

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

Order Granting Motion to Compel

Pending before the Court is Defendant, West Virginia-American Water Company's Motion to Compel Full Response to Subpoena, filed on December 20, 2024. WVAWC's Motion to Compel sought an order compelling West Virginia Paving, Inc., to provide full and complete responses to a subpoena duces tecum served on July 22, 2024. The Court has received no response to the Motion to Compel from West Virginia Paving. After reviewing the filings and considering all the documents in the record, the Court holds that Defendants' Motion should be GRANTED. In support of its holding, the Court FINDS and CONCLUDES as follows:

FINDINGS OF FACT

1. This is an action related to a water leak and gas outage that occurred on November 10, 2023 (the "Incident").
2. Plaintiff Mountaineer Gas Company alleges that a water main owned and operated by WVAWC and located on Charleston, West Virginia's West Side, ruptured, resulting in water infiltrating MGC's gas lines and disrupting gas service to residents and businesses on Charleston's West Side. See Compl. As a result of the Incident, MGC had to expend resources draining its gas pipelines and restoring

service to its customers on the West Side. *Id.*

3. In its Answer, WVAWC asserted, among other defenses, that any harm MGC has suffered was the result of acts or omissions from other parties over whom WVAWC has no control. See Ans. at 5 (Affirmative Defense 5).

4. As part of discovery related to the Incident, WVAWC served a subpoena duces tecum on West Virginia Paving, seeking documents related to paving projects West Virginia Paving performed on Charleston's West Side from 2014 to present, including requests for proposals, invitations to bid, bids, schedules, contract documents, project plans, specifications, permits and approvals, environmental impact assessments, budget documents, financial plans, progress reports, meeting minutes, change orders, completion certificates, emails, letters, memoranda, photographs, videos, and maintenance and warranty documents. See Subpoena Duces Tecum to West Virginia Paving.

5. The Subpoena also sought documents, including internal policies and practices related to efforts made by West Virginia Paving to notify WVAWC and other utility companies about paving projects, internal policies governing how West Virginia Paving complies with its obligation to ensure that utility lines, valves, meters, and manholes are relocated or adjusted at no cost to the City of Charleston, and documents related to efforts of West Virginia Paving and its subcontractors to avoid damaging or paving over WVAWC's valves from 2014 to present. See *id.*

6. West Virginia Paving provided some of these documents on September 5, 2024, including photographs, bids, and contracts related to West Virginia Paving's work on Charleston's West Side, but did not fully respond to the subpoena.

7. Specifically, West Virginia Paving has provided no electronically stored information related to West Virginia Paving's projects on Charleston's West Side, including communications between West Virginia Paving and WVAWC related to West Virginia Paving's efforts to avoid damaging or paving over valves, communications between West Virginia Paving and MGC regarding paving projects.

8. Further, West Paving has not produced any internal policies governing West Virginia Paving's responsibility to notify utility companies about upcoming paving projects, internal policies governing West Virginia Paving's efforts to comply with its obligation to ensure that utility lines, valves, meters, and manholes are relocated without additional cost to the City of Charleston, efforts made by West Virginia Paving or its subcontractors to avoid damaging or paving over any of WVAWC's valves from 2014 to present; the warnings, instructions, or training West Virginia Paving provides to its employees or subcontractors on avoiding paving over WVAWC's valves, or a list of subcontractors West Virginia Paving has used in its paving projects from 2014 to present.

9. WVAWC attempted to resolve the issue in good faith, communicating with West Virginia Paving on multiple occasions regarding the subpoena. Instead of providing responsive documents, West Virginia Paving was evasive and repeatedly promised to produce the requested documents, but never did so.

10. WVAWC has filed a Motion to Compel seeking to require West Virginia

Paving to fully respond to this Subpoena. A copy of the Motion to Compel was served on West Virginia Paving.

11. West Virginia Paving never filed any Motion to Quash or Motion for Protective Order requesting this Court limit or otherwise alter the scope of the subpoena and has not filed a response to WVAWC's Motion to Compel.

CONCLUSIONS OF LAW

1. Under West Virginia Rule of Civil Procedure 34, "[a] person not a party to the action may be compelled to produce documents and things or to submit to an inspection provided in Rule 45." W. Va. R. Civ. P. 34 (1998).¹

2. West Virginia Rule of Civil Procedure 45 permits a party to an action to serve a subpoena "command[ing] each person to whom it is directed ... to produce and permit inspection and copying of designated books, documents, or tangible things in the possession, custody or control of that person[.]" W. Va. R. Civ. P. 45(a)(1) (1998). "A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand." W. Va. R. Civ. P. 45(e)(1) (1998).

3. "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.” Syl. Pt. 4, *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 12, 537 S.E.2d 632, 633 (2000).

¹ Because the subpoena at issue was served on July 22, 2024, the Court relies on the prior version of West Virginia’s Rules of Civil Procedure.

4. The documents WVAWC requested in its subpoena to West Virginia Paving relate to its affirmative defense that MGC’s harm was caused by the acts or omissions of parties that WVAWC does not control.

5. Therefore, the documents WVAWC requested in the subpoena are within the scope of discovery for this matter.

6. Under Rule 45, West Virginia Paving is obligated to produce the documents requested by WVAWC as they are kept in the usual course of business, or otherwise labeled to correspond with specific requests in the subpoena. W. Va. R. Civ. P. 45(e)(1) (1998).

7. Further, under Rule 34, “[t]he party submitting the request may move for an order under Rule 37(a) with respect to any objection or other failure to respond to the request or any part thereof[.]” W. Va. R. Civ. P. 34(b) (1998).

8. Rule 37, in turn, permits a party to move for an order compelling production of documents requested under Rule 34. See W. Va. R. Civ. P. 37(a)(2) (2010). “If the motion is granted, the court shall, after affording an opportunity to be heard, require the

party ... whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." W. Va. R. Civ. P. 37(a)(4)(A) (2010).

9. Here, WVAWC moved for an order compelling West Virginia Paving to provide full responses to the subpoena served on July 22, 2024, after making a good faith effort to obtain the discovery without court intervention. West Virginia Paving has had more than nine months to provide the requested documents but has refused to provide full responses without reasonable basis for doing so. In doing so, West Virginia Paving has been evasive and improperly delayed its response to WVAWC's subpoena.

10. Further, West Virginia Paving has had ample opportunity to file a response to the Motion to Compel, or to otherwise file a Motion to Quash or Motion for Protective Order but has failed to do so.

11. Therefore, an award of expenses, including attorney's fees, is appropriate under the circumstances.

For the foregoing reasons, WVAWC's Motion to Compel is hereby **GRANTED**.

The Court hereby **ORDERS** that West Virginia Paving is compelled to serve complete and full responses to WVAWC's subpoena within fourteen (14) days of the entry of this Order.

Further, the Court hereby **ORDERS** that WVAWC file an affidavit setting forth the

fees and expenses incurred in attempting to secure West Virginia Paving's compliance with the subpoena and in obtaining this order. West Virginia Paving shall respond to the affidavit within 21 days or pay the amount sought by WVAWC.

The Clerk is hereby directed to forward copies of this Order to all counsel of record and to counsel for West Virginia Paving at the following address: Sarah T. Brooks, CRH Americas, Inc., 900 Ashwood Parkway, Suite 600, Atlanta, GA 30338.

/s/ David M. Hammer
Circuit Court Judge
8th 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.courtswv.gov/e-file/ for more details.