MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF OF WEST VIRGINIA RURAL WATER ASSOCIATION

COMES NOW the West Virginia Rural Water Association ("WVRWA" or the "Association"), by and through its Officers and Directors, and files this Motion and Brief pursuant to Rule 9.1 of the Commission's Rules of Practice and Procedure and Rule 30 of the West Virginia Supreme Court of Appeals Rules of Appellate Procedure. WVRWA respectfully requests of the Commission leave to file this amicus curiae pleading, and further requests that the Commission consider the brief in its deliberations regarding the important issues raised at this docket. In support of these requests, WVRWA states that:

I. Introduction

WVRWA is a West Virginia non-profit member corporation with headquarters located in Scott Depot, West Virginia. Its membership includes approximately 300 public utilities, serving West Virginians in every part of our great State. The mission of the Association is to provide its members, and ultimately the served citizens, with responsive, comprehensive and high quality utility leadership and technical support services. The Association's goal is to serve West Virginia by leading in advocacy and training for publicly owned water and wastewater systems.
II. Motion for Leave to File Amicus Curiae Brief

The Commission recently observed that its Rules of Practice and Procedure "do not provide for the filing of amicus curiae briefs nor do the rules prohibit such a filing." For this reason, the Commission looks to Rule 30\(^1\) of Rules of Appellate Procedure for guidance on requests for leave to file such a pleading. Snowshoe Property Owners Council v. Pocahontas County Public Service District, Case No. 07-1890-WS-PSD-C (Final Order, Oct. 16, 2008).

Rule 30 requires that a motion for leave to file an amicus curiae brief include the (i) proposed brief, (ii) a statement of the moving party’s interest, and (iii) why the amicus curiae brief is desirable and relevant.

WVRWA’s brief is desirable and relevant because it presents the position of many of West Virginia’s public water utilities and operators. These public servants are professional, competent and dedicated advocates for sound operation, management, and financing of public infrastructure. The pleading will allow the Commission to consider their concerns regarding the present and future delivery of utility service in our State.

It is not hyperbole to state that the matters presented in this case are fundamental to the present and future success of our State and the health and well-being of our people. For these reasons, the Association respectfully requests that the Commission ORDER that the amicus curiae brief presented below be filed at this docket.

III. WVRWA’s Amicus Curiae Brief

Introduction

West Virginia and its local governments have, through reasonable reliance on explicit and implicit promises made by Defendant, abandoned many publicly owned utilities and thus tendered public wealth and management prerogative to the private, investor-owned Defendant utility.

\(^1\)Because of recent amendments to the Supreme Court’s Rules of Appellate Procedure, former Rule 19 is now Rule 30.
The underlying assumption in these transactions was and remains that the behavior of the Defendant would remain consistent with the long term objectives and interests of our State and its Citizens. The actions of WVAWC that are the subject of this case are precisely contrary to those interests and objectives.

West Virginia's central long term water infrastructure objective has been constant and constantly restated by our leaders: To "provide the availability of adequate, economical and reliable utility services throughout the State." *W.Va. Code 24-1-1 (a) (2)* For example,

I am also committed to maximizing our water potential. It is unconscionable to me that in the year 2005, approximately 25 percent of West Virginia homes still have no access to a formal, clean water system and 45 percent of our population is not connected to a centralized public wastewater treatment system. How can we expect to be taken seriously as a potential business location if we aren't even taking care of the basic needs of our current citizens? This must change and it must change as quickly as possible. *Governor Joe Manchin III, State of the State and Inaugural Address, February 9, 2005*

The Defendant's recent unilateral announcement that it is, "due to current economic conditions ... unable to financially participate in [public-private] partnerships" is harmful, and perhaps destructive, to West Virginia's central and critical water infrastructure objective.

**Issues presented**

1) May the Defendant Water Company unilaterally and summarily abrogate its responsibilities to the detriment of the served public and contrary to its long-standing promises?

2) May the Defendant Water Company use its monopoly power, granted by this Commission and our local governments, to dictate new and diminished terms of service?

3) Is the served public to be held responsible for a purportedly failed business model that was developed and marketed by the Defendant?
4) What is the best path forward to deliver drinking water to unserved and underserved areas of our State, and thus best protect and promote the health and prosperity of the people of West Virginia?

May the Defendant Water Company unilaterally and summarily abrogate its responsibilities to the detriment of the served public and contrary to its long-standing promises and course of conduct?

The Public Service Commission "has the power to require a public utility to expand its service to an area within the utility's franchise. Further, a public utility is under a duty to make reasonable expansion of service in accordance with its franchise and charter obligations." Landowners Non Profit Water Association, Inc., Case No. 01-1637-W-CN (Commission Order, August 29, 2002)

Defendant's franchise obligations arise from the explicit and implicit promises made by WVAWC. These promises were made to induce and secure contracts with various public entities which tendered to WVAWC assets and capital funding from the public wealth, and operations and maintenance contracts with political subdivisions of our State. One direct result of these contracts, contemplated by all parties and the reviewing Commission, was the dismantling and deactivation of publicly owned utilities in favor of WVAWC. The consequence of this result is the monopoly market power of the Defendant in the served areas, and the corresponding and intended inability of our local governments to provide essential public utility services.

Defendant predictably denies that it made any promises to our public entities "other than in writing". (See: Defendant Answer, Paragraph 28) This denial is contrary to fact and the public interest, and is also inconsistent with West Virginia contract law. Our law requires that the fact finder resolve differing contract interpretations by examining "the surrounding circumstances which exist at the time a contract in writing was entered into, the situation of the parties, and the subject matter of the instrument and, when the words are ambiguous, will call in aid the acts done under it as a clue to the intention of the parties." Kanawha Banking & Trust Company v. Gilbert, 131 W.Va. 88, 46 S.E.2d 225, 236 (1947)
The nature of the Defendant’s sell to our Citizens is clear by the following acts of the involved public entities and their governing Commissions and Councils. The dismantled utilities, and the public’s resulting inability to operate and make necessary and required capital expansion and improvements, are proof that the Defendant marketed its “public-private” business model as reliable and perpetual. Defendant’s unilateral abandonment of its promised and previously implemented course of conduct is an unreasonable act that will frustrate the goal of continued service expansion into unserved and underserved areas, which will deny or make unaffordable public water service to our State’s poorest communities and Citizens.

On July 20, 2011, the President and CEO of American Water encouraged that, ‘public-private partnerships should be more widely pursued for water and wastewater services.” He exhorted, “Now is the time to enable the private sector to provide resources to help financially distressed municipal systems update, maintain and operate their facilities in a true partnership.” (See: Exhibit A, attached)

Unfortunately, the company proposes that many West Virginians may no longer enjoy this “true partnership”.

**May the Defendant Water Company use its monopoly power, granted by this Commission and our local governments, to dictate new and diminished terms of service?**

Defendant has monopoly power such that, absent appropriate and effective regulation, it may dictate the terms of service to the Citizens of our State. Of course, our Public Service Commission regulates monopolies because market forces are unable or unavailable to effectively regulate price and practices.

As discussed above, Defendant gained monopoly power in its West Virginia service area by making explicit and implicit promises to our Citizens and following a course of conduct consistent with these promises. It is cynical, perhaps unethical, and certainly against the interests of the State, for Defendant to now summarily and unilaterally deny and reverse its promises and discontinue the course of conduct that led to and followed its award of monopoly market power.

Because of Defendant’s promises and acts, and its resulting position in the marketplace, our local governments have no bargaining power in this matter. Therefore, it is imperative that
the Commission intervene and review the course of conduct announced by Defendant. WVRWA is confident that, upon this review, the Commission will conclude that this conduct is an unreasonable utility practice.

**Is the served public to be held responsible for a purportedly failed business model that was developed and marketed by the Defendant?**

Defendant claims “current economic conditions”, “the continual decline in customer usage” and “regulatory lag” leading to inadequate customer rates as reasons for its unilateral change in course.

It is perhaps a canard that the poor economy requires and justifies Defendant’s acts. These poor conditions, suffered by many citizens of our State, have not had similar impact upon the financial performance of Defendant’s parent corporation, American Water (NYSE: AWK). For the twelve months ending on September 30, 2011, American Water shareholder return was significantly ahead of both the S&P 500 and Dow Jones Utilities indices and the company reported an average return on equity of 10.1% (See: Exhibit B, attached).

American Water’s current business strategy is announced in the introduction of its most recent (2010) annual report: “We also continue to strategically review our business activities. We are taking steps to ensure that we are operating in areas where we can best serve customers and meet business objectives. This effort is about creating value by investing capital and resources and strategically growing where we can drive operational excellence and take advantage of our existing critical mass.” Elsewhere in this Annual Report, this strategy is called as “portfolio optimization”.

Of course, the parts of West Virginia that can be most reliably and economically served, and thus help the company take advantage of its “existing critical mass” are already served with public water. West Virginians without reliable public water supply are predominately in remote areas that present capital cost and service challenges, and doubtless would not promote the company’s portfolio optimization. For this reason, Defendant proposes to frustrate their quest for clean drinking water.
Defendant is a subsidiary of the largest publicly traded United States water and wastewater utility company. It is therefore fair to impute upon it full knowledge of the demography and geography of its West Virginia service area, and likewise the economic risks and potential rewards of its agreements with our local governments. As an expert in the water utility business, it was also well aware of the elasticity of demand that arises when tariff prices are increased and/or demographic changes occur.

With this information and expertise, and with significant bargaining power, the Defendant made express and implied promises to our local governments to induce them into a business relationship purportedly in the best interest of both our Citizens and the company. Now that these interests have diverged, our unserved and underserved Citizens are proposed to be ignored by the company in favor of portfolio optimization.

Whatever reason(s) offered by the Company for this action, reasonable or unreasonable, it is an act directly contrary to our goal of providing adequate, economical and reliable utility service throughout our State.

What is the best path forward to deliver drinking water to unserved and underserved areas of our State, and thus best protect and promote the health and prosperity of the people of West Virginia?

The Association pledges that it is, and will remain, available to work with the parties to this case, as well as the Commission, other agencies of our State, and all concerned West Virginians, to take whatever steps are necessary to ensure that the Company's refusal to further participate in public-private partnerships does not delay or defeat expansion of public water infrastructure.

The West Virginia Infrastructure and Jobs Development Council is an important and perhaps indispensable resource to assist the Commission as it considers these matters. Its support and information will allow the Commission and these parties to consider the state-wide impact of the company's decision to withdraw from public-private partnerships.
Conclusion

Fortunately, our laws grant the Commission the power, and assign it the duty, to protect our Citizens from harm that would otherwise occur. West Virginians who await the benefits of promises made and relied upon must not be allowed to suffer in favor of portfolio optimization. Furthermore, WVAWC must not be allowed to harvest the low hanging fruit of profitable service extensions and then refuse or abandon similar service to areas of our State that do not enhance its portfolio.

FOR THESE REASONS, and for those reasons presented by Complainants, West Virginia Rural Water Association joins with Complainants in requesting that this Honorable Commission grant the relief sought in the Complaint filed at this docket. In addition, and/or in the alternative, WVRWA respectfully requests that the Commission ORDER that:

1) The case is retained by the Commission; and,

2) This amicus curiae brief be filed at this docket; and,

3) The West Virginia Infrastructure and Jobs Development Council be joined as an additional and indispensable party to this case.

Respectfully submitted,

WEST VIRGINIA RURAL WATER ASSOCIATION

Alan Haught
President

By Counsel:

Timothy P. Stranko
WV Bar ID# 7236
Steptoe & Johnson PLLC
P.O. Box 1616
Morgantown, WV 26501
304.598.8107
timothy.stranko@steptoe-johnson.com
EXHIBIT A
Viewpoint: Let the private sector help with water infrastructure challenges

Jul 20, 2011 10:16 AM, By Jeff Sterba

Aging water and wastewater systems need repair, and private resources are ready to be unleashed

For most Americans, access to clean drinking water is as effortless as turning on the tap. At a cost that is typically less than a penny per gallon, substantially less than other developed countries, clean water is often taken for granted. But many of the pipes that make it so easy for 300 million Americans to take clean water for granted were originally intended to survive 50 to 75 years, yet they have been in service for more than 100 years. Without renewal or replacement, water pipes in the U.S. that are classified as poor, very poor or life-expired will increase from 10 percent to 44 percent by 2020.

Already, aging wastewater systems discharge billions of gallons of untreated wastewater into surface waters every year. Leaking and broken pipes waste nearly 2 trillion gallons of clean drinking water each year. And every two minutes, somewhere in the U.S., a significant water line ruptures often underground where it is not visible risking major damage to roads and structures.

A recently released study by White Plains, N.Y.-based ITT Corp. confirms that American voters value their water service over any other, from electricity to Internet to cable television. The “Value of Water Survey” finds that 80 percent of Americans support water infrastructure reform. Twenty-nine percent believe the U.S. system, in its current state, is approaching crisis stage. And, as many as three in four anticipate “direct and personal consequences” if water service is disrupted. That growing public awareness affords governments an unprecedented opportunity to tackle the nation’s water challenges through collaboration and innovation.

The U.S. Environmental Protection Agency estimates that it will cost upwards of $1 trillion over the next 20 years to replace and repair the nation’s water and wastewater infrastructures. Who is going to pay the massive repair bill?

The burden, which would normally fall on the public sector, can be reduced if private sector investment in water infrastructure is more widely enabled. Some argue that private investment would allow private companies to “own” the nation’s water future. Nothing could be further from the truth. Water is a public resource regulated by federal and state governments, and private sector investment can help treat and deliver that resource to consumers.

What can be done to attract more private investment? The Sustainable Water Infrastructure Investment Act (SWIIA) which, although it passed the U.S. House twice, failed to reach the Senate floor for a vote in 2010 would remove water and wastewater from the limitations that have been placed on private investment through the use of private activity bonds. The bonds provide low-cost financing for water and wastewater projects. Caps placed on private activity bonds in 1986 have never been updated, and lifting state volume caps, as SWIIA calls for, would enable local governments to tap into private sector capital. Reintroduced as a bipartisan, bicameral act in the 112th Congress, the SWIIA is gaining bipartisan support with over 30 co-sponsors in the House and is currently awaiting consideration from the House Ways and Means Committee.

Second, public-private partnerships should be more widely pursued for water and wastewater services. Although approximately 86 percent of water systems are municipally owned, the private sector has been a steward of the U.S. public water supply for 200 years and has a long-standing record of bringing capital, efficiencies and innovations to...
municipal partnerships. Now is the time to enable the private sector to provide resources to help financially distressed municipal systems update, maintain and operate their facilities in a true partnership.

Third, we need to invest in innovative solutions to water quantity and quality challenges. There is a finite amount of source water, and it needs to be used in a sustainable way. The use of innovative technologies such as advanced metering and sensing systems to help detect and stop losses of treated water, water reuse (treating wastewater to a high quality for use in heating/cooling systems, irrigation and other applications), and desalination of sea water or brackish water sources will help maximize water resources.

For quality water to be ready at the tap in the future, it will require a strong commitment now. Everyone government, utilities and American households must understand what is at stake and work together to create viable solutions. The Sustainable Water Infrastructure Investment Act is an important first step.

Jeff Sterba is the president and CEO of Voorhees, N.J.-based American Water, the nation’s largest investor-owned water and wastewater utility company serving 15 million people in more than 30 states and parts of Canada.
EXHIBIT B
Total Shareholder Return: American Water vs. Indices
(September 30, 2010 – September 30, 2011)

<table>
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<th>Shareholder Return</th>
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<tr>
<td>American Water</td>
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<tr>
<td>Dow Jones Utilities</td>
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</tbody>
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Continuing Effort to Earn an Appropriate Rate of Return on Prudent Investments

- As of August 26, 2011: $314.6 million in annualized revenue requests from 9 outstanding rate cases
- In 2011 American Water received average ROE of 10.1%

- 2010 Recovery Received includes $1.5 million of additional annualized revenues in California associated with its Motion for reconsideration and rate base addition for cases finalized in 2009
- Recovery Received reflects final orders issued, and does not include interim rate increases.

October 2011
CERTIFICATE OF SERVICE

I, Timothy P. Stranko, Counsel for West Virginia Rural Water Association, do hereby certify that the foregoing MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF OF WEST VIRGINIA RURAL WATER ASSOCIATION has been served on the parties noted below this 26th day of October, 2011, by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Sandra Squire, Executive Secretary (Original +12)
Public Service Commission of West Virginia
P.O. Box 812
Charleston, WV 25323

John Philip Melick, Esq.
Christopher L. Callas, Esq.
Jackson Kelly PLLC
P.O. Box 553
Charleston, WV 25322
Counsel for West Virginia-American Water Company

James Ellers, P.E., Executive Director
West Virginia Infrastructure and Jobs Development Council
180 Association Drive
Charleston, WV 25311

Timothy P. Stranko (WVSB No. 7236)