

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

MURRAY ENERGY CORPORATION, et al.,

Plaintiffs,

v.

Civil Action No. 5:14-cv-39

JUDGE BAILEY

GINA McCARTHY, Administrator,
United States Environmental Protection Agency,
in her official capacity,

Defendant.

**MEMORANDUM IN RESPONSE TO UNITED STATES' MOTION TO DESIGNATE
THE JUNE 29, 2016 COURT TRANSCRIPT FOR RESTRICTED ACCESS**

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On June 29, 2016, this Court held a public hearing at which the parties appeared to present argument on Plaintiffs' Motion for In Camera Review, to Compel Documents, and to Permit Depositions. Defendant has now moved, Dkt. #244, to restrict access to the transcript from that public hearing. The excessive non-public filings in this litigation—protecting documents that Defendant has unilaterally marked as confidential—have become burdensome, and Plaintiffs oppose Defendant's motion.

Generally, Courts should hesitate to restrict public access to its proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (“Subject to the traditional time, place, and manner restrictions, streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.” (citations omitted)). Transcripts of public proceedings should be equally available to the public. *See Cohen v. Public Serv. Co.*, No. 13-cv-578, 2014 U.S. Dist. LEXIS 93861, at *5 (D. Colo. July 10, 2014) (denying a motion to restrict access to a hearing transcript because “[t]he exhibits at issue here and to which the plaintiff seeks to attach restricted access relate directly to her claims and may be evidence at trial[,] [t]he work of a district court ordinarily is open to the public[, and] [t]he exhibits at issue here at not private or confidential”).¹ There is no reason for this Court to restrict public access to records of one of its public hearings.

¹ The Northern District of West Virginia's Local Rules of General Practice and Procedure indicate a strong preference to provide public access to hearing transcripts, recognizing that information “elicited during testimony or other court proceedings . . . will become available to the public when the official transcript is filed at the courthouse unless, and until, it is redacted.” L.R. 5.08(c). The rule refers to Local Rule 5.08(a) for its list of restricted information: social security numbers, names of minor children, dates of birth, financial account numbers, home addresses in criminal cases.

Additionally, Defendant simply has not met its burden to keep the transcripts off of the public record. The Northern District of West Virginia's Local Rules of Civil Procedure recognizes that "[t]he rule requiring public inspection of Court documents . . . may be abrogated only in exceptional circumstances." L.R. 26.05(b)(1). When moving to seal a document, for example, the movant must explain "(A) the reasons why sealing is necessary, including reasons why alternatives to sealing, such as redaction, are inadequate; (B) the requested duration of the proposed seal; and (C) a discussion of the propriety of sealing, giving due regard to the parameters of the common law and First Amendment rights of access as interpreted by the Supreme Court and our Court of Appeals." L.R. 26.05(b)(2).²

In requesting that the transcript be designated for restricted access, Defendant bases this request upon the mere potential discussion of documents that it has unilaterally stamped confidential. But Plaintiffs are not aware of any confidential information appearing on the transcript and Defendant has cited no such information in its motion. Simply put, no good cause exists to abridge the public's First Amendment rights of access to court proceedings. Plaintiffs respectfully request that this Court deny Defendant's motion to designate the June 29, 2016 court transcript for restricted access and that the transcript is made available to the public in accordance with Local Rules of General Practice and Procedure 5.08(c).

² While the Northern District of West Virginia Local Rules do not specifically address a motion to restrict access to a hearing transcript, Defendant must meet similar requirements to those for a motion to seal the document. *See, e.g.*, D. Colo. L.R. Civ. P. 7.2(c) ("A motion to restrict public access shall be open to public inspection and must: . . . (2) address the interest to be protected and why such interest outweighs the presumption of public access (stipulations between the parties or stipulated protective orders with regard to discovery, alone, are insufficient to justify restriction); (3) identify a clearly defined and serious injury that would result if access is not restricted; (4) explain why no alternative to restriction is practicable . . .").

Dated: July 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on all attorneys of record via the Court's electronic case filing system on the date reflected in the Court's electronic case filing records.

/s/ Jacob A Manning _____
Counsel for Plaintiffs