

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2023 DEC -7 AM 11:06

POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

VS.

Civil Action No.: 18-C-115

Presiding Judge: Christopher C. Wilkes

Resolution Judge: Michael D. Lorensen

WW CONSULTANTS, INC.,

Defendant and Third-Party Plaintiff,

VS.

ORDERS CONSTRUCTION COMPANY, INC.,
and PIPE PLUS, INC.,

Third-Party Defendants.

**ORDER DENYING PUBLIC SERVICE COMMISSION OF WEST VIRGINIA'S
OBJECTIONS TO PLAINTIFF'S SUBPOENA AND MOTION TO QUASH**

This matter came before the Court this 7th day of December 2023, upon Nonparty the Public Service Commission of West Virginia's Objections to Plaintiff's Subpoena and Motion to Quash. The Plaintiff, Pocahontas County Public Service District, by counsel, Christopher D. Negley, Esq., and Nonparty, Public Service Commission of West Virginia, by counsel, Jessica Carter, Esq., have fully briefed the issues necessary¹. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full

¹ The Court notes it entered a Briefing Order on November 16, 2023, seeking a Reply and a proposed order from the Public Service Commission of West Virginia. Although the Public Service Commission of West Virginia submitted its proposed order to the Court, a Reply was not filed. Accordingly, this Court considers the Public Service Commission of West Virginia's objections and motion, and Plaintiff's response.

consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds the claims, including professional negligence, against Defendant WW Consultants, Inc., regarding the Headworks section of Plaintiff's wastewater treatment plant. *See* Pl's Resp., p. 5.

2. On October 17, 2023, Plaintiff issued a Subpoena Duces Tecum to the West Virginia Public Service Commission (hereinafter "WV PSC"), which was attached as Exhibit A to Plaintiff's Response. *See* Pl's Resp., p. 1. Said Subpoena Duces Tecum commanded the records custodian for the WV PSC to appear at Plaintiff's counsel's office to "produce and permit inspection of and copying of designated books, documents or tangible things in your possession, custody or control, as follows: any and all documents related to case No. 22-0315-PSD-CN". *Id.* Further, in lieu of appearing in the Plaintiff's office, the WV PSC had the option of producing the documents, along with a certification certifying their authenticity, to Plaintiff's counsel. *Id.* at 1-2.

3. On or about October 31, 2023, the WV PSC filed the instant Public Service Commission of West Virginia's Objections to Plaintiff's Subpoena and Motion to Quash, arguing the subpoena is overly broad and burdensome, includes documents that are protected under the attorney work product privilege, and without waiving objection, argued all documents of record, except for drafts and those protected by attorney client privilege, were available on its website. *See* Mot., p. 1-2. The WV PSC did not submit a privilege log.

4. On November 8, 2023, Plaintiff filed Response of the Pocahontas County Public Service District to the Public Service Commission's Objections to Plaintiff's Subpoena and

Motion to Quash, arguing its request was not overly broad as it was limited to the Public Service Commission Case File No. 22-0315-PSD-CN only, which involved the Plaintiff's project here, argued the documents relevancy to the professional engineering claims at issue in this case, and rejected the WV PSC's direction to its website, citing authentication issues and the WV PSC's ability to "pick and choose their response to only those documents on their website". *See* Pl's Resp., p. 2-3. Further, Plaintiff argues the WV PSC did not provide a privilege log, and thus its attorney client privilege objection is invalid. *Id.* at 4.

5. On November 16, 2023, a Briefing Order was entered.

6. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

The WV PSC filed the instant motion to quash, seeking the Court to deny Plaintiff's subpoena for the deposition of its records custodian and sustain its objections to the subpoena for records. *See* Mot., p. 2.

The use of a subpoena duces tecum "in the discovery process to obtain access to documents in the possession of persons who are not parties to the litigation—and the ability of a circuit court to determine the appropriateness of such [subpoena]—is explicitly provided for in the *West Virginia Rules of Civil Procedure*." *State ex rel. W.Va. State Police v. Taylor*, 201 W.Va. 554, 564, 499 S.E.2d 283, 293 (1997).

The West Virginia Supreme Court of Appeals has observed that "[t]he [circuit] court has broad discretion in determining whether a subpoena is unreasonable, and a decision of the circuit court will be reversed only if it is clearly unreasonable, arbitrary or fanciful." *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 17, 483 S.E.2d 12, 17 (1996).

Rule 45 of the West Virginia Rules of Civil Procedure governs subpoenas. Rule 45(d)

provides as follows:

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued may enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to paragraph (e)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person to travel for a deposition to a place other than the county in which that person resides or is employed or transacts business in person or at a place fixed by order of the court;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

W. Va. R. Civ. P. 45.

Rule 45 is subject to the provisions of our state's discovery rules. "When Rule 45 of the West Virginia Rules of Civil Procedure is used as a discovery device as permitted in W.Va. R. Civ. P. 34, Rule 45 is subject to all of the discovery provisions, including, but not limited to, the scope of discovery outlined in W.Va. R. Civ. P. 26(b)(1), which permits discovery only of matters that are relevant to the subject matter involved in the pending action, not privileged, and are, or are likely to lead to the discovery of, admissible evidence." Syllabus Point 4, *Keplinger v. Va. Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000); Syl. Pt. 2, *Kahle's Kitchens, Inc. v. Shutler Cabinets, Inc.*, 240 W. Va. 209, 809 S.E.2d 520 (2018).

With regard to a protective order, as an initial matter, it is provided under Rule 26(b)(1) that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" W. Va. R. Civ. P. 26. Rule 26(c) of the West Virginia Rules of Civil Procedure governs protective orders. Rule 26(c) states that:

"Upon motion by a party or by the person from whom discovery is sought, *and for good cause shown*, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place[.]

W. Va. R. Civ. P. 26(c)(1)-(2).

With regard to good cause, the West Virginia Supreme Court of Appeals has explained the Rules of Civil Procedure puts the burden on the party seeking relief to show some plainly adequate reason therefor. The courts have insisted on *a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements*, in order to establish good cause.” *AT & T Commc'ns of W. Virginia, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 188 W. Va. 250, 253, 423 S.E.2d 859, 862 (1992) *citing* 8 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2035 at 264–65 (1970) (footnote omitted). [emphasis added].

Further, West Virginia Rule of Civil Procedure 45(e)(2) provides:

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

W. Va. R. Civ. P. 45(a)(2).

Here, the Court finds that the subpoena duces tecum was narrowly tailored to the specific case number of the PSC, as to avoid being overly broad or unduly burdensome. Plaintiff avers it crafted the subpoena specifically to review, inspect, and copy documents in the PSC case file related to the Commission’s evaluation and decision regarding the Plaintiff’s project to provide upgrades to the wastewater treatment plant’s headworks section. *See* Pl’s Resp., p. 2. Plaintiff demonstrated this is relevant to the case in that Plaintiff could not construct any modifications to its wastewater treatment plant absent a Certificate of Convenience and Necessity pursuant to West Virginia code. *Id.* Documents that underly the PSC’s decision are relevant.

The Court thus concludes the subpoena seeks relevant discovery and is not overly broad.

Further, the Court addresses the WV PSC's contention that all the pertinent documents are on its website. The Court agrees with Plaintiff that simply referring Plaintiff to its website does not solve authentication issues of the documents for their use at trial.

Additionally, the WV PSC averred that Plaintiff seeks information that is subject to work product privilege. However, this assertion was not supported by a description of the documents that are being withheld, as required by Rule 45(e). Therefore, the Court finds that such objection, as pled, is invalid. The Court will DENY the instant motion. In complying with the subpoena duces tecum, if any privileged documents are implicated, the WV PSC is directed to fully comply with Rule 45 in providing a privilege log or other description of withheld documents.

For all of these reasons, the Public Service Commission of West Virginia's Objections to Plaintiff's Subpoena and Motion to Quash is hereby DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that the Public Service Commission of West Virginia's Objections to Plaintiff's Subpoena and Motion to Quash is hereby DENIED. Any objections the WV PSC has under the attorney-client privilege shall be brought with a privilege log in accordance with Rule 45.


The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, all *pro se* parties, to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401, and to the movant at:

Jessica Lane, Esq.
Jessica Carter, Esq.
General Counsel Office
Public Service Commission

201 Brooks Street
Charleston, WV 25301

ENTERED this 7th day of December 2023.

Date: 12/7/23
Certified copies sent to:
☒ counsel of record C. Negley
☐ parties R.M. Hall
☐ other (please indicate) M. Daniels
By: ☒ certified/1st class mail D. Hohlitzel
☐ fax Bus. Ct.
☐ hand delivery J. Lane
☐ interdepartmental
Other directives accomplished: [Signature]
Deputy Circuit Clerk


JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION