), filed a petition to intervene. That petition to intervene was granted by Commission Order entered on June 26, 2015.

By Order issued May 27, 2015, the Commission (i) made WVAWC a respondent in these proceedings, (ii) consolidated the three cases, (iii) suspended the proposed increased rates and charges through Wednesday, February 24, 2016, (iv) granted a waiver to allow WVAWC additional time to provide individual notice, (v) established the completion date for individual customer notice; (vi) set an intervention date of July 29, 2015; and (vii) granted the CAD request to intervene.

On May 28, 2015, WVAWC filed a corrected Tariff Form No. 8.

On June 4, 2015, Staff filed its initial memorandum summarizing the WVAWC rate applications and describing alleged deficiencies in the WVAWC Rule 42 Exhibits filed in the water and sewer base rate cases. Staff stated that among the deficiencies was WVAWC's failure to follow a Commission directive that it should submit a public document containing every page of the confidential information properly redacted so that

the pagination layout in both the public and confidential versions is identical. The memorandum stated that Staff would file a motion requesting that the Commission dismiss the cases unless WVAWC agreed to toll the statutory deadline and commence a 300-day suspension period on the date that WVAWC cured the deficiencies noted by Staff.

On June 5, 2015, WVAWC filed a partial response to the June 4, 2015, Staff memorandum by filing a redacted testimony exhibit RPN-3. WVAWC stated it would file a further response to the Staff memorandum in a timely manner.

On June 10, 2015, Staff filed a letter stating that Staff, the CAD, the Kanawha County Commission and Kanawha County Regional Redevelopment Authority agreed to the following dates for the procedural schedule in these cases:

September 30, 2015 -	Staff/Intervenor Direct Testimony
October 14, 2015 -	Company Rebuttal Testimony
October 27, 2015 -	Evidentiary hearing

The letter requested on behalf of Staff and CAD that the Commission not set a discovery cut-off date. In addition, the letter stated that WVAWC did not agree to the date for Company rebuttal testimony.

On June 11, 2015, WVAWC filed a Response to the June 4, 2015 Staff memorandum. WVAWC stated that many of the Staff concerns are easily explained and addressed by simple backup calculations. WVAWC filed a CD with the Response to provide backup data as well as a number of Exhibits. WVAWC also stated that the Staff concerns could have easily been handled through discovery or a phone call. Other Staff complaints were directed toward improvements in the way that WVAWC presented its adjustments. WVAWC stated that it stands by its presentations and believes no supplementation is required to make the filings comply with Rule 42. WVAWC stated that no tolling is necessary and dismissal would be unjustified.

Also on June 11, 2015, Staff filed a Motion to Dismiss or Toll the Statutory Suspension Period.

On June 12, 2015, WVAWC filed a Response to the Staff proposed procedural schedule arguing that the due date for Staff and Intervenor testimony should be moved five days earlier, to September 25, 2015, to provide WVAWC with nineteen days to file rebuttal instead of fourteen days. WVAWC also requested a discovery deadline set seven days after the Staff/Intervenor direct testimony date, on Friday, October 2, 2015, which is consistent with the schedule set in the pending Mountaineer Gas rate case. WVAWC stated that moving the Staff and Intervenor testimony date five days earlier is not unreasonable because Staff and the Intervenors will have 148 days to prepare testimony because WVAWC filed all of its direct testimony when it filed its rate case.

Also on June 12, 2015, WVAWC filed a Response to the Staff Motion to Dismiss or Toll. This Response asked the Commission to deny the Motion for the reasons stated in the WVAWC Response filed on June 11, 2015.

### DISCUSSION

The WVAWC argument that the due date for Staff and the Intervenor testimony should be September 25, 2015, is reasonable because WVAWC filed all of its direct testimony when it filed the cases and the parties will have 148 days to prepare direct testimony. The Commission will establish a discovery deadline similar to the deadline set in the pending rate case for Mountaineer Gas Company, that being seven days following the Staff and Intervenor direct testimony due date. The Commission will adopt a procedural schedule with testimony due dates, a discovery deadline, public comment hearings and the evidentiary hearing, all as set forth in the ordering paragraphs.

#### Protective Order

As indicated, on the date it filed its rate case, WVAWC filed a Motion for Protective Order. WVAWC seeks protective treatment for:

- a) information derived from American Water tax returns provided as a component of i) the water rate case workpapers, in response to the requirements of Statement A, Schedule 5 Supplemental Information under Tariff Rule 19.3.e; and ii) Exhibit RPN-3 of Company witness Mr. Nevirauskas' direct testimony (Tax Return Data); and
- b) portions of Exhibit RPN-2 of Mr. Nevirauskas' direct testimony, that include data on the pension and OPEB actuarial calculations prepared by American Water's actuary (Pension/OPEB Data).

The motion for protective treatment argued that the information satisfies the test identified and set forth by the Supreme Court of Appeals in State ex rel. v. Tsapis, 187 W.Va. 337, 419 S.E.2d 1 (1992), and is exempt from FOIA disclosure under either the "trade secret" or the "invasion of privacy" exemptions in W. Va. Code § 29B-1-4(a) and (2). As stated above, on June 5, 2015, WVAWC filed a redacted exhibit RPN-3 to Mr. Nevirauskas' direct testimony.

The Commission will grant the motion for protective treatment of the Tax Return Data because the Commission recognizes the clear preference of both Congress and the West Virginia Legislature to maintain the confidentiality of income taxation information as a trade secret. Bluefield Gas Company, Case No. 12-0427-6-42T (Commission Order January 30, 2013), citing 26 U.S.C. §6103, W.Va. Code §11-10-5d, Town of Burnsville v. Cline, 188 W. Va. 510, 425 S.E. 2d 186 (1992). In Bluefield, the Commission found

that good cause existed to protect the tax information filed under seal. The Commission will order protective treatment for the Tax Return Data filed in these cases.

Regarding Mr. Nevirauskas' direct testimony relating to the Pension/OPEB Data, the Commission concludes that it should take under advisement whether to grant permanent protective treatment. As a state agency, the Commission must determine that the information for which a party seeks protective treatment meets one of the exemptions contained in the FOIA before granting permanent protection of the information. AT&T v. Public Service Commission, 423 S.E. 3d 859 (W.Va. 1992) (requiring credible showing of likely harm). Trade secrets are a FOIA exemption, pursuant to W.Va. Code §29B-1-4(1); also, W.Va. Proc. R. 26(c)(7) (trade secrets may be protected). The Commission has stated it will not grant protective treatment in the absence of convincing evidence supporting a conclusion that harm will result by making the material public. Mountaineer Gas Co., Case No. 88-428-G-30C (Commission Order November 29, 1988); Mountaineer Gas Co., Case No. 89-640-6-42T (Commission Order February 21, 1990).

Until the Commission issues a decision on permanent protective treatment, it will grant interim protective treatment to the redacted portions of Exhibit RPN-2 to Mr. Nevirauskas' written direct testimony. The Commission will restrict disclosure of the exhibit to parties who execute a protective agreement, and will keep the exhibit segregated from the rest of the case file and under seal.

The Commission prefers not to hold an in camera session during the course of the hearing unless it is absolutely necessary. The parties should conduct their cross examination accordingly. In an effort to avoid convening in a closed session, the Commission may rule immediately from the bench regarding any testimony or exhibit that is subject to a motion for protective treatment or protective agreement. Alternatively, the Commission may go into closed session with the understanding that the motion for protective treatment has not yet been finally decided, and that the resolution of the motion will be decided in the closed session or as part of the final order in this case. The parties are reminded that the Commission is not bound by protective agreements among parties in its determination of whether information should be afforded protective treatment.

#### Motion to Dismiss or Toll

The Commission has reviewed the Rule 42 Exhibit to determine whether it is necessary to dismiss this case unless the statutory decision date is tolled. WVAWC deviated from Rule 42 requirements by grouping certain adjustments. Given the extent and nature of WVAWC's filing, we do not believe the matter should be tolled. The adjustments are fully explained and the work papers filed in support of the adjustments contain all of the information needed for the other parties to evaluate the adjustments. If necessary, after review of the materials filed by WVAWC on June 11, 2015, Staff should use the discovery process to further clarify the adjustments. Based on our review, the

deviations from Rule 42 do not justify either a tolling or dismissal of the cases, and the Staff motion will be denied.

**FINDINGS OF FACT**

1. WVAWC seeks protective treatment of Tax Return Data and Pension/OPEB Data.
2. A Staff Motion to Dismiss or Toll is pending.

**CONCLUSIONS OF LAW**

1. The Commission should adopt the procedural schedule set forth in the ordering paragraphs.
2. The Tax Return Data is entitled to permanent protective treatment. Bluefield Gas Company, Case No. 12-0427-6-42T (Commission Order January 30, 2013), citing 26 U.S.C. §6103, W.Va. Code §11-10-5d, Town of Burnsville v. Cline, 188 W. Va. 510, 425 S.E. 2d 186 (1992), AT&T v. Public Service Commission, 423 S.E. 2d 859 (1992).
5. The Commission should take under advisement whether to grant permanent protective treatment to the Pension/OPEB Data. Until the Commission issues a decision on permanent protective treatment, it will grant interim protective treatment to the redacted portions of Exhibit RPN-2 to Mr. Nevirauskas' written direct testimony.
6. The Staff motion to dismiss should be denied because the deviations from Rule 42 do not justify either a tolling or dismissal of the cases.

**ORDER**

IT IS THEREFORE ORDERED that the following procedural schedule is adopted:

Friday, September 25, 2015	Staff/Intervenor Direct Testimony due
Wednesday, September 30, 2015	Public comment hearings (1:00 p.m. and 6:00 p.m.) at the Lewis County Courthouse, Old Circuit Courtroom, 2 <sup>nd</sup> Floor, 110 Center Avenue, Weston, WV.
Thursday, October 1, 2015	Public comment hearings (1:00 p.m. and 6:00 p.m.) at 519 John Marshall Drive, Huntington, WV
Friday, October 2, 2015	Deadline for completion of discovery

Wednesday, October 7, 2015	Public comment hearings (1:00 p.m. and 6:00 p.m.) at the Fayette County Courthouse, Circuit Courtroom, 100 Court Street, Fayetteville, WV
Thursday, October 8, 2015	Public comment hearings (1:00 p.m. and 6:00 p.m.) at the Mercer County Courthouse, Judge Sadler's Courtroom, 2 <sup>nd</sup> Floor, 1501 W. Main Street, Princeton, WV
Thursday, October 15, 2015	Company Rebuttal Testimony
Monday, October 26, 2015	Public comment hearing at 6:00 p.m. at the Public Service Commission, Howard M. Cunningham Hearing Room, 201 Brooks Street, Charleston, WV
Tuesday, October 27, 2015	Start of Evidentiary hearing at 9:30 a.m., Charleston, WV

IT IS FURTHER ORDERED that the Staff motion to dismiss or toll the statutory decision period is denied.

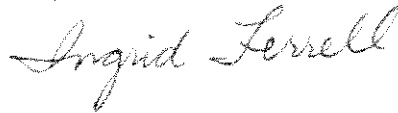
IT IS FURTHER ORDERED that the WVAWC motion for protective treatment of the Tax Return Data as defined in this Order is granted.

IT IS FURTHER ORDERED that the Office of Executive Secretary maintain WVAWC Tax Return Data under seal and keep it separate and apart from the rest of the file in the instant proceeding and marked "Confidential-Not Subject to Disclosure". The information shall be made available to all parties to this proceeding, upon execution by those parties or their counsel, of a protective agreement with WVAWC, binding those parties to maintain the confidentiality of the information. If any party desires to base its testimony on any of the proprietary information and the parties cannot agree to lift the Protective Order, the testimony containing proprietary or confidential information shall be supplied to the Commission and to the parties who have executed the protective agreement, clearly labeling such copies of testimony as containing proprietary information subject to the terms of this Order. Upon the conclusion of these proceedings, any testimony which references or contains any of the proprietary or confidential information which may have been received into evidence in this proceeding, shall not be made available to the public or made available to anyone not a party to a protective agreement with WVAWC, unless this Protective Order is lifted by the Commission.

IT IS FURTHER ORDERED that the Commission grants interim protective treatment to the Pension/OPEB data redacted portions of Exhibit RPN-2 to Mr. Nevirauskas' written direct testimony. Until further order of the Commission, the documents should be treated as described in the above ordering paragraph regarding WVAWC Tax Return Data.

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, on other parties by United States First Class Mail and on Staff by hand delivery.

A True Copy, Teste,

A handwritten signature in cursive script that reads "Ingrid Ferrell".

Ingrid Ferrell  
Executive Secretary

JML/rt  
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