

In the Circuit Court of Kanawha County, West Virginia

MOUNTAINEER GAS COMPANY,
Plaintiff,

v.

Case No. CC-20-2023-C-1067
Judge David Hammer

**WEST VIRGINIA-AMERICAN WATER
COMPANY,**
Defendant

STIPULATION AND PROTECTIVE ORDER

WHEREAS, the parties may have proprietary information and documents that are not in the public domain and are confidential, including information and documents containing Critical Energy Infrastructure Information ("CEII"), the unrestricted disclosure of which may cause undue irreparable damage to the defendants and the public, as well as violate federal law regarding CEII; and

WHEREAS, one of the purposes of this Protective Order is to protect the confidentiality of such information and documents; and

WHEREAS, the West Virginia Rules of Civil Procedure provide for the issuance of protective orders limiting the disclosure of certain information in appropriate circumstances; and

WHEREAS, the parties have agreed to protect the confidentiality of such information in accordance with the following terms and conditions:

1. Documents that contain non-public information may be designated as "Confidential" in the manner described below, so long as the materials concern the producing party's trade secrets, research and development, commercial or proprietary business information, or information for which the producing party otherwise has a compelling need for confidentiality. This includes, without limitation: (a) documents,

exhibits, answers to interrogatories, responses to requests for admissions and deposition transcriptions and all original written, recorded, graphic or electronic matters (and all identical and non-identical copies thereof); (b) any copies, notes, abstracts or summaries of such information, and the information itself; (c) any file or other compilation including separate and distinct documents; or (d) any pleading, affidavit, declaration, brief, motion, transcript or other writing containing such information (subsections (a) to (d) collectively referred to herein as "Litigation Materials"), all of which may be designated as "Confidential" under this Protective Order, as appropriate.

2. Only non-public documents produced in discovery may be designated as "Confidential." Accordingly, "Confidential" materials shall not include any documents concerning information that at any time has been: (a) produced or disclosed without being subject to a protective order or other nondisclosure agreement, or made available to the public or otherwise available for public access; or (b) disclosed in connection with any governmental public filing without being subject to a protective order or other nondisclosure agreement and could not reasonably be assumed to be or have been intended to be kept confidential.

3. All "Confidential" Litigation Materials shall be used by the parties and their counsel solely for the purpose of the prosecution or defense of the pending civil actions contained in the style above (and which may be updated from time to time if other such related cases are filed in the future). Litigation Materials designated as "Confidential" shall not be disclosed to anyone except as provided herein and the contents thereof shall not be used for any business, commercial or competitive purpose, or used in any manner in any other case, litigation or proceeding whether or not factually related to these actions unless expressly allowed in this Order or expressly agreed to in writing by the producing party.

4. (a) Parties shall designate documents in good faith. The process for resolving disputes as set forth below presumes this good faith in the initial designations, objections and meet-and-confer process. The following process will apply to resolution of disputes hereunder: (1) any party who objects to a designation by a producing party shall state concisely the basis for those objections in a letter to the producing party which said letter shall not exceed five pages; (2) the letter need only be served by email on the producing party to start this process; (3) the objecting party and producing party shall have ten days from the date the letter is sent to meet and confer to resolve the objections and/or narrow the issues to be briefed; (4) any objections not so resolved shall be the subject of a regularly noticed motion filed by the objecting party; (5) said motion shall be filed and served no later than thirty days after the meet and confer period ends; (6) the objecting party shall be allowed to file a response brief consistent with the applicable rules; and (7) only the objecting and producing parties need to file briefs, but other parties may file a brief if they so choose.

(b) In addition to the procedures described above, the following shall apply to the process: (1) a party shall not be obligated to challenge the propriety of a confidential designation at the time the designation is made, and failure to so challenge does not preclude a subsequent challenge; (2) with the permission of the Court, either the producing or objecting party may request a short informal discovery conference to be held telephonically with the Court or an appointed discovery referee in order to avoid the need for any motion; (3) said conference should be held during the 10-day meet and confer period, or the 30-day period for bringing the motion in accordance with the convenience of the Court or an appointed discovery referee; (4) if the producing party does not oppose the motion, then designations which are the subject of the objections are declassified; and (5) the parties will attempt in good faith to combine as many issues

under this Protective Order as possible so that said matters can be handled efficiently and effectively, and the parties further reserve the right to request, for good cause shown, additional time to file any motion.

5. Any Litigation Materials the designation of which is subject to such dispute shall be treated as "Confidential" as designated by the producing party pending resolution of the dispute by this Court.

6. If any party or non-party uses Litigation Materials designated as "Confidential" pursuant to this Protective Order during the course of a deposition herein, that portion of the deposition record reflecting such "Confidential" information shall be stamped as "Confidential" and access thereto shall be limited pursuant to the other terms of this Protective Order. Counsel may invoke the provisions of this Protective Order by stating on the record during the deposition that testimony given at the deposition is designated "Confidential" or by designating the deposition transcript or portions thereof as "Confidential" before the time expires within which the witness may sign the deposition transcript. No person shall be present during portions of the depositions designated "Confidential" unless such person is authorized under the terms of this order to receive Litigation Materials containing such confidential information or unless the producing party consents to such person being present.

7. Nothing in this Protective Order affects the right of the party or non-party that produced "Confidential" Litigation Materials to use or disclose such information in any way. Such disclosure shall not waive the protections of this Protective Order and shall not entitle other parties, non-parties or their attorneys to use or disclose such information in violation of the Protective Order, except that if the producing party uses such materials in a manner inconsistent with their confidential status, then that shall serve as a basis to object to the designation and said objections shall be resolved as set

forth in paragraph 4 above.

8. In the event that documents or Litigation Materials are produced by another person which are actual copies of documents or other Litigation Materials which a party has produced and designated "Confidential" that party may designate such materials under this Protective Order even if they have not been so designated by the person producing them. To the extent that a person produces documents which are not actual copies of documents previously produced and designated by a party but which contain a party's "Confidential" information, a party may designate those documents, or portions thereof as may be appropriate, as "Confidential," subject to the dispute resolution process set forth in paragraph 4 above. Said designations shall be made as soon as reasonably possible, and shall contain the Bates stamp number(s) of the portions of the documents designated, the nature of the designations, and if an entire document is designated, which portions of the document contain the information supporting the designation so that an objecting party may determine what information is specifically at issue.

9. Litigation Materials marked or treated as "Confidential" or copies or extracts therefrom and the information therein, may be given, shown, made available to, or communicated to only the following, each of whom shall maintain the confidentiality of the document consistent with this Protective Order:

- a. the Court, all Court personnel, any discovery referee or any settlement mediator;
- b. Court reporters and videographers who record depositions or other testimony in this action;
- c. named parties, including officers, directors or in-house counsel of a named party or its affiliated companies;

d. other employees of a named party or its affiliated companies, but only for the specific purpose of working directly on the litigation at the request or at the direction of counsel;

e. outside counsel for the named parties and employees of such counsel to whom it is necessary that the Litigation Materials be shown for purposes of this litigation;

f. pursuant to the provisions of paragraph 10, consultants and experts to whom it is necessary that the Litigation Materials be shown for purposes of assisting counsel in this litigation;

g. deposition witnesses;

h. e-discovery consultants and employees of copying, imaging and computer services for the purpose of copying, imaging or organizing documents provided that all documents designated as "Confidential" are retrieved by the party furnishing those documents upon completion of the services;

i. employees, counsel, or consultants for any insurance company that issued a policy of insurance affording or potentially affording coverage to a Party with respect to the relevant actions, but only for the specific purposes of prosecuting, defending or attempting to settle the Action; in the course of such Insurer's investigation, evaluation and/or determination relating in any way to insurance coverage or a claim for insurance coverage concerning the actions; or in any disputes relating in any way to insurance coverage or a claim for insurance coverage concerning the actions; *provided*, however that such Insurer shall not disclose any Litigation Materials designated as "Confidential" in any other proceeding without prior written notice to counsel for the party who designed the Litigation Materials as Confidential.

j. any other person upon the written agreement of the party or non-

party who designated the Litigation Materials as “Confidential” (which agreement may be recorded in a deposition or other transcript), or pursuant to Court order;

k. the author, addressees and recipients of the documents or any person who would have had access to such information by virtue of his/her employment; and

l. persons whose alleged communications are memorialized and described in the “Confidential” documents.

10. If any party wishes to disclose Litigation Materials produced by any other party and designated “Confidential” to any expert or consultant, either testifying or non-testifying, the expert or consultant must sign the agreement attached hereto as Exhibit A. Nothing in this Protective Order shall require that non-testifying experts or consultants be deposed or otherwise be the subject of discovery.

11. Each person (except for the Court, Court personnel, any discovery referee, any settlement mediator, Court reporters and videographers, e-discovery consultants and copying, imaging and computer service employees) provided access to Litigation Materials marked “Confidential” pursuant to the terms of the Protective Order shall, before gaining such access, receive a copy of this Protective Order. Those persons described in paragraphs 9 and 10 as subject to a requirement to sign an agreement shall sign such an agreement in the form attached hereto as “Exhibit A” or shall agree to be bound by the terms of this Protective Order on the record at a deposition or hearing in this litigation. A file shall be maintained by each attorney of record for a party of all written agreements signed by covered persons who have received such Litigation Materials from that party or persons affiliated with that party. The party maintaining such signatures shall not be required to disclose the identity of any consultants or experts not otherwise required to be disclosed under the West Virginia Rules of Civil Procedure or by

the Court.

12. Any “Confidential” Litigation Materials filed with the Court shall be filed under seal pursuant to the West Virginia Rules of Civil Procedure and the West Virginia Trial Court Rules. All such filings shall be in sealed envelopes or other appropriate containers on which shall be endorsed the caption of this litigation, a generic designation of the contents, the word “Confidential” as applicable and words in substantially the following form:

This envelope contains documents which are filed under seal in this case by [name of party] and, by Order of his Court dated __, shall not be opened nor its contents displayed or revealed except as provided in that Order or by further Order of the Court.

Any pleading or other paper required to be filed under seal pursuant to this paragraph shall also bear the legend “FILED UNDER SEAL” in the upper-right hand corner of the cover page of the document. Only those portions of such documents and materials containing or reflecting “Confidential” Litigation Materials shall be considered “Confidential” and may be disclosed only in accordance with this Order. Where feasible, only those portions of such filing which are “Confidential” shall be filed under seal. No party or other person may have access to any sealed document from the files of the Court without an order of the Court.

Each document filed under seal may be returned to the party which filed it (1) if no appeal is taken, within ninety days after a final judgment is rendered, or (2) if an appeal is taken, within thirty days after the mandate of the last reviewing court which disposes of this litigation in its entirety is filed (“the final resolution of this litigation”). If the party that filed a sealed document fails to remove the document within the appropriate time frame, the clerk of the Court may destroy the document, return the document to counsel for the party that produced the document or the party that filed the sealed document upon request within two years after the final resolution of this litigation, or take any other action

with respect to the document it deems appropriate.

13. "Confidential" Litigation Materials shall maintain such protections and designations in connection with any trial in this matter. Before the trial begins, the parties will meet and confer in good faith as part of the pretrial conference statement process to put into place a procedure for identification of and use of "Confidential" documents at trial. Any documents which remain "Confidential" before trial shall maintain their status through the time of the pretrial conference or resolution of the procedures described above.

14. The provisions of this Order may be modified at any time by stipulation of the parties approved by order of the Court. In addition, a party may at any time apply to the Court for modification of this Protective Order pursuant to a motion brought in accordance with the rules of the Court. Nothing in this Stipulation and Order shall constitute: (a) an agreement by any party to produce any documents or other materials in discovery not otherwise agreed upon or required by Court order or the West Virginia Rules of Civil Procedure; (b) a waiver by any person or party of any right to object to or seek a further protective order with respect to any discovery in this or any other action; or (c) a waiver of any claim of immunity or privilege with respect to any testimony, document or information.

15. In the event that Litigation Materials designated as "Confidential" are disclosed to someone not authorized under the terms of this Protective Order to receive such information, counsel of record for the party involved shall immediately give notice to counsel of record for the party who designated the Litigation Materials as "Confidential," and shall also describe the circumstances surrounding the unauthorized disclosure. If a party fails to treat documents designated as "Confidential" in the manner provided herein, the party shall immediately take such steps as are necessary to have such items placed

under seal and/or restored to their confidential status. Nothing in this Order waives or limits in any way any producing party's legal rights and remedies should any violation of this Order be otherwise unlawful or actionable.

16. In the event that Litigation Materials claimed to be "Confidential" are inadvertently produced without the appropriate designation, such documents and copies thereof shall be returned to the producing party within five days of any written notice requesting their return to affix the appropriate designation or immediately stamped "Confidential" as requested by the producing party. The receiving party may challenge the confidential nature of the documents, but the inadvertent production of the documents, or the giving of testimony, claimed to be "Confidential" shall not constitute a waiver of the confidentiality designation.

17. Within thirty days following termination of this litigation (including the final resolution of any appeals), the originals and all copies, whether exact copies or compilations, digests or non-exact copies in any form, of Litigation Materials designated as "Confidential" shall be returned to the producing party or destroyed by the receiving party with a certification to the producing party that it has done so. Notwithstanding this, however,

- (a) counsel of record may retain their file copies of all court filings, deposition or hearing transcripts and exhibits, and correspondence, provided that counsel of record continues to treat all "Confidential" Litigation Materials in the manner provided for in this Protective Order; and
- (b) unless other arrangements are agreed upon, each Insurer that has received "Confidential" Litigation Materials shall certify that it will continue to maintain such "Confidential" Litigation Materials in the manner provided for in this Protective Order and subject to such Insurer's internal document retention

and/or destruction policies and applicable law, and shall return or destroy any “Confidential” Litigation Materials at the end, if applicable, of the retention period.

18. The termination of proceedings in this action shall not thereafter relieve the parties from the obligation of maintaining the confidentiality of all Litigation Materials designated as “Confidential” which are received pursuant to this Protective Order, and are not used at trial, or are used at trial under restriction designed to exclude from the public record those portions of the Litigation Materials that were designated as “Confidential.” This provision shall not apply to any Litigation Materials that are the subject of a superseding ruling of the Court as to the scope of their disclosure. The Court shall retain jurisdiction to enforce and/or to modify this Protective Order.

19. The terms of this Protective Order shall apply to discovery directed to non-parties to this Litigation, and such non-parties may specifically invoke or waive the terms and protections of this Protective Order. To the extent that any discovery is served on a non-party, the party serving the discovery shall provide the non-party with a copy of this Protective Order and specifically mention the non-party’s right to invoke or waive the terms of this Protective Order.

20. Nothing in this Order shall (a) waive or limit in any way a producing party’s lawful rights or remedies should any violation of this Order be otherwise unlawful or actionable; (b) operate as an admission for any purpose by any party to this proceeding that any Litigation Material is admissible or inadmissible at trial of this action; (c) prejudice in any way the right of a party to withhold production of Litigation Materials pending review by the Court or any appointed discovery referee; (d) prejudice in any way the right of any party to request a higher level of confidentiality or protection than that provided under this Order; or (e) operate as an admission that the related case over

which this Protective Order governs arises from the same transaction or occurrence or should otherwise be consolidated together in any way.

21. This Order will survive the termination of the litigation and will continue to be binding upon all persons to whom Litigation Materials designated as Confidential is produced or disclosed.

22. This Court will retain jurisdiction over all persons subject to this Order to the extend necessary to enforce any obligations arising hereunder or to impose sanctions for any contempt thereof.

/s/ David M. Hammer
Circuit Court Judge
13th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.

Prepared and Agreed by:

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EXHIBIT A

AGREEMENT CONCERNING MATERIAL COVERED BY AN ORDER ENTERED IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

The undersigned hereby acknowledges that he or she has read the attached STIPULATION AND PROTECTIVE ORDER entered in the cases listed below, and understands the terms thereof and agrees to be bound by such terms, including the obligations set forth in Paragraphs 17 and 18 of the Stipulation and Protective Order.

Dated: _____

[Type or Print Name]