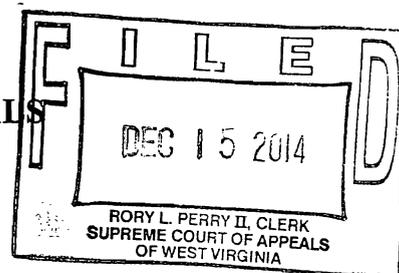


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



ALLIED WASTE SERVICES OF NORTH AMERICA, LLC
Doing business as Republic Services of West Virginia,

Petitioner,

v.

No. 14-1136

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

**STATEMENT OF THE RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
OF ITS REASONS FOR THE ENTRY OF ITS ORDER
OF OCTOBER 3, 2014, IN**

CASE NO. 13-1162-MC-30E, CASE NO. 13-1163-MC-30E, CASE NO. 13-1164-MC-30E, CASE NO. 13-1165-MC-30E, CASE NO. 13-1166-MC-30E, CASE NO. 13-1668-MC-30E, CASE NO. 13-1669-MC-30E, CASE NO. 13-1670-MC-30E, CASE NO. 13-1671-MC-30E and CASE NO. 13-1672-MC-30E

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA**

By Counsel,

RICHARD E. HITT, ESQ.

GENERAL COUNSEL

WV BAR No. 1743

201 Brooks Street

Charleston, WV 25301

(304)340-0450

rhitt@psc.state.wv.us

CARYN WATSON SHORT, ESQ.

DIRECTOR, LEGAL DIVISION

WV BAR No. 4962

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**LINDA S. BOUVETTE, ESQ.
STAFF ATTORNEY
LEGAL DIVISION
WV BAR No. 5927**

December 15, 2014

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON**

**ALLIED WASTE SERVICES OF NORTH AMERICA, LLC
Doing business as Republic Services of West Virginia,**

Petitioner,

v.

No. 14-1136

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

**STATEMENT OF THE RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF OCTOBER 3, 2014, IN
CASE NO. 13-1162-MC-30E, CASE NO. 13-1163-MC-30E, CASE NO. 13-1164-
MC-30E, CASE NO. 13-1165-MC-30E, CASE NO. 13-1166-MC-30E, CASE NO. 13-
1668-MC-30E, CASE NO. 13-1669-MC-30E, CASE NO. 13-1670-MC-30E, CASE
NO. 13-1671-MC-30E and CASE NO. 13-1672-MC-30E**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA:**

The Respondent, Public Service Commission of West Virginia (hereinafter "Commission"), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of October 3, 2014, in Case No. 13-1162-MC-30E, Case No. 13-1163-MC-30E, Case No. 13-1164-MC-30E, Case No. 13-1165-MC-30E, Case No. 13-1166-MC-30E, Case No. 13-1668-MC-30E, Case No. 13-1669-MC-30E, Case No. 13-1670-MC-30E, Case No. 13-1671-MC-30E and Case No. 13-1672-MC-30E.

STATEMENT OF THE CASE

The West Virginia Legislature has granted jurisdiction to the Public Service Commission of West Virginia (“Commission”) to regulate the rates of both motor carriers of solid waste (collection and transportation) and solid waste facilities. In the instant cases, the Commission was considering proposed rate increases for various motor carrier authorities held by Allied Waste Services of North America, LLC dba Republic Services of West Virginia (“Allied” or Petitioner”). In its operations in West Virginia, Allied controls all services relating to solid waste disposal and is regulated as a public utility in each of these services. Allied holds certificates to operate as a common carrier and permits to operate as a contract carrier in the collection and transportation of solid waste to its place of disposal. Allied also has a certificate to own and operate a transfer station, Mountaineer Transfer Station (“MTS”)¹. Finally, it has a certificate to own and operate a landfill that is the place of permanent disposal, Short Creek Landfill (“Short Creek”). Although each of these public utility services is performed by one legal entity, Allied, each service has a separate Commission tariff that imposes approved fees on the users of each service. All of these fees are ultimately passed on to the public that generates the solid waste.

¹ A transfer station is a solid waste facility where solid waste is unloaded from collection vehicles and briefly held while it is reloaded onto larger long-distance transport vehicles for shipment to landfills or other treatment or disposal facilities. By combining the loads of several individual waste collection trucks into a single shipment, communities can save money on the labor and operating costs of transporting the waste to a distant disposal site.

The Commission cases before the Court consist of applications by Allied's motor carrier interest to increase its rates charged to the public to recover costs associated with the disposal of waste at Allied's disposal interests². Again, the costs of all these services are paid by the public served under the certificates and permits which were the subject of the applications filed with the Commission.

In 1989, the West Virginia Legislature passed Enrolled Committee Substitute for Senate Bill 301, codified at W.Va. Code §24A-2-4a, which, *inter alia*, singled out a particular cost and provided for the expedited pass-through of increases in landfill tip fees (disposal rates) as rate surcharges for motor carriers of solid waste subject to certain conditions. By its express terms, the statute intended to create an expedited process for a motor carrier to recover increases "in the disposal rate charged by the landfill at which the solid waste is disposed by the motor carrier, commonly known as the tip fee". W.Va. Code §24A-2-4a. In considering the intent of the statute, it is important to note that the legislation does not deal with the situation where the tip fee decreases either at the landfill used by the motor carrier or because the motor carrier switches to another landfill. Since enactment of the statute, the Commission has promulgated related rules and has processed a number of these expedited tip fee surcharge applications under its tariff rules, 150 CSR 2, Rule 33.7 ("Tariff Rule 30-E")³ to ensure that (1) motor carriers

² As explanation for the ten different PSC docket numbers, when the Commission receives a rate application by a motor carrier, it docket a separate PSC case for each certificate held by the applicant that would be affected by the proposed increase.

³ This Rule is referred to as Rule 33.7 in pleadings filed with the Commission and this brief. The rules will be renumbered to implement changes resulting from the passage of House Bill 4601, to Rule 34.7, effective January 11, 2015.

of solid waste recover from their rate payers the full cost of the service being provided; and (2) customers pay just and reasonable rates and the true cost of service for solid waste transportation and disposal services.

On November 1, 2013, the Petitioner, Allied filed ten (10) applications seeking Tariff Rule 30-E relief for disposal through its transfer station, Mountaineer Transfer Station. The Commission had recently approved rates for Mountaineer Transfer Station which resulted in an increase in its tipping fee. *Allied Waste Services of North America, LLC dba Mountaineer Transfer Station*, Case No. 12-1532-SWF-42A, Order entered October 3, 2013.

Acting within the time period specified by the statute, two (2) of the applications were approved by order entered November 13, 2013. On November 14, 2013, the Commission entered an order denying the remaining eight (8) applications and amending the November 13, 2013 order by establishing a refund requirement for the first two applications. On November 25, 2013, Allied filed a petition for reconsideration of the order and requested a hearing before the Commission. The Commission held a hearing on the petition for reconsideration on April 1, 2014. A final order was entered on October 3, 2014, denying the petition for reconsideration, resulting in this proceeding before the Court.

The primary basis for the approval of two and the denial of eight applications was the disposal history and prior rate relief for each certificate.

Certificates Obtained From Suburban (Granted 30-E Relief)

Solid waste collected under the two certificates (Certificate Nos. 4865 and 4879) for which 30-E relief was granted, was routinely disposed of through the Suburban Sanitation Transfer Station (with ultimate disposal at Meadowfill and S&S Landfills) by Allied's predecessor, Suburban Sanitation, Inc. ("Suburban.") The rates charged to the customers served under these two certificates reflected the cost of transporting the waste to the transfer station and subsequently to the landfills as well as the tip fees charged by the transfer station and the landfills.

On July 11, 2011, the Commission approved the transfer of these two certificates and the certificate of convenience and necessity for Suburban Sanitation Transfer Station from Suburban to Allied. *Suburban Sanitation Company, Inc.*, Case No. 10-1757-MC-TC, Case No. 10-1758-MC-TC and Case No. 10-1759-SWF-PC, and *Allied Waste Services of North America, LLC*, Case No. 11-0239-SWF-CN, (consolidated), Commission order entered on March 29, 2013. Allied intended to construct a new transfer station in Monongalia County to replace the Suburban Transfer Station, which was also located in Monongalia County. The Suburban Transfer Station would be demolished upon completion of the new transfer station. Allied stated in its pleadings that the new transfer station would replace the Suburban Transfer Station, would be located in the vicinity of the Suburban Transfer Station, be subject to the same contingencies and conditions as Suburban, and at least for a period of eighteen (18) months, have the same tariff rates.

At the time the certificates were transferred, Allied obtained a certificate of convenience and necessity to replace the Suburban Transfer Station with a new state-of-the-art facility known as Mountaineer Transfer Station (“MTS”). *Allied Waste Services of North America, LLC*, Case No. 11-0239-SWF-CN. The new facility was completed on November 11, 2011 and Allied immediately began transporting waste collected under its certificates to it. Following its disposal at MTS, the waste was ultimately disposed of at Short Creek Landfill, which is also owned by Allied. Prior to Allied’s purchase of the certificates and transfer station, the waste was transported to the Suburban Transfer Station and ultimately disposed of at Meadowfill Landfill, owned by Waste Management of West Virginia, Inc., a competitor of Allied.

On November 11, 2012, Allied applied for a rate increase for the Mountaineer Transfer Station. *Allied Waste Services of North America, LLC dba Mountaineer Transfer Station*, Case No. 12-1532-SWF-42A. The Commission approved the rate increase on October 3, 2013. Shortly thereafter, Allied filed the ten (10) applications for 30-E relief.

Allied submitted the required documentation with the Tariff Rule 30-E applications that showed customers were paying a rate based on disposal at Meadowfill Landfill (\$58.35 per ton) but Allied was paying a much lower rate based on the switch it made to dispose at its own Short Creek Landfill (\$49.50 per ton), a difference of \$8.85 per ton⁴. Allied had a duty not only under Tariff Rule 30-E but under common rules of

⁴ At the time of the filing of the applications, Allied’s existing tariff rate (Suburban’s existing tariff on the date of the transfer) included a 30-E surcharge that covered a prior

fairness and equity to report the decrease in tip fees so that its rates could be adjusted to ensure its customers were paying just and reasonable rates and the true cost of service. Instead, through its dealings with its affiliated interests, Allied pocketed the tip fee savings that were generated by overcharging its customers on the collection side of its business.

By failing to report the reduction in tip fees and reducing its rates to the public, Allied profited at the expense of its customers - in clear violation of Tariff Rule 30-E. This was not an oversight by Allied – it was a deliberate decision. As testified to by Allied at the evidentiary hearing on the petition for reconsideration, it did so with full knowledge of the impact on the ratepayers with no intention of refunding that difference. (April 1, 2014, Transcript, p. 34-38) According to Allied, changing to Short Creek was a smart business decision because it increased revenues at the landfill and generated cost savings for its hauling operation, all at the ratepayers' expense.

The Commission did grant the 30-E surcharge requested in the application for these two certificates but required the tip fee savings be refunded back to the customers who were overcharged for the services rendered.

Certificates and Permits Obtained from BFI (Denied Applications)

The waste transported by Allied under Certificate Nos. F-5619, F-5620, F-7337, F-7439 and F-7498 and Permit Nos. H-10155, H-10824 and H-10840 (acquired from

increase in costs at Meadowfill Landfill which raised the tip fee at the Suburban Sanitation Transfer Station to \$58.35 per ton. This rate was approved by order entered June 1, 2007 in *Suburban Sanitation, Inc.*, Case No. 07-0928-MC-30E (Certificate No. F-4865) and in *Suburban Sanitation, Inc.*, Case No. 07-0929-MC-30E (Certificate No. F-4879.)

BFI) was directly disposed of at either Meadowfill Landfill or S&S Landfill. Customers' rates were based on the transportation and tipping fees using these two landfills. Once Allied completed construction of its own transfer station, MTS, it began transporting waste collected pursuant to these certificates and permits to MTS with subsequent disposal at its own landfill, Short Creek. However, Allied made no effort to ensure that its rates reflected the true cost of service resulting from the change in transportation and disposal costs at a different landfill. Allied even advised the Commission that using Mountaineer Transfer Station and Short Creek Landfill resulted in a huge cost savings - a cost savings it was unwilling to pass through to its customers. (April 1, 2014, Transcript, p. 35-37.) Since its rates were not based on disposal at Mountaineer Transfer Station (rather, they were based on the tipping fees at Meadowfill Landfill and S&S Landfill), the Commission properly denied Tariff Rule 30-E relief and recommended that Allied file a Tariff Rule 42 application (a general rate case) to determine rates based on disposal at Mountaineer Transfer Station with subsequent disposal at Short Creek. A general rate case would allow Allied to recover the cost associated with switching to its own transfer station and landfill while also passing cost savings through to customers. To date, Allied has declined to seek rate relief through the filing of a Tariff Rule 42 application.

SUMMARY OF ARGUMENT

The general powers of the Commission to establish just and reasonable rates based primarily upon the cost of providing services to the public are very familiar to the Court. In establishing just and reasonable rates for a motor carrier, the Commission includes the motor carrier's own transportation costs incurred to transport the waste to places of

disposal (e.g., fuel, wages and vehicle costs) as well as the tip fee (the disposal rate charged by the solid waste disposal facility.) Once these costs are established in a motor carrier's rates, then subsequent increases in the tip fee may be recovered through the expedited process provided by the Legislature.

Regarding the authority it obtained from Suburban, (the two applications that were granted 30-E relief), Allied had rates that reflected both the tipping fee for the transfer station it acquired from Suburban, and the cost of ultimate disposal of waste at Meadowfill and S&S Landfills. The tipping fee embedded in Allied's rates was \$58.35 per ton (Suburban Transfer Station's rate of \$13 per ton and Meadowfill and S&S Landfills' rate of \$45.35 per ton).

Beginning in November, 2011, Allied stopped disposing of waste at Meadowfill and S&S and began using its own landfill, Short Creek, which had a tipping fee of \$36.50 per ton, for a total tipping fee of \$49.50 per ton. Nonetheless, until November, 2013, the rates paid by Allied's customers reflected a tipping fee cost of \$58.35 per ton. Thus, Allied overcharged its customers by \$8.85 per ton. Although by order dated November 13, 2013, the Commission granted 30-E relief, Allied appeals the Commission requirement in its November 14, 2013 Order that Allied refund this overcharge to its customers.

Allied incorrectly argues that the provisions of W.Va. Code §24A-2-4a establish the entire legal authority that the Commission possesses regarding tipping fees, i.e., the Commission can only consider increases in tipping fee costs. Not only is the argument illogical, it is wrong. The Legislature established an expedited process to recover

increases in tipping fees. That is the only issue specifically set out in the statute. The statute instructs the Commission to establish rules that set forth the particulars of fee surcharge applications. These rules, which have been in effect for over twenty years, contain a refund obligation when tipping fee costs decrease. Every Commission Order that grants a 30-E increase, including Allied's order, recites the refund requirement if the tip fee decrease. This is perfectly compatible with the general ratemaking authority of the Commission to maintain just and reasonable rates, based primarily on costs.

Furthermore, the statute is silent as to a reduction in tip fee costs. The very purpose of agency rulemaking is to supply that which the Legislature has omitted from its statutory enactments. Griffith v. Frontier W.Va., Inc., 228 W.Va. 277, 719 SE. 2d 747, 755 (2011). Since the statute is silent as to a specific issue (reduction or refund of tip fees), the question for the Court is whether the agency's answer is based upon a permissible construction of the statute. Id. at 757, citing Syl. pt. 4, Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). Not only is the Commission expressly given the authority to "fill the gap," it is "entitled to deference on the question." Appalachian, 466 S.E.2d at 440.

Regarding the authority that Allied obtained from BFI, Allied's rates reflect tip fees associated with taking waste directly to the Meadowfill and S&S Landfills near Clarksburg. In November, 2011, it voluntarily switched its waste disposal from these two landfills to its own transfer station in Morgantown, MTS, and landfill, Short Creek. By its own admission, Allied saved considerable costs by making this switch.

When it filed 30-E applications in November 2013, its existing rates did not reflect

tip fees at MTS and Short Creek and did not reflect the admitted cost savings. The Commission denied the 30-E applications stating:

W.Va. Code 24A-2-4a contemplates expedited treatment for motor carriers whose costs go up as the result of increases at the landfill at which they are disposing of solid waste where the cost of disposal at that landfill has previously been provided for in their rates. It does not contemplate expedited treatment for motor carriers to pass through to their ratepayers a tipping fee that the motor carrier chose to pay by virtue of its own decision to switch landfills.

Commission Order, November 14, 2013, at page 5.

If Allied wishes to pursue a rate increase, the Commission Order directed it to file a Rule 42 general rate filing. Again, this is a permissible construction of the tip fee statute and consistent with the Commission's general rate authority.

Finally, Allied makes a convoluted and misplaced argument suggesting that the Commission has engaged in impermissible flow control. This argument ignores the statute, W.Va. Code §24-2-1h that gives the Commission the authority to require a motor carrier to dispose of solid waste at a particular solid waste facility. But, relative to the issues in this case, the argument is misplaced since the Commission orders have nothing to do with flow control. The Orders are restricted to the issue of the proper recovery of tip fees.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Rules of Appellate Procedure, the Court, by Order entered November 13, 2014, established oral argument on the appeal for February 24, 2015.

STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in W.Va. Code §24-5-1, which provides in part:

Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order.

In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981). In Syllabus Point 1 of Sexton this Court reiterated previous holdings: “[A]n order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.” (Citations and quotation marks omitted). In Monongahela Power Company, this Court adopted the comprehensive standard of review applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. . . The Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but

instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Monongahela Power Company, Syllabus Point 2 (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Company in Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981) may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and (3) whether the substantive result of the Commission's order is proper.

ARGUMENT

I. THE COMMISSION HAS BROAD AUTHORITY TO ESTABLISH RATES THAT ARE JUST, REASONABLE AND BASED PRIMARILY ON COST OF SERVICE.

As a general matter, the Legislature has delegated broad authority and duty to “ensure fair and prompt regulation of public utilities in the interest of the using and consuming public,” “ensure that rates and charges for utility services are just, reasonable” and ensure that rates are “based on the costs of providing these services”. W.Va. Code §24-1-1(a)(1) and (4).

W.Va. Code § 24-1-1(b), also provides:

The Legislature creates the Public Service Commission to exercise the legislative powers delegated to it. The Public Service Commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the

State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

As noted by the Court in Syllabus point 4, in State ex re. Water Development Authority v. Northern Wayne County Public Service District and the Public Service Commission, 195 W.Va. 135, 464 S.E. 2d 777 (1995),

W.Va. Code 24-3-2(1983), clearly and unambiguously gives the Public Service Commission the power to reduce or increase rates whenever it finds that the existing rate is unjust, unreasonable, insufficient, or unjustly discriminatory or otherwise in violation of any provision of W.Va. Code 24-1-1, et seq. Syl. pt. 2, Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993).

There can be no doubt that the Commission has the necessary statutory power and authority to determine and set rates for solid waste facilities, public utilities and motor carriers and the duty to ensure that rates are just and reasonable (W.Va. Code §24-2-1f (solid waste facilities); W.Va. Code §24-2-3 (public utilities); and W.Va. Code §24A-5-1 (motor carriers of solid waste.))

Both Allied and its customers are entitled to have solid waste transported for disposal at a cost-based rate. Allied could ensure its rates are cost-based by filing a general rate case that would consider all its costs, including increased tip fees, in determining what rates its customers should pay. But, to date, it has made no such filing. Instead, Allied 'waved a flag' in front of the Commission and disclosed that its actions are in fact reaping a large cost savings by using its own facilities, Mountaineer Transfer Station and Short Creek Landfill, as opposed to taking waste directly to Meadowfill Landfill. Further, Allied has no intention of filing a rate case that would eliminate that cost savings. (April 1, 2014, Transcript, p.33-42; Keith Koebley, Prefiled Direct

Testimony, p. 5-7.)

II. THE COMMISSION PROPERLY CONSTRUED W.VA. CODE §24A-2-4a AND GRANTED TARIFF RULE 30-E RELIEF TO TWO CERTIFICATES AND DENIED TARIFF RULE 30-E RELIEF TO EIGHT OTHER CERTIFICATES AND PERMITS.

A. Applications Granted but Requiring Refunds

The Commission's decision to order refunds for two applications but grant 30-E relief and to deny 30-E relief for the other certificates and permits was proper. Allied claims that the Commission exceeded its "statutory jurisdiction and power" in denying its petition for reconsideration. In particular, Allied claims that 150 CSR 2, Tariff Rule 33.7.f., by containing a refund provision, is inconsistent with W.Va. Code §24A-2-4a. The Commission relied on Tariff Rule 33.7.f. in ordering refunds to Allied's customers for the time period they were overcharged for disposal costs.

W.Va. Code §24A-2-4a allows motor carriers of solid waste to apply to the Commission for approval of an expedited rate surcharge to pass through to its customers an increase in the disposal rate charged by its commercial solid waste disposal facility.

Any common carrier transporting solid waste in this state pursuant to authority granted under section five, article two, chapter twenty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, may make application to the commission for approval of a rate surcharge to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed by the motor carrier, commonly known as the tip fee, to commercial and residential customers, including increases which are the direct result of fees, charges, taxes, or any other assessment imposed upon the landfill by a governmental body. The commission shall within fourteen days of receipt of said application notify the motor carrier of approval of the requested rate surcharge, or approval of a rate surcharge other than in the amount requested and the reason therefor. The effective date of the approved rate surcharge shall be the same date as the effective date of the increase in the tip fee to which the surcharge relates; except that in the event the application for approval of the rate surcharge is received by

the commission more than sixty days after the effective date of the tip fee increase, then the effective date of the approved rate surcharge shall be the date said application was received by the commission.

The commission shall immediately promulgate emergency rules which set forth the procedures for the filing of the tip fee rate surcharge application. It is the purpose of this statute to provide an expedited process which will allow the subject motor carriers to pass through tip fee increases to all customers. Only that data necessary to review in accordance with this statute may be required by the commission to be submitted by the motor carrier.

The language of the statute is clear and unambiguous; if the tip fee at the solid waste facility used by the motor carrier increases, then the motor carrier may petition the Commission for an increase in rates to cover the new tip fee amount. The statute and Tariff Rule 30-E intend that the motor carrier's current rates reflect disposal at the solid waste facility that has increased its tip fee. Furthermore, the statute is silent concerning how reductions in tipping fees are to be handled either at the disposal facility being used or through a switch to a cheaper facility.

Pursuant to the Legislature's directive, the Commission promulgated regulations to implement the expedited rate surcharge, Tariff Rule 30-E.

Rule 33.7. M.C. RULE 30-E. Solid Waste Tipping Fees -- The following accelerated procedure may be used by common carriers of solid waste applying for a rate surcharge because of an increase or decrease in the disposal rates, commonly known as tipping fees, charged by commercial solid waste facilities.

33.7.a. If any motor carrier of solid waste is required to pay higher tip fees as a result of increased commercial solid waste facility costs, or as a result of a rate filing pending before this Commission, or of any increases imposed by commercial solid waste facilities, such motor carrier may file an application in the form of M.C. Tariff Form No. 2, and amended tariffs with this Commission stating rates and charges designed to produce additional revenues sufficient, but no more than sufficient to offset such increased costs for tip fees and request an effective date for such amended rates not

prior to the date it incurs said higher costs.

33.7.b. The Commission may investigate the reasonableness of the new rates so sought by the motor carrier to determine:

1. Whether the increase in tip fees is duly authorized and collectible by the commercial solid waste facility;

2. Whether the increase in rates filed by the motor carrier are no more than sufficient to offset such increased costs;

3. The effective date of such costs and the permanency thereof;
and

4. The possibility of the motor carrier receiving a refund at the termination of the proceeding in which the increased tip fees are pending.

33.7.c. Any motor carrier using the foregoing procedure shall file a petition simultaneously with the tariff filing, invoking the provisions of this rule.

33.7.d. The motor carrier shall file evidence of past solid waste disposal tip fees in the form of copies of bills rendered by the solid waste disposal facility. The minimum data requirement in support of this filing shall be copies of the most recent six (6) months' disposal bills.

33.7.e. Before placing rates into effect pursuant to this procedure, the motor carrier shall enter into an agreement that, if it shall receive a refund or reduction of all or part of the higher tip fees upon which its higher rates and charges are based, placed into effect as authorized by this procedure, it will comply with such order as the commission shall thereafter make in reference to such refund or tip fee reduction so received.

33.7.f. When any motor carrier which has increased its rates pursuant to proceedings under this rule receives a reduction, or a refund, on the tip fees of any commercial solid waste facility whose rates and charges were the basis for the rate increase proceedings under this rule, it shall report promptly to this Commission the new reduced rates and charges so ordered and the annual savings in costs resulting to the motor carrier from such reduction from the date said commercial solid waste facility increased its rates under this rule, or the amount of refund and the period to which it relates. Whereupon, this Commission may conduct an investigation to determine:

1. The amount of the reduction;
2. The effective date of the reduction;
3. The manner in which, and the extent to which, the motor carrier shall make refunds to its customers as a result of any refund or reduction received from a commercial solid waste facility to which it transports solid waste; and
4. The manner in which, and the extent to which, the motor carrier shall amend or adjust its rates to give effect to such reduction.

33.7.g. Any motor carrier which invokes the proceedings provided under 33.7.a. hereof shall be deemed to have consented in advance to the proceedings under Rule 33.7.f.

33.7.h. Nothing in this rule shall be construed to prevent the Commission from investigating, in a separate proceeding, whether a motor carrier should absorb all or part of an increase in tip fees from a commercial solid waste facility.

The Commission's Tariff Rule 30-E faithfully reflects the intent of the Legislature to provide expedited rate relief to motor carriers of solid waste when tip fees at their disposal facilities are increased.

Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and Regulations that it has in the statute.

Syl. pt. 4, Ranger Fuel Corp. v. West Virginia Human Rights Commission, 180 W. Va. 260, 376 S.E.2d 154 (1988).

However, the statute did not address those instances in which the tip fee actually decreases, as in the present case. The Court has recognized that the very function of agency rulemaking is to “supply that which the Legislature has omitted from its statutory

enactments.” Griffith v. Frontier W.Va., Inc., 228 W.Va. 277, 719 S.E.2d 747, 755 (2011). Rules provide guidance when a statute is silent or ambiguous with respect to a specific issue. Id. “If the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap[,] and the agency is entitled to deference on the question.” Id., quoting Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 589, 466 S.E.2d 424, 440 (1995).

In its rulemaking, the Commission has provisions that provide for reductions in the tipping fee surcharge or refunds whichever may be required to ensure that the motor carrier recovers its actual cost while ensuring that customers pay no more than the true cost of solid waste disposal⁵.

That which is necessarily implied in a statute or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms. Syl. pt. 14, State v. Harden, 62 W.Va. 313, 58 S.E. 715 (1907).

Syl. Pt. 4, Smith v. State Workmen’s Compensation Commissioner, 159 W.Va. 108; 219 S.E.2d 361 (1975).

Allied was charging rates based on a disposal cost of \$58.35 per ton but Allied was actually paying disposal costs of \$49.50 per ton, a difference of \$8.85 per ton. Allied was

⁵ This aspect of the Commission rules - ensuring that utilities recover certain costs while ensuring that ratepayers pay no more than actual costs - is found in other Commission tariff rules that allow expedited recovery of certain specified costs. For example, true up mechanisms similar to Motor Carrier Rule 30-E can be found in 150 CSR 2, Rule 30-B, specifically, Rule 13.1.f (adjusting purchased gas, water and electricity purchased and/or transported for resale and transportation and/or treatment of sewage); Rule 30-C, specifically, Rules 13.2.d and 13.2.f (adjusting purchased gas costs); Rule 30-D, specifically Rule 13.3.d (adjusting purchased power costs of non-generating electric utility; and, Rule 30-F, specifically Rule 13.5.h (Safe Drinking Water Act expenses).

pocketing the savings associated with the lower tipping fees rather than passing it on to its customers in the form of reduced rates⁶. The Commission included Sections f through h of Tariff Rule 30-E to ensure that ratepayers benefited from any decrease in tip fees rather than allowing the motor carrier a windfall. This is perfectly compatible with legislative intent that customers pay just and reasonable rates. The Legislature intended to create an expedited process whereby a motor carrier could recover increases in tipping fee costs at the site where it disposes of its waste. The Legislature did not intend for the surcharge to recover amounts from ratepayers that are in excess of the tipping fees charged. There can be no reasonable interpretation of the statute that would reach a contrary conclusion. Furthermore, any such conclusion would be contrary to longstanding Commission rules relating to tipping fee recovery as well as the Commission's overarching legislative directive to ensure that rates are just, reasonable and based primarily upon costs.

Nonetheless, Allied argues that the Commission has no authority to include the

⁶ Petitioner claims that Suburban Sanitation, Inc. (its predecessor in title) took its waste directly to Meadowfill Landfill. Petitioner made that same claim in its Pre-filed Direct Testimony of Keith Koebley, but acknowledged its error at the evidentiary hearing. *See* April 1, 2014, Transcript, p. 22. Suburban Sanitation, Inc.'s 30E applications and Commission orders reflect that Suburban took its waste to the Suburban Sanitation Transfer Station, which, in turn, disposed of the waste at Meadowfill and S&S Landfills (owned by Waste Management of West Virginia, Inc.) Suburban applied for and obtained a 30E surcharge to cover the increased tipping fee at the Transfer Station resulting from an increase in landfill disposal costs. When Allied purchased these certificates in 2011, it continued to use the Suburban Sanitation Transfer Station and charged its customers the same amount that Suburban charged. When the Mountaineer Transfer Station (owned by Allied) was completed, it began disposing of waste at Short Creek Landfill (owned by Allied). Mountaineer Transfer Station had a lower disposal rate than Suburban Sanitation Transfer Station. However, Allied did not reduce its rates to reflect the lower disposal cost at Mountaineer Transfer Station but pocketed the savings.

refund requirements in Tariff Rule 30-E, because the subject matter of refunds of tip fees were not included in the underlying legislation.

It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

Syl. Pt. 3, Rowe v. W.Va. Dept. of Corrections, 170 W.Va. 230, 292 S.E.2d 650 (1982).

The Commission's construction of this statute and other statutes in Chapters 24 and 24A to include rule provisions that accommodate decreases in tip fees is consistent with and contemplated in its power and authority regarding utility ratemaking. As previously noted, the Commission has a statutory obligation and duty imposed on it by the Legislature to set fair and reasonable rates for utilities, motor carriers and their customers. W.Va. Code §§ 24-1-1(a)4, 24-2-2(a), 24-2-3, 24A-2-3 and 24A-2-4. There is no language in W.Va. Code §24A-2-4a that suggests that the Legislature intended to diminish this authority and responsibility.

If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute...Syllabus Point 4, Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

Syllabus Point 3, City of Wheeling v. Public Service Commission, 199 W.Va. 252, 483 S.E.2d 835 (1997).

In many cases, the Court has characterized the Commission's authority by stating '[t]he Public Service Commission was created by the Legislature for the

purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public. Boggs v. Public Service Commission, 154 W.Va. 146, 174 S.E.2d 331 (1970).’ Syllabus Point 1, West Virginia-Citizen Action Group v. Public Service Commission, 175 W.Va. 39, 330 S.E.2d 849 (1985).

Syllabus Point 1, City of South Charleston v. Public Service Commission, 204 W.Va. 566, 514 S.E.2d 622 (1999).

Allied’s argument that the Commission has no authority to order a refund when tip fees decrease is inconsistent with the purpose of W.Va. Code §24A-2-4a to ensure that a motor carrier’s rates reflect its cost of service and with the Commission’s mandate to ensure that all rates are just, reasonable and primarily based on cost of service. “But in no case shall the charge be more than the service is reasonably worth, considering the cost of the service.” W.Va. Code §24-2-2(a).

“The rules of statutory construction require that meaning be given to all provisions in a statutory scheme; if at all possible, statutes must be interpreted so that no enactment is meaningless. The rules of statutory construction require that a construction of a statute that leads to inconsistent results or is in conflict with another statute be avoided.

Belt v. Cole, 172 W.Va. 383, 305 S.E.2d 340 (1983); Mills v. VanKirk, 192 W.Va. 695, 453 S.E.2d 678 (1994). “Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. pt. 6, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. Christina Painter, Case No. 13-1225 (Order entered October 30, 2014); Syl. pt. 3, Smith v. State Workmen’s Compensation Commissioner, 159 W.Va.

108, 219 S.E. 2d 361 (1975,); Syl. pt. 4, Community Antenna Service, Inc. v. Charter Communications VI, LLC, 227 W.Va. 595, 712 S.E.2d 504 (2011). See also Syl. pt. 7, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles (“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.”)

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. (Citations omitted).

State ex rel. Water Development Authority v. Northern Wayne County Public Service District and the Public Service Commission, 195 W.Va. 135, 464 S.E.2d 777 (1995).

The Commission has the power and authority granted in Chapters 24 and 24A to set rates for motor carriers. To knowingly allow Allied to charge a higher rate for its tipping fees at the expense of its customers, which rate is not based on its cost of service and results in a windfall to Allied, is in direct conflict with the Commission’s statutory mandate to ensure reasonable, just rates based primarily on the cost of service.

The commission is vested with power and authority to supervise and regulate all common carriers by motor vehicle and to fix, alter, regulate, and determine just, fair reasonable, and sufficient rates...The Commission shall have power and authority, by general order or otherwise, to prescribe rule and regulations in conformity with this chapter applicable to any and all such common carriers by motor vehicle and to do all things necessary to carry out and enforce the provisions of this chapter.

W.Va. Code §24A-2-3. The Commission's construction of this statute and others, including W.Va. Code §24A-2-4a, to order Allied to refund an overcollection of tip fees is well within its power and authority.

There is no inconsistency – Tariff Rule 30-E, Section f is consistent with W.Va. Code §24A-2-4a and the Commission's overall mandate of ensuring rates are just, reasonable and primarily cost-based – for the motor carrier and its customers.

It is also consistent with past Commission practice. In 2003, the Commission considered a similar case where the transfer station had switched landfills resulting in a lower tip fee. In the Recommended Decision entered on January 8, 2003, final on January 28, 2003, in *Southern Sanitation, Inc*⁷, MC Case No. 02-0331-MC-30E, Case No. 02-0332-MC-30E, Case No. 02-0333-MC30E; Cases No. 02-0983-MC-42A; Case No. 02-1056-MC-42A, and Case No. 02-1057-MC-T (consolidated), the Administrative Law Judge noted that "...Southern is now disposing of much of the solid waste it collects at facilities other than the facilities which were used by Mountaineer Sanitation Services, Inc., at the time that the Commission issued the Orders approving the various 30-E surcharge incorporated in the existing rates." (Recommended Decision, page 1) As a result, a refund of the difference in tipping rates was ordered by the Commission to be paid by Southern.

Likewise, in the Recommended Decision entered on May 27, 2003, in *Lusk*

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<http://intranet.psc.state.wv.us/scripts/orders/ViewDocument.cfm?CaseActivityID=101635&Source=Archives>

Disposal, Inc., M.C. Case No. 26411-30E (Reopened)⁸, the Administrative Law Judge noted in Finding of Fact #9, that “[p]ursuant to Tariff Rule 30E, the Commission may order LDS to refund any overcharges that result from LDS obtaining a Rule 30-E rate increase on the basis of an increase in the tipping fees charged at the Mercer County Landfill and then continuing to charge customers under such increased rates even after LDS has diverted the solid waste generated by those customers to another, cheaper landfill, i.e. the landfill at Bristol, Virginia.” Lusk was required to issue refunds of the overcharges to its customers. Finally, the Commission noted in “*Fly-By-Nite*” that when rates are based on a certain disposal pattern, changing that pattern requires notice to the Commission so it may determine if refunds are in order.

Because Fly-By-Nite's rates were based on Mercer County's tipping fee, Tariff Rule 30E, 150 C.S.R. Series 2, requires Fly-By-Nite to notify the Commission if Fly-By-Nite stops using the Mercer County landfill so the Commission can consider whether customers are due any refund of excess rates by virtue of the landfill change.

Recommended Decision entered on August 29, 2005, in Case No. 03-1163-MC-GI, *Fly-By-Nite Disposal, Inc.*

There is no question that a refund is owed to the customers served under the two certificates for which 30-E relief was granted. Allied shows a complete lack of concern for its customers, who are captives of Allied in its provision of solid waste transportation services. Petitioner's attempt to line its pockets at the expense of its customers must be rejected and refunds should be paid.

⁸ On July 12, 2004, the Commission entered an order on the exceptions to the Recommended Decision, stating that the refunds would be required in the pending rate case per the stipulated agreement.

Allowing Tariff Rule 30-E relief for these two certificates is appropriate and consistent with past Commission practice. Likewise, requiring Allied to refund the difference in disposal costs is consistent with past Commission practice and, more importantly, assures customers pay just and reasonable rates.

B. Applications Denied

With regard to the certificates for which Tariff Rule 30-E relief was denied, the Commission's order was consistent with W.Va. Code §24A-2-4a. Every motor carrier of solid waste has rates that reflect the carrier's costs associated with collection and transportation also includes the cost for disposal (tip fee) at a particular solid waste facility. The statute provides a process for recovering increases in the tipping fee at the landfill reflected in the existing rates. Allied's rates established for each of these certificates and permits however, were based on disposal and the tipping fees at either Meadowfill Landfill or S&S Landfill. Allied then voluntarily chose to haul the waste gathered under these certificates and permits to Mountaineer Transfer Station which, in turn, disposed of the waste at Short Creek Landfill. (Allied owns both Mountaineer Transfer Station and Short Creek Landfill, so it financially benefits from using its facilities to dispose of the waste it hauls under these certificates and permits.) Even though its transportation and disposal costs changed, Allied made no effort to change its rates to reflect its new cost of service. Its rates were not based on disposal through MTS and Short Creek Landfill but through Meadowfill Landfill or S&S Landfill. Therefore, Allied did not qualify for relief under Tariff Rule 30-E.

Allied acknowledged a significant cost savings by transporting waste to

Mountaineer Transfer Station because it was located closer to its customers, allowing Allied a faster turnaround on its trucks. Allied elected to retain all cost savings generated by using Mountaineer Transfer Station as opposed to Meadowfill Landfill.

Attorney Bouvette: You indicated there's a dollar cost savings—a dollar per ton cost savings, and you said that cost savings benefits the hauler because of faster turnaround and so forth. And all I'm asking you is, how is Allied going to credit that cost savings back to its customers?

Mr. Koebley: I mean, there is no feature right now for that.

Attorney Bouvette: There is no intent on Allied's part to give credit back to the customers for the cost savings that you're reaping?

Mr. Koebley: There is no plan to do that.

April 1, 2014, Transcript, K. Koebley Cross Examination, p. 37-38.

That cost savings is the difference in transportation cost to Meadowfill Landfill that was embedded in the rates paid by Allied's customers served under these certificates and permits and the admittedly lower transportation cost to haul the waste to Mountaineer Transfer Station. Allied continues to generate that cost savings each day it hauls waste under these certificates and permits to Mountaineer Transfer Station. To allow Allied a Tariff Rule 30E expedited surcharge on top of this cost savings would allow it to reap a double benefit at the sole expense of its customers.

Allied raises the case of *General Refuse Service, Inc.* as support for its claim that the Commission erred in denying it 30-E relief. *General Refuse Service, Inc.* filed M.C. Case No. 26356-30E on February 6, 1995, seeking Tariff Rule 30-E relief at Sycamore Landfill. *General Refuse Service, Inc.* had previously disposed of its waste at a landfill

owned by Disposal Service, Inc.⁹ The Commission entered an order granting the relief on February 21, 1995.

On February 17, 1995, General Refuse Service, Inc. and L&S Sanitation, Inc. filed a complaint against Disposal Service, Inc., Case No. 95-0116-SWF-C. General Refuse Service, Inc. and L&S Sanitation, Inc. alleged that Disposal Service, Inc. refused to provide space in its landfill for their waste, unless they signed a 'put or pay' contract. That is, General Refuse would pay for the landfill space even if it was not used. The Administrative Law Judge noted in its Recommended Decision issued on November 15, 1995, that Disposal Service, Inc. had entered into contracts with certain haulers for all of its capacity, leaving no capacity for General Refuse Service, Inc., forcing it to find another location to dispose of its waste. On exceptions, the Commission entered an order on May 20, 1996, dismissing the complaints, stating that General Refuse Service, Inc. and L&S Sanitation, Inc. could use other facilities for disposal if capacity was unavailable. The Commission's decision to allow 30-E relief to General Refuse Service, Inc. was necessitated by it being forced to use another solid waste facility. Therefore, this case does not support Petitioner's claim for Tariff Rule 30-E relief since Allied made a voluntary business decision to switch to use its own disposal facility, Mountaineer Transfer Station.

⁹ Disposal Service, Inc. and Sycamore Landfill are located next to each other so transportation costs remained the same.

III. THE COMMISSION IS NOT ENGAGING IN FLOW CONTROL OR ACTING AS PETITIONER'S BOARD OF DIRECTORS BY DENYING TARIFF RULE 30-E RELIEF TO THE EIGHT CERTIFICATES AND PERMITS.

Allied argues that the Commission is engaging in flow control and acting as a super board of directors by refusing to grant it 30-E relief. Allied attempted that argument in its pre-filed rebuttal testimony in the evidentiary hearing on the exceptions.

“By denying the ability of Allied to charge its customers the tipping fee at Short Creek Landfill¹⁰, the Commission effectively is forcing Allied to take its waste to another solid waste facility. This is flow control as the Commission will economically dictate where Allied can take its waste.

Keith Koebley, Pre-filed Rebuttal Testimony, p. 4.

The Commission has the statutory authority to engage in flow control as set forth in W.Va. Code §24-2-1h.

- (a) Upon the petition of any county or regional solid waste authority, motor carrier or solid waste facility, or upon the commission's own motion, the commission may issue an order that solid waste generated in the surrounding geographical area of a solid waste facility and transported for processing or disposal by solid waste collectors and haulers who are “motor carriers,” defined in chapter twenty-four-a [24A-1-1 et seq.] of this code, be processed or disposed of at a designated solid waste facility or facilities...

But flow control is not a legitimate issue in this case. The Commission was quite clear in its order that it was not directing Allied to dispose of the waste at another location. (“The Commission has not, as Allied argues, required Allied to take waste to Meadowfill.” Commission Order entered November 14, 2013). The Commission denied

¹⁰ The tip fee increase was associated with Mountaineer Transfer Station not Short Creek Landfill.

Tariff Rule 30-E relief because the increase was not related to the tipping fee already considered and included in Allied's rates.

Allied also claims that the Commission is "trying to become a board of directors or managers of Allied and this Court should not allow this to happen." Allied Brief, p. 22. Allied misconstrues the Commission's intent in its denial of 30-E relief and its recommendation that Allied file a general rate case to determine fair, just and reasonable rates that are based on Allied's cost of service. It is not directing Allied to dispose of waste at Meadowfill Landfill or any other landfill as claimed by Allied in its brief at page 20 ("However, now the Public Service Commission is not allowing Allied to take its waste to MTS.") Quite simply, the Commission is not dictating where Allied chooses to dispose of waste collected under its certificates and permits; it is primarily concerned that Allied recover its true cost of service and that Allied's customers are paying just and reasonable rates for the service being rendered.

CONCLUSION

Therefore, the Public Service Commission's October 3, 2014 Final Order should be upheld and the petition of Allied Waste Services of North America, LLC should be denied.

Respectfully submitted this 15th day of December, 2014.

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel,

A handwritten signature in black ink, appearing to read "Richard E. Hitt", written over a horizontal line.

RICHARD E. HITT

State Bar I.D. No. 1743

CARYN WATSON SHORT

State Bar I.D. No. 4962

LINDA S. BOUVETTE

State Bar I.D. No. 5926

CERTIFICATE OF SERVICE

I, RICHARD E. HITT, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Order of October 3, 2014, in Case No. 13-1162-MC-30E, Case No. 13-1163-MC-30E, Case No. 13-1164-MC-30E, Case No. 13-1165-MC-30E, Case No. 13-1166-MC-30E, Case No. 13-1668-MC-30E, Case No. 13-1669-MC-30E, Case No. 13-1670-MC-30E, Case No. 13-1671-MC-30E and Case No. 13-1672-MC-30E" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 15th day of December, 2014.

Samuel F. Hanna, Esq.
P.O. Box 2311
Charleston, West Virginia 25328

A handwritten signature in black ink, appearing to read "Richard E. Hitt", written over a horizontal line.

RICHARD E. HITT
State Bar I.D. No. 1743
CARYN WATSON SHORT
State Bar I.D. No. 4962
LINDA S. BOUVETTE
State Bar I.D. No. 5926