

**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 2<sup>nd</sup> day of February 2012.

CASE NO. 11-0740-W-GI

WEST VIRGINIA-AMERICAN WATER COMPANY,  
a public utility, Charleston, Kanawha County.

General investigation regarding recent staffing changes.

**COMMISSION ORDER**

The Commission grants, in part, a request for reconsideration and modifies its earlier Order in this proceeding.

**BACKGROUND**

On May 25, 2011, the Utility Workers Union of America, AFL-CIO, and UWUA Local 537 (UWUA) filed a formal complaint alleging that the West Virginia-American Water Company (WVAWC) planned to improperly reduce its staff by thirty-one employees.

The Commission issued an Order on May 31, 2011, directing WVAWC to file documents supporting its staffing reductions and provide a description of each position eliminated. The Commission temporarily enjoined WVAWC from reducing staffing levels through involuntary termination pending further review.

On June 2, 2011, the Consumer Advocate Division of the Commission (CAD) petitioned to intervene arguing that this matter may have an impact on ratepayers, and the Laborers International Union of North America, Local 1353, AFL-CIO (LIUNA) petitioned to intervene to advocate for the interests of its membership.

By Order entered on June 9, 2011, the Commission converted this proceeding to a limited general investigation, granted pending requests to intervene and established a procedural schedule.

The Commission issued a final Order in this matter on October 13, 2011 (Commission Order) dissolving the May 31, 2011 Interim Relief Order. It directed WVAWC to retain certain positions that are necessary to certain of the WVAWC operations, to improve its distribution infrastructure replacement cycle and ruled on the July 29, 2011 protective treatment request. The extensive procedural background of this case, the positions of the parties and the analyses of the Commission are set forth in the

Commission Order and can be accessed on the Commission's website at: <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=330867&NotType='WebDocket'>.

On October 20, 2011, WVAWC requested a seven-day extension to the normal ten-day period to file a petition for reconsideration challenging the Commission Order. The Commission granted the request.

On October 31, 2011, WVAWC filed its Petition for Reconsideration (Petition) and requested that the Commission reconsider three aspects of the Commission Order including (i) the requirement to maintain a minimum complement of 289 positions, (ii) a directive to retain the position slated for termination in the Webster Springs District and (iii) the denial of a portion of the protective treatment request. WVAWC subsequently withdrew its request to reconsider denying protective treatment regarding its 2011 net income projection because that information was previously disclosed. November 9, 2011 WVAWC letter.

On November 10, 2011, LIUNA responded in opposition to the Petition and asserted that the Petition failed to put forth new information. On November 10, 2011, UWUA also filed a response opposing the Petition, arguing that this Commission properly exercised its authority in the Commission Order.

### INTRODUCTION

This has been a particularly trying but significant decision. WVAWC asserted both in its testimony and briefs that the actions of the Commission in entering the Commission Order were an unwarranted intrusion on the "right" of WVAWC to conduct its affairs in a manner consistent with the business judgment of its management. WVAWC continues to argue that position in its Petition asserting that the Commission has exceeded its authority, but it does narrow the focus of its concern to the language of the Commission Order that required WVAWC to maintain a complement of 289 positions.

In the Commission Order, the Commission recited its statutory duty and responsibilities to prescribe fair and prompt regulations that promote adequate, economical and reliable utility services throughout the State. Those are not mere bald assertions. The Commission is charged by statute with balancing the interests of customers, regulated utilities and the economy in general in its decisions. See, W.Va. Code §24-1-1, Commission Order at 8, 9. These duties impose an obligation on the Commission to act if it finds that acts and practices of a utility endanger the quality of service it is required to provide. W.Va. Code §§24-2-2, 24-2-7.

The Commission will address the argument about the 289 positions later in this Order, but as a preliminary matter, the Commission feels constrained to focus (again) on exactly what happened and the events that occurred shortly after the entry of the Order in West Virginia-American Water Company, Case No. 10-0920-W-42T (Commission Order

entered April 18, 2011) (2010 Rate Order or 2010 Rate Case as appropriate) and the other events that have also occurred related to WVAWC.

WVAWC attempted to terminate thirty-one employees (asserting at first that they had “already been terminated” when in fact they had not) within days of the 2010 Rate Order becoming a final nonappealable order of the Commission. Although certain ratemaking issues related to the proper level of revenues in the 2010 Rate Order might have been disputed by WVAWC, the facts are that WVAWC (i) argued at the hearing in the 2010 Rate Case that it needed 316 employees to maintain adequate service to its customers (which the Commission recognized in WVAWC’s cost of service in the 2010 Rate Order) and (ii) did not appeal the 2010 Rate Case to the West Virginia Supreme Court of Appeals as is its absolute right under W.Va. Code §24-5-1.

The actions of WVAWC have, to an extent, engendered a loss of confidence that the Commission has historically had in the judgment of WVAWC and explain the Commission’s requirement for collection of statistical information to assure that WVAWC does not allow its service quality to decline below acceptable standards. 2010 Rate Case Order at 21-23. Further, these actions also explain why the Commission ordered WVAWC to maintain a minimum complement of 289 positions. The Commission believes that the reaction of WVAWC to that requirement (and the list of potential circumstances recited in the Petition to that requirement), was excessive and unfounded. The WVAWC characterization of the Commission Order as a “headcount” requirement was not correct. There was never an intention to impose a requirement to maintain 289 active employees at all times. The Commission directed that WVAWC maintain and manage from a target level of 289 “positions,” not “headcount.” The Commission will nevertheless attempt to address to some extent the concerns of WVAWC and will modify our Order.

### **DISCUSSION**

In its limited request for reconsideration, WVAWC sought three changes to the Commission Order including relief from (i) a directive to maintain a minimum complement of 289 positions, (ii) a prohibition from eliminating a position from the Webster Springs District and (iii) denial of a portion of the request for a protective Order. The Commission has reviewed the WVAWC request and the replies from LIUNA and the UWUA.

#### **Staffing Requirement**

The bulk of the Petition concentrated on a requirement in the Commission Order to maintain a minimum staffing complement of 289 positions. WVAWC advanced a series of arguments contending that the requirement is unnecessary, impractical, unsupported in the October 13, 2011 Order, imposed without affording due process to WVAWC and could be interpreted to violate its rights under the National Labor Relations Act. WVAWC viewed what it dubbed the “289 headcount requirement” to be a strict mandate to maintain a fixed employment level in the face of any potential

circumstance that may arise. For example, WVAWC asserted that under the “headcount requirement” it would be required to hire replacement workers in the event of a strike, retain employees that are unneeded after it implements future automation at a treatment plant or any other similar cost savings measures. Petition at 10, 15.

WVAWC interpreted the Commission’s requirement to maintain a minimum complement of 289 positions as the iron-clad rule depicted in its Petition that under no circumstances could WVAWC have fewer than 289 active employees. On the contrary, the requirement to maintain 289 positions is sufficiently flexible to account for the normal fluctuations that occur in the day-to-day operation of any business as well as the extreme labor relations problems posited by WVAWC in its Petition. Obviously, WVAWC will have employee changes over the monitoring period creating temporary vacancies, including some extended vacancies due to strikes or other labor disputes.

The Commission is not charged with resolving collective bargaining disputes, and we are uncomfortable with either side reducing what we view as quality of service issues to pro-union/pro-management arguments. Likewise, we are equally concerned with arguments that seem to confer on management some unrestricted right to direct the operations of WVAWC as they deem appropriate. Management’s right to conduct the affairs of a utility is neither unrestricted nor absolute. As a public utility, that right is limited by and conditioned by the requirements of case and statutory law.

As noted by CAD during the recent rate proceeding, WVAWC generally has a small percentage of its positions vacant at any given time. 2010 Rate Order at 36-37 (citing Ex. RCS-D at 32-34). WVAWC will need to recruit new employees at times because of retirements or resignations, and WVAWC may slip below 289 active employees. The Commission couched its initial staffing requirement in terms of a number of “positions,” not the specific “headcount” as WVAWC asserts. If the Commission had intended the rigid staffing level WVAWC envisioned, it would have had no need to include the number of employees in the list of metrics reported under the monitoring program. Further, the Commission noted in the Commission Order that it continues to welcome additional steps by WVAWC to reduce costs. We also repeatedly referenced our primary concern and statutory charge that further cost cutting measures not affect the ability or capacity of WVAWC to provide safe reliable water service to its customers.

Considering the arguments advanced by WVAWC regarding the potential problems flowing from the 289 positions staffing requirement and out of an abundance of caution, the Commission will again address the minimum complement requirement. From the entry of this Order forward, the Commission clarifies that WVAWC is not required at all times to maintain the precise number of 288<sup>1</sup> employees; however, WVAWC must refrain from terminating additional positions with the intention or effect of accomplishing by other means its original staffing goals of terminating positions specifically identified by the Commission as necessary to maintain service quality to

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<sup>1</sup> The original 289 position requirement less the Webster Springs position discussed below.

customers. The Commission insists that WVAWC maintain service quality to its customers regardless of its precise staffing level. The Commission will also require that in addition to disclosing the number of employees in each quarterly monitoring report, WVAWC explain any reductions in the number of employees below 288. Until the requirement for that report is removed by later Commission Order, that report must include some level of cost-benefit analysis of the staffing reduction and describe the likely impact on service quality, including an explanation of the job duties performed within each terminated position and how those duties are or will be performed in the future or why the duties themselves are no longer necessary. WVAWC will assure the Commission that its staffing changes do not degrade service quality to customers, which includes the quality and availability of water and responsiveness to customers. The Commission will require Staff to file an analysis of each quarterly monitoring filing as a closed entry within thirty days of the monitoring report filings.

WVAWC has the flexibility it asserts that it needs to run its business under the Commission Order. At the same time, WVAWC should not interpret this Order as license to subvert the intent of the Commission Order to maintain service quality. In addition, the Commission specifically expects WVAWC to continue the valve programs and level of outside plant crews discussed in the Commission Order.

#### Webster Springs Employee

WVAWC also requested that the Commission reconsider a directive to retain a position slated for termination in its Webster Springs District. In the Commission Order, the Commission determined that the Webster Springs portion of the WVAWC system presented a unique circumstance and challenge. Testimony showed that during certain days of the week, WVAWC would have only one employee on duty, leaving it unable to both monitor the local treatment plant and address any potential emergencies that may arise. Commission Order at 18. The Webster Springs area is unlike other portions of the WVAWC system. Anyone who is familiar with WVAWC operations knows that Webster Springs is relatively small and is in a particularly operationally isolated area as compared to other areas of WVAWC service territory in West Virginia. *Id.* The Commission rejected assurances from WVAWC that in the event of an emergency within the Webster Springs District, it could promptly dispatch assistance from its operations in Weston or Gassaway.

In the Petition, WVAWC questioned the basis the Commission relied on in making its decision on this point. WVAWC asserted that its experience has shown that two employees and a supervisor are sufficient to operate its Webster Springs facilities. WVAWC criticized the testimony of Mr. Lanham, arguing that he is unfamiliar with that area. It also noted that several additional WVAWC employees live within sufficient proximity to allow them to respond to any potential emergency that might arise. Petition at 16-17. WVAWC proposed an alternative to the Commission directive to maintain the existing staffing level in Webster Springs. In the event that the Commission elected to reconsider the staffing directive regarding Webster Springs, WVAWC pledged to assign an employee from another operating area to provide temporary support to the Webster

Springs District to cover vacations or an illness of one of the remaining employees. Under its proposal, WVAWC committed to having available a minimum of two employees plus a supervisor to operate the Webster Springs plant and handle service calls. Id. at 18.

After review of the new alternative WVAWC presented, the Commission will modify the Commission Order and adopt the plan WVAWC proposed in its Petition. The WVAWC proposal prevents a potential lapse in staffing in the Webster Springs District that allows for a timely response to an emergency without the need of recruiting a new employee.

### Protective Treatment

WVAWC challenged a portion of the Commission ruling on its July 29, 2011 Motion for Protective Order. WVAWC noted that the Commission rejected several aspects of its Motion for Protective Order including protection for (i) redacted portions of LIUNA Cross Exhibit 2, (ii) operating procedures produced in response to discovery request UWUA 1-4-1, (iii) budget projections initially produced in response to Staff discovery request 1-7 that Byron Harris, CAD, subsequently incorporated into a portion of his pre-filed direct testimony and (iv) 2011 Capital budget information also contained in discovery response 1-7 and testimony Mr. Harris filed. WVAWC declined to contest the Commission determination relating to the response to discovery request UWUA 1-4-1 and withdrew its request to reconsider protective treatment for net income information contained in its response to Staff Data Request 1-7. It argued, however, that the redactions from LIUNA Cross Exhibit 2, a portion of the response to Staff request 1-7 relating to internal budget projections and the confidential version of the testimony filed by Mr. Harris derived therefrom contain information exempt from the provisions of the West Virginia Freedom of Information Act, codified as W.Va. Code §29B-1-1 to 7 (WV FOIA).

In regard to exhibit LIUNA Cross Exhibit 2, WVAWC did not present any new facts, but merely disputed the rationale the Commission put forward in the October 13, 2011 Commission Order. WVAWC contended that the redacted data, originally presented to the Commission in a printed booklet that LIUNA handed out during the evidentiary hearing, bearing a date from over five years ago and without information that is traceable to individual employees is a commercially valuable WVAWC trade secret that this Commission must hold back from the public record. Considering these factors, however, the Commission cannot conclude that LIUNA Cross Exhibit 2 is a trade secret. Therefore, the Commission rejects this portion of the reconsideration request as unreasonable and will release LIUNA Cross Exhibit 2 into the public record.

Finally, WVAWC requested that the Commission reconsider the public release of certain budget projections from its response to Staff request 1.7 that Mr. Harris also incorporated into the confidential version of his pre-filed direct testimony. WVAWC renewed its argument that budget projections for 2011 and 2012 are trade secrets despite its lack of substantial competition. It urged the Commission to “respect the principle that

private budgeting and financial projections deserve confidential treatment.” Petition at 24. The Commission is statutorily constrained, however, to release as much of its record to the public as possible. See, W.Va. Code §29B-1-1.

WVAWC also substantially narrowed its protective treatment request to the redaction of certain portions of the response to Staff request 1.7, as shown in Confidential Exhibit A to Petition for Reconsideration. The November 9, 2011 Amendment further narrowed this aspect of the original protective treatment request. Considering the narrowed request, the Commission will reconsider its outright denial and defer the protective treatment motion covering the unredacted response to Staff discovery request 1.7 and the confidential version of the direct testimony of Mr. Harris. Therefore, the Commission will direct the Executive Secretary to hold the confidentiality of the unredacted version of the response to the Staff data request 1.7, and the confidential version of the direct testimony filed by Mr. Harris, separate and apart from the case file pending a request under WV FOIA. The Commission will also protect Confidential Exhibit A to the reconsideration request in like manner. In the event that the Executive Secretary receives a request for this information, the Commission will afford WVAWC a brief opportunity to contest its release.

This decision does not imply that we are finding that the redacted information is a trade secret that is entitled to protected treatment. We do not withhold information from the public, even temporarily, without concern. As we indicated above, WVAWC is a public utility and is a unique business, imbued with the public interest and afforded a monopoly status that is protected from direct competition. In return for this protected status, its rates and other aspects of its operations are subject to the jurisdiction of the Commission and the strictures of state law. The Commission believes that public confidence in the regulatory process is damaged when financial information pertinent to the ratemaking process is withheld from the public. WVAWC should file a redacted public version of its response to Staff discovery request 1.7 within ten days of the entry of this Order.

### **FINDINGS OF FACT**

1. The Commission issued an Order dissolving the May 31, 2011 Interim Relief Order, but directing WVAWC to retain certain positions it planned to eliminate and to improve its distribution infrastructure replacement cycle. Commission Order.
2. WVAWC requested reconsideration of three aspects of the Commission Order including (i) a directive to retain a minimum complement of 289 positions, (ii) a directive to retain the position slated for termination in the Webster Springs District and (iii) denial of a portion of the protective treatment request.

### **CONCLUSIONS OF LAW**

1. It is reasonable to modify the Commission Order to require WVAWC to report and justify any reductions in staffing complement and to place WVAWC on notice that it

should not proceed with reductions in budgeted positions unless it can attest to a continuation of service quality to customers, including the quality and availability of water supply and responsiveness to customers.

2. The revised staffing plan for the Webster Springs District WVAWC proposed is a reasonable alternative to maintaining an additional full-time employee at Webster Springs that allows for a timely response to an emergency.

3. LIUNA Cross Ex. 2 is not a trade secret or otherwise exempt from the WV FOIA.

4. It is reasonable to defer the request for protective treatment for portions of the response to Staff discovery request 1.7, the pre-filed direct testimony of Mr. Harris and Confidential Exhibit A to the reconsideration request.

### **ORDER**

IT IS THEREFORE ORDERED that WVAWC shall explain any future reductions in staffing levels below 288 employees as part of the quarterly monitoring report following any future termination. The explanation shall include some level of cost-benefit analysis of the change and description of the likely impact on service quality including an explanation of the job duties performed within each terminated position and how those duties are or will be performed in the future or why the duties themselves are no longer necessary. WVAWC shall provide assurance that any future staffing reductions will not degrade service quality to customers. WVAWC shall not eliminate positions without good cause or as an alternate means of accomplishing its initial proposed layoffs subsequently retained in the Commission Order. WVAWC shall maintain the valve and outside plant programs discussed in the Commission Order.

IT IS FURTHER ORDERED that Staff shall file an analysis of each quarterly monitoring report filed under the Commission Order as a closed entry in this matter within thirty days of the filing of the associated monitoring report.

IT IS FURTHER ORDERED that the request to reconsider the prohibition against termination of an employee in the Webster Springs District as discussed in the October 13, 2011 Commission Order is granted. WVAWC shall implement the alternative plan presented in its Petition.

IT IS FURTHER ORDERED that the request to reconsider the denial of protective treatment for LIUNA Cross Exhibit 2 is denied.

IT IS FURTHER ORDERED that the Executive Secretary of this Commission shall hold the response to Staff discovery request 1.7, the confidential version of the direct testimony of Byron Harris and Confidential Exhibit A to the Petition for Reconsideration under seal, separate and apart from the rest of this case file pending a request for those documents under WV FOIA.



IT IS FURTHER ORDERED that WVAWC shall file a redacted public version of its response to Staff discovery request 1.7 as described in the Petition for Reconsideration, Confidential Exhibit A thereto and its November 9, 2011 Amendment within ten days of the entry of this Order.

IT IS FURTHER ORDERED that the remnant of the October 13, 2011 Commission Order remains in full force and effect.

IT IS FURTHER ORDERED that on entry of this Order, this matter is removed from the active docket of Commission cases.

IT IS FURTHER ORDERED that the Executive Secretary 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 other parties of record and on Staff by hand delivery.

A True Copy, Teste:

  
Sandra Squire  
Executive Secretary

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