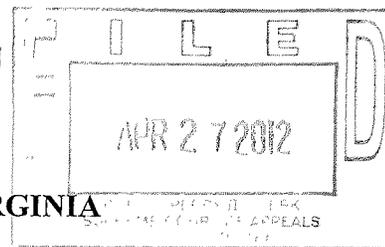


No. 12-0527



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

**STATE OF WEST VIRGINIA EX REL.  
THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA and  
THE WETZEL COUNTY SOLID WASTE AUTHORITY,**

**Petitioners,**

**vs.**

**LACKAWANNA TRANSPORT COMPANY, and  
SOLID WASTE SERVICES, INCORPORATED,**

**Respondents, and**

**PASQUALE MASCARO, in his capacity as President  
and stockholder of the Respondents,**

**An Interested Party.**

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**PETITION FOR A WRIT OF MANDAMUS  
TO ENFORCE AN ORDER OF THE PUBLIC SERVICE COMMISSION**

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DARRELL V. MCGRAW, JR.,  
ATTORNEY GENERAL

SILAS B. TAYLOR (State Bar No. 3712)  
SENIOR DEPUTY ATTORNEY GENERAL  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
(304) 558-2021  
[silastaylor@yahoo.com](mailto:silastaylor@yahoo.com)

RICHARD E. HITT (State Bar No. 1743)  
GENERAL COUNSEL  
WV PUBLIC SERVICE COMMISSION  
201 Brooks Street  
Post Office Box 812  
Charleston, West Virginia 25323  
(304) 340-0450  
[rhitt@psc.state.wv.us](mailto:rhitt@psc.state.wv.us)

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**Respondents, and**

**PASQUALE MASCARO, in his capacity as President  
and stockholder of the Respondents,**

**An Interested Party.**

**PETITION FOR A WRIT OF MANDAMUS  
TO ENFORCE AN ORDER OF THE PUBLIC SERVICE COMMISSION**

**To the Honorable Justices of the Supreme Court of Appeals of West Virginia:**

**I.**

**QUESTION PRESENTED**

Whether this Court should issue a writ of mandamus pursuant to West Virginia Code § 24-2-2 to compel the Respondents to comply with an order of the Public Service Commission that required them to provide information and financial records pertinent to an ongoing investigation of the Respondents being conducted by the Commission pursuant to West Virginia Code §§ 24-2-3 and 24-2-7.

## II.

### STATEMENT OF THE CASE

#### A. The Order That Petitioners Seek to Enforce

This Petition is brought pursuant to West Virginia Code § 24-2-2 (hereafter “Code § \_\_\_\_”), which authorizes original jurisdiction mandamus proceedings<sup>1</sup> to enforce orders of the Public Service Commission, as follows:

(a) The [public service] commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter. . . . The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the name of the state in any circuit court having jurisdiction of the parties or of the subject matter, or the supreme court of appeals direct, and the proceedings shall have priority over all pending cases.

The “lawful order” that the Respondents disobeyed and that the Petitioners now seek to enforce was entered by the Public Service Commission (hereafter “Commission”) on October 13, 2011 (Appendix at 1; hereafter “APP \_\_\_\_”). That order compelled the Respondents to produce information, including financial records, that had been requested of them during discovery by the Wetzel County Solid Waste Authority (hereafter “Wetzel County”) and that the Commission deemed relevant to its ongoing investigation of the Respondents. The investigation (Case No. 08-2129-SWF-GI) is for the purposes of 1) determining whether the financial interactions between the Respondents have resulted in the inadequate funding by Lackawanna Transport Company (hereafter “Lackawanna”) of its accrued liability for closure and post-closure costs associated with waste already in place at its landfill in Wetzel County; 2) whether Lackawanna should be required to

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<sup>1</sup> Independently of this statute, mandamus was (and is) available at common law to compel a public service company to perform its duties to the public. *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W.Va. 207, 220, 151 S.E.2d 102, 109 (1966); *Bluefield Waterworks & Imp. Co. v. City of Bluefield*, 69 W.Va. 1, 5, 70 S.E. 772, 776 (1911).

establish an escrow account to fund those costs; and 3) the proper manner of funding such an escrow account, including whether Solid Waste Services, Inc. (hereafter “Solid Waste Services”) may be liable for some portion of the unfunded liability. (APP 1, 7-8, 14.)

The Respondents petitioned the Commission to reconsider its order compelling discovery, which petition was denied on November 30, 2011 (APP 10). One of the Respondents, Lackawanna, then attempted to appeal the order to this Court, but the Clerk would not accept the appeal because the order was interlocutory.<sup>2</sup> Subsequently, Respondents provided most of the information pertaining to Lackawanna, but refused to provide the parallel information pertaining to Solid Waste Services. The purpose of this proceeding is to compel production of the missing information, including financial records, pertaining to Solid Waste Services.

**B. Description of the Parties**

The Commission, a Petitioner herein, is a state agency with “the power to regulate and control the public utilities in this State.” *Delardas v. Morgantown Water Commission*, 148 W.Va. 776, 784-785, 137 S.E.2d 426, 433 (1964). Code § 24-2-2 empowers the Commission to “investigate all rates, methods and practices of public utilities.” When initiating the investigation of Respondents, the Commission also relied upon Code §§ 24-2-3 and 24-2-7. (APP 1.) Code § 24-2-3 permits the Commission to “audit and investigate management practices” impacting rates, and requires that, “in determining just and reasonable rates, the commission shall investigate and review transactions between utilities and affiliates.” Code § 24-2-7 requires, in pertinent part, that the Commission “fix reasonable measurements, regulations, acts, practices or services . . . in lieu

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<sup>2</sup> See letter from Rory Perry dated January 5, 2012 (APP 17) stating, in part, that “the order of the Public Service Commission is an interlocutory order that is not subject to appeal.”

of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter . . . .”

The other Petitioner, the Wetzel County Solid Waste Authority (hereafter “Wetzel County”), is a county agency with certain powers and duties related to solid waste management in Wetzel County, all as provided by Code § 22C-4-1 *et seq.* Wetzel County requested the Commission to investigate the Respondents, which request was granted by order entered May 14, 2010. Said order made Wetzel County a formal party to the investigation.

Respondent Lackawanna is the legal owner of the Wetzel County Landfill, near New Martinsville, West Virginia, which landfill is a utility regulated by the Commission pursuant to Code §§ 24-2-1(a), 24-2-1c and 24-2-1f. Lackawanna is a “Subchapter S”<sup>3</sup> corporation wholly owned by its President, Pasquale Mascaro.

Mr. Mascaro is also President and co-owner of Respondent Solid Waste Services, a family-owned Pennsylvania company (also Subchapter S) that provides solid waste collection and disposal services to customers in Pennsylvania, New York, and New Jersey, and that extensively used the Wetzel County Landfill for that purpose through at least 2007. (APP 5, 19.) The Commission’s Administrative Law Judge (ALJ) in Lackawanna’s 2007 rate case found “that SWS [Solid Waste Services] effectively controls the Wetzel County Landfill” and had diverted landfill revenues to

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<sup>3</sup> Subchapter S corporations are “pass-through” organizations. Like partnerships, they pay no income taxes. Rather, their profits/losses are reported as taxable income/deductions on the personal income tax returns of their owners (stockholders). (APP 98.) Such corporations are required to annually file I.R.S. Form 1120S, a detailed informational return disclosing profits/losses and other financial data pertinent to determining and verifying the taxable income/deductions reported on the income tax returns of the corporations’ owners. (*Id.*) The Commission required Lackawanna and Solid Waste Services to produce their 1120S returns and indicated that it would “entertain an appropriate motion for protective treatment.” (APP 14.) Lackawanna eventually supplied its 1120S returns, but Solid Waste Services did not.

itself. (APP 19, 23 at fn. 1, 24.) The Commission has not yet addressed these issues, but did conclude that it had jurisdiction over Solid Waste Services for purposes of making it a party to the 2007 rate case and the subsequent investigation, and for purposes of requiring it to respond to the disputed discovery requests in both cases. (APP 8, 20, 22.)

Pasquale Mascaro is named as an interested party because, as President of both of the Respondents, sole owner of Lackawanna Transport Company, and co-owner of Solid Waste Services, Inc., he has an interest in the outcome of this proceeding. However, no relief is sought against him except as may be incidental to any relief that may be ordered against one or both of the Respondents.

**C. Why Petitioners Seek Relief Directly From this Court**

Respondents' refusal to produce business records of Solid Waste Services in the 2007 rate case and the subsequent investigation has caused a multi-year delay in the resolution of important issues and has thereby frustrated the Commission's ability to exercise its rate-making and regulatory functions regarding the Wetzel County Landfill. To minimize further delay, Petitioners have chosen to seek relief directly in this Court, as authorized by Code § 24-2-2, rather than first proceeding in circuit court.<sup>4</sup> Petitioners are confident that any order issued by a circuit court would be appealed. Other than the documentary record of proceedings before the Commission, no evidence will be required to resolve this matter and any review of a circuit court decision would likely be *de novo*.

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<sup>4</sup> Code § 24-2-2 allows the Commission to seek enforcement of its orders in either a circuit court or this Court. Code § 24-2-10 allows the commission or any party to seek enforcement in circuit court of a "a subpoena or other process" to compel the appearance of witnesses or the production of documents at a hearing. The discovery requests at issue here were interrogatories and document requests authorized by the Commission's Rules of Practice and Procedure (150 C.S.R. 1), which rules, in turn, are authorized by Code § 24-1-7.

Thus, this Court will be presented with this case in either event and will gain little or no efficiency from a prior circuit court decision.

**D. The Proceedings Before the Public Service Commission<sup>5</sup>**

1. The 2007 Rate Proceeding:

Some of the financial records that Respondents refused to disclose were originally sought in a rate proceeding initiated by Lackawanna in 2007 (Case No. 07-0615-SWF-42A), which proceeding was dismissed due to the Respondents' failure to cooperate in discovery. (APP 18-20.) In that proceeding, two distinct problems arose, both of which required examination of the financial records of Solid Waste Services.

First, it was discovered that Solid Waste Services received substantial revenue from the operation of Lackawanna's landfill, much of which did not appear on Lackawanna's books, nor was it otherwise disclosed to the Commission's staff for purposes of the staff's rate calculation.<sup>6</sup> Upon learning of the missing revenue through cross-examination at the evidentiary hearing, the Administrative Law Judge (hereafter "ALJ") found that a proper rate could not be determined absent an examination of the financial records of Solid Waste Services. (APP 19, 23 at fn. 1.)

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<sup>5</sup> All orders and filings in the two Commission proceedings described in this section are available online at <http://www.psc.state.wv.us/WebDocket/default.htm>. The Appendix hereto contains selected documents therefrom.

<sup>6</sup> Via cross examination and discovery in the rate case, it was learned that Solid Waste Services (among other things) sold access to the Wetzel County Landfill to trash collection companies at above-tariff rates. (APP 4-5.) In other words, Solid Waste Services, rather than Lackawanna, collected tipping fees from certain haulers that used the landfill, which fees were larger than the landfill itself could lawfully charge. This resulted in the diversion of utility revenues to Solid Waste Services that, according to the Commission's Administrative Law Judge, should have been credited to Lackawanna, impacting its rates. (APP 19, 23 at fn. 1.) Wetzel County's Petition for Investigation estimated that at least \$11 million of the landfill's operating revenues had been diverted to Solid Waste Services since the landfill was acquired by Mr. Mascaro in 1987.

Accordingly, the Commission required production of certain financial records of Solid Waste Services. (APP 20, 22.) However, they were not provided, resulting in the dismissal of the rate case by recommended decision of the ALJ entered on September 4, 2008.<sup>7</sup> In his recommendation, the ALJ stated:

In this proceeding, it has been established that there was off-book revenue during the test year generated by the landfill that is not reflected on its books and records, but which went to SWS [Solid Waste Services]. It is also clear that SWS effectively controls the Wetzel County Landfill, both as a matter of practice and under the contract that SWS has with LTC [Lackawanna Transport Company]. The Commission has already determined that SWS is a proper party to this proceeding. SWS's steadfast refusal to comply with legitimate discovery requests and orders of the Commission makes it impossible for the Commission to establish just and reasonable rates for LTC at this time. Accordingly, the proceeding must be dismissed.

(APP 24.)

Second, it was discovered that, through December 31, 2007, Lackawanna had accrued an unfunded liability (accounting reserve) of over \$3 million for anticipated "closure and post-closure costs" associated with waste already deposited in its landfill.<sup>8</sup> Lackawanna is the only commercial

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<sup>7</sup> Because Respondents filed no "exceptions" to the ALJ's recommended decision, it became final and effective on September 24, 2008, without being reviewed by the Commission itself. Code § 24-1-9(e).

<sup>8</sup> Generally Accepted Accounting Principles (GAAP) require that the anticipated costs of closing a landfill be accrued as current expenses during the income-producing life of the landfill and, if funds are not set aside for that purpose, that the expenses be recorded as an accrued liability. *See* Financial Accounting Standards Board (FASB) Statement 143; *see also* APP 71. These costs are substantial because federal and state environmental regulations require 1) that a landfill be capped at the end of its useful life with impermeable material topped with earth and native vegetation, 2) that sub-surface groundwater and landfill-produced methane be monitored (sampled and analyzed) for 30 years after the landfill closes, and 3) that provision be made for the collection and treatment of "leachate" (liquid runoff from the landfill) and the prevention of erosion. (*See* 40 C.F.R. Part 258.) The Internal Revenue Code permits such expenses to be accrued and deducted from operating revenue during the lifetime of the landfill, even though the costs are not actually incurred or paid until after closure. 26 U.S.C. § 468. Based on Lackawanna's 2009 tax return (Form 1120S), received in discovery, Lackawanna had then deducted more than \$4 million from its operating revenues

landfill in West Virginia that has not established an escrow account to accumulate funds with which to pay such costs, which accumulation is necessary because closure costs are not actually incurred until after the landfill is no longer producing income. Since 1990, the Commission has required commercial landfills to establish such escrows as a condition of receiving a rate increase and allows each landfill to recover in its rates the costs of funding its escrow. (APP 15.) However, Lackawanna has not completed a rate case since this requirement became effective and has no escrow account, nor has it otherwise set aside any funds to meet this legal obligation.<sup>9</sup>

In the rate case and the subsequent investigation, Wetzel County has taken the position that Solid Waste Services should provide some funding for any escrow to be established for closure and post-closure costs because the already-accrued costs of closure are attributable, in large part, to waste deposited at the landfill by Solid Waste Services or its customers, from which activities Solid Waste Services derived substantial revenue that should have been credited to Lackawanna.<sup>10</sup> While the Commission has not yet resolved this issue, it has determined that the missing records will aid it in doing so. (APP 7.)

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pursuant to this provision (APP 50), which would create corresponding reductions in the taxable income of its owner, Pasquale Mascaro.

<sup>9</sup> Lackawanna pointed out below that, in 1990, it had posted a surety bond with the West Virginia Department of Environmental Protection (DEP) in the amount of \$676,000 conditioned on the satisfactory fulfillment of all of its obligations under the Solid Waste Management Act (Code § 22-15-1 *et seq.*), including closure and post-closure requirements. Upon learning of the discrepancy between the amount of the bond and the anticipated costs of closure, “which may reach \$5 million,” the Commission stated that it was “troubled by this revelation.” (APP 6-7.)

<sup>10</sup> *See* footnote 6. Commission staff noted that, “from 1986 until 2006, SWS deposited approximately sixty percent of all waste deposited in the landfill, charging more to haulers [customers of SWS] than it paid to LTC.” (APP 5.)

2. The Commission's Investigation

In his Recommended Decision dismissing the rate case, the ALJ proposed that a general investigation be initiated to establish an escrow account for closure and post-closure costs:

Wetzel County has correctly argued that it is essential to implement escrow accounts for closure and post-closure costs. Wetzel County is free to petition the Commission to initiate a general investigation into LTC and SWS to establish such accounts. Given the procedural status and time frame of this proceeding, it would be extremely difficult to establish such accounts herein, since SWS continues to refuse to participate in discovery. A general investigation, with a reasonable schedule, would allow ample time for the enforcement of Commission orders concerning discovery in circuit court.

(APP 4 at fn. 2.)

Accordingly, in December of 2008, Wetzel County filed a petition with the Commission seeking an investigation oriented towards establishing an escrow account and determining whether the diversion of revenues from Lackawanna to Solid Waste Services resulted in the inadequate funding by Lackawanna of closure and post-closure costs. The Commission granted the petition and opened the investigation by order entered May 14, 2010. (APP 1.) Two months later, Wetzel County filed the discovery requests at issue here. Since then, the entire investigation has been consumed by Respondents' repeated efforts to resist answering those requests, culminating in Lackawanna's appeal to this Court, rejected by letter dated January 5, 2012 (APP 17).<sup>11</sup> At that time, Respondents had completely failed to respond to any of Wetzel County's discovery requests, resulting in multiple postponements of the evidentiary hearing.

On February 8, 2012, Wetzel County filed a Petition to further postpone proceedings pending enforcement, by contempt or otherwise, of the Commission's order compelling discovery responses.

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<sup>11</sup> For a blow by blow rendition of Respondents' resistance to Wetzel County's discovery requests, see Exhibit 1 at pages two through six.

A few days later, the Respondents filed purported “Answers” to the discovery requests, which Wetzel County then criticized as incomplete, particularly as they included no financial information whatsoever from Solid Waste Services. (Exhibit 7 at 6.)

In response to the above filings, the Commission entered an order on February 14, 2012, postponing proceedings for approximately three months and requiring Wetzel County to indicate whether judicial enforcement proceedings were still necessary in light of Respondents’ purported Answers. Wetzel County responded by detailing the information that remained undisclosed and requesting that the Commission authorize judicial enforcement proceedings. (APP 27 *et seq.*) By order entered March 20, 2012, the Commission found that Respondents “have not fully complied” with the Commission’s orders compelling discovery and allowed them ten more days to file complete responses. (APP 83.) The Commission further stated:

If LTC and SWS have not submitted all data responses within ten days of the date of this Order, counsel for WCSWA should confer with the General Counsel of the Commission regarding enforcement of the October 13 and November 30, 2011 Commission Orders in state court.

(*Id.*) No further responses were filed by Respondents.. Hence, this Petition.

The evidentiary hearing in the investigation is currently set for May 24, 2012. However, counsel anticipate seeking a continuance based on the pendency of this Petition for Mandamus.

**E. The Specific Information That Respondents Failed to Produce**

The Commission’s last Order regarding this discovery dispute was issued on March 20, 2012. It found that Lackawanna and Solid Waste Services had “not fully complied with the October 13 and November 30, 2011 Orders granting WCSWA motion to compel.” (APP 83.) In so finding, the Commission referenced and described the most recent filings of Wetzel County and the Respondents, in which all parties agreed that none of the information regarding Solid Waste Services

that had been sought by Discovery Requests Numbers 6, 9, 10, 11 and 12 had been provided. (APP 82). Consequently, this Petition for Mandamus is limited to obtaining that information even though Wetzel County maintains that other information is missing as well.

The full text of the aforesaid unanswered discovery requests is contained in the Appendix, but may be summarized as follows:

6. Provide ledgers or other accounting records of Solid Waste Services that contemporaneously recorded transfers of funds from Lackawanna to Solid Waste Services from 2001 through 2009. (APP 39-40.)
9. Provide detailed year-end financial statements (prepared by outside accountants, if available) for Solid Waste Services for each of the years 2000-2009. (APP 59.)
10. Provide I.R.S. Forms 1120S for Solid Waste Services for each of the years 2000-2009. (APP 60.)
11. Identify those items in the financial statements and tax returns of Solid Waste Services that include funds transferred to or from LTC and state the purpose of such transfers. (APP 62.)
12. As to each tax return of Solid Waste Services, identify each entry therein that includes transfers from or to Pasquale Mascaro and the purpose thereof. (App 62.)

### **III.**

#### **SUMMARY OF ARGUMENT**

The Commission has broad investigatory authority that encompasses the power to demand records directly from a company related to a utility with whom the utility has transactions that impact its regulated rates and practices, as is clearly the case here. Code § 24-1-1(e)(3), 24-2-2, 24-2-3, and 24-2-9. In addition, the Commission has promulgated rules of procedure pursuant to

Code § 24-1-7 that permit it to require a utility to disclose the records of its non-utility affiliate in the same manner and to the same extent as is allowed by the *Rules of Civil Procedure*, which rules permit a court to require a party to produce records of a non-party affiliate that may be in possession of the party or to which the party can reasonably obtain access.

This Court has original jurisdiction, in mandamus, to enforce orders of the Commission directed at utilities. Code § 24-2-2. Whether that jurisdiction encompasses Solid Waste Services, which claims not to be a utility, is of no consequence because Lackawanna possesses the records of Solid Waste Services and may, as a utility, be compelled by mandamus to produce them.

#### IV.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners anticipate that the Respondents' Response will raise a multitude of factual and legal defenses that were deemed to be without merit by the Commission, resulting in the order that Petitioners now seek to enforce. Consequently, Petitioners request that any scheduling order provide Petitioners with the opportunity to file a reply memorandum. If that opportunity is provided, oral argument should not be necessary and will cause further delay. Otherwise, oral argument under Rule 20 will be needed because this case involves an issue of fundamental public importance – the scope of the Public Service Commission's authority to investigate allegations that a utility and its non-utility affiliate have engaged in practices calculated to evade the Commission's regulatory jurisdiction.

Petitioners believe that the issue presented merits a full published opinion rather than a non-precedential memorandum decision. However, Petitioners request that the Court issue a pre-opinion mandate granting the relief requested so as to minimize further delay in the resolution of the underlying investigation.

V.

ARGUMENT

A. The Commission Has Authority to Require Disclosure of The Records of a Utility's Related Company(s).

The Commission's Orders of October 31, 2011 and March 20, 2012 are lawful Orders that directed both Lackawanna and Solid Waste Services to provide pertinent information regarding their business dealings with one another. Code § 24-2-2 empowers the Commission to "investigate all rates, methods and practices of public utilities." Code § 24-2-3 provides, in part, that "in determining just and reasonable rates, the commission shall investigate and review transactions between utilities and affiliates."

Although Solid Waste Services has not yet been found by the Commission to be a utility, that is a possible outcome of the pending investigation. Regardless, however, the Commission correctly concluded that it has jurisdiction over Solid Waste Services to obtain information "as may be in the opinion of the Commission necessary to the exercise of its mandate." (APP 8, quoting W. Va. Code § 24-1-1(e)(3).)

Solid Waste Services has consistently maintained that, despite the above statutes and the breadth of the Commission's authority, the Commission lacks jurisdiction to compel a non-utility to provide information. This argument is a "red herring." The order in dispute, and the underlying discovery requests, were worded so as to require *both* Respondents to provide *one-another's* records, thus requiring Lackawanna, a utility, to provide financial records of its affiliate, Solid Waste Services, regardless of whether the affiliate could be directly ordered to do so. (APP 9, 40, 59, 60, 62.) The Commission has specific statutory authority to demand of a utility that it provide pertinent

information regarding the profits earned by its non-utility affiliates in transactions with the utility.

In particular, Code 24-2-3 provides, in part:

In determining just and reasonable rates, the commission shall investigate and review transactions between utilities and affiliates. The commission shall limit the total return of the utility to a level which, when considered with the level of profit or return the affiliate earns on transactions with the utility, is just and reasonable.

In addition, Code § 24-2-9 provides specific statutory authority for the Commission to demand any pertinent records of Solid Waste Services that may be in Lackawanna's possession, as follows:

The commission may at any time require persons, firms, companies, associations, corporations or municipalities, subject to the provisions of this chapter, to furnish *any information which may be in their possession*, respecting rates, tolls, charges or *practices in conducting their service*, and to furnish the commission at all times for inspection any books or papers or reports and statements, which reports and statements shall be under oath, when so required by the commission, . . .

(Emphasis supplied.)

The following quote illustrates the Commission's general practice regarding transactions between a utility and its non-utility affiliate:

The issues regarding allocation of expenses between utilities and non-utility affiliates is generally raised in every base rate case filed with the Commission, if the utility has a non-utility affiliate. The only way the Commission and parties to Commission proceedings can verify that non-utility expenses are not being allocated to the utility cost of service is to review the non-utility affiliate expenses.

Recommended Decision of May 21, 1999, in Case No. 98-1496-G-42T, *West Virginia Power Gas Service*.<sup>12</sup>

It would be absurd to argue that Lackawanna lacks possession of the records of Solid Waste Services. They have a common President (Pasquale Mascaro), a common Comptroller (Thomas

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<sup>12</sup><http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=86736&Source=Archive>.

Sassaman), a common General Counsel (William Fox), and a common stockholder (Pasquale Mascaro), each of whom has unfettered access to the records of both corporations. The salaries of the common executive staff are paid entirely by Solid Waste Services, despite that their services are, in part, for Lackawanna. (APP 56-57.) Numerous other inter-company transactions evidence utter and complete cooperation between the two corporations.<sup>13</sup>

**B. This Court May Require Respondents to Produce the Records of Solid Waste Services.**

Per Code § 24-2-2, and by common law, this Court has original jurisdiction to issue a writ of mandamus to compel a utility to perform its legal duties to the public. *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W.Va. 207, 220, 151 S.E.2d 102, 109 (1966) (original jurisdiction mandamus proceeding to compel utility to charge rates sufficient to pay back its bonded debt). Here, the efforts of the Commission to ensure that the public is not saddled with the multi-million dollar cost of closing the Wetzel County Landfill have been frustrated and thwarted by the Respondents' refusal to provide financial information and records pertinent to that goal.

While the Commission has not yet determined whether Solid Waste Services is a utility subject to its direct regulatory authority, the information already of record (summarized in the preceding sections) is clearly sufficient to show such a nexus between Lackawanna and Solid Waste Services as to justify the production of the latter's records. Assuming, *arguendo*, that this Court's jurisdiction in mandamus does not extend to corporations, such as Solid Waste Services, that have not yet been determined to be a utility, this Court may, nonetheless, require Lackawanna to produce

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<sup>13</sup> For instance, in 2009, Lackawanna paid the entirety of its gross revenue for the entire year to Solid Waste Services for "administrative services including accounting, purchasing, human resources, information technology, legal risk management, environmental compliance, sales and engineering services." (APP 43.) Lackawanna's total (gross) revenue for that year was about \$1.4 million (APP 51) and its payments to Solid Waste Services exceeded \$1.6 million (APP 43).

the records of Solid Waste Services that are in its possession. The Commission's orders directing the production of those records are directed against both Lackawanna and Solid Waste Services, and may be enforced against either. (APP 1-16.)

The Commission acted within its authority in requiring Lackawanna to produce the records of Solid Waste Services. It has broad statutory authority to promulgate rules, "including rules of procedure and for taking evidence in all matters that may come before it." Code § 24-1-7. The Commission has adopted Rule 26 of the *West Virginia Rules of Civil Procedure* to resolve disputes as to the scope of the Commission's own Rules of Practice and Procedure that govern discovery.<sup>14</sup> Applying that standard to a gas utility that refused to divulge the records of its non-utility affiliate (a gas supplier), the Commission ruled:

[T]he Commission is of the opinion that the requested information is relevant to this rate proceeding and is discoverable under the Commission's discovery policy. Mountaineer argues that the requested information is not available to Mountaineer. Under Rule 33 of the *West Virginia Rules of Civil Procedure*, a party is required to provide information "as is available to the party". Mountaineer shall be required to produce such information as is reasonably available to it. In the interest of facilitating the discovery process, Mountaineer should cooperate to the fullest extent possible. The Commission would observe that it has inherent authority over persons, whether public utilities or not, as is necessary in the exercise of its mandate in this proceeding to compel the production of papers or other documents. West Virginia Code §24-1-1(e)(3). In order to avoid undue delays with the filing of further motions and issuance of further orders to join G.A.S. as a party to this proceeding and compel such documents, however, Mountaineer is urged to produce the requested

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<sup>14</sup>150 C.S.R. 1 at § 13.6 *et seq.* In a 1993 order, the Commission stated:

The Commission has adopted the requirements of Rule 26 of the *West Virginia Rules of Civil Procedure* as the standard governing discovery disputes and requests for protected treatment.

Order of September 24, 1993, in Case No. 93-0616-T-PC, available online at <http://www.psc.state.wv.us/scripts/orders/ViewDocument.cfm?CaseActivityID=56478&Source=Archives>.

information that is available to it or may be made reasonably available to it from its close sister subsidiary, G.A.S.

Order of July 9, 1993 in Case No. 93-0005-G-42T.<sup>15</sup>

The quoted ruling is in accord with federal interpretations of the parallel federal rules. According to Wright and Miller's *Federal Practice and Procedure*, discussing Rule 34 of the *Federal Rules of Civil Procedure* (document production);

An area of particular concern has arisen where a corporate party is related to another corporation, and this nonparty corporation actually possesses the materials in question. Rather than adopting an overarching rule for such situations, the courts have tended to focus on the facts shown in a particular case. In parent-subsidary situations, courts have looked to whether the "alter ego" doctrine would justify piercing the corporate veil, whether the litigant corporation acted as the agent of the nonparty corporation in connection with the matter in litigation, whether the litigant corporation could secure materials from the nonparty corporation to meet its own business needs, and whether, by virtue of stock ownership or otherwise, one corporation effectively controls the other.

8A Fed. Prac. & Proc. Civ.2d § 2210.

An interesting application of the above principles arose out of a case involving another Mascaro-owned West Virginia landfill – the Brooke County Landfill. Like the Wetzel County Landfill, the Brooke County Landfill is owned by a Subchapter S corporation owned by Pasquale Mascaro (Valero Terrestrial Corporation). (APP 98.) In 2001, Valero claimed that it was financially incapable of complying with certain orders of the Circuit Court of Brooke County that required it to cease accepting sewage sludge and to remediate (clean up) the sewage sludge already on the premises. In rebuttal to Valero's claim of poverty, Brooke County submitted the affidavit of a Public Service Commission utility analyst who estimated that Solid Waste Services had received

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<sup>15</sup><http://www.psc.state.wv.us/scripts/orders/ViewDocument.cfm?CaseActivityID=55717&Source=Archives>

“at least \$16.5 million of dollars in revenues which should be attributed to Valero.” (APP 99.) Accordingly, the Circuit Court granted a motion to compel Valero to produce not only its own financial records but those of Solid Waste Services, though the latter was not a party to the litigation. (APP 103-105.)

The situation before the Commission is remarkably similar to that described above. The Commission was well within its rule-making and statutory authority to require Lackawanna to produce financial records of Solid Waste Services. Consequently, the Commission’s order compelling Lackawanna to do so was a “lawful order” that may be enforced by mandamus per Code § 24-2-2.

## VI.

### CONCLUSION

WHEREFORE, the Public Service Commission of West Virginia and the Wetzel County Solid Waste Authority pray that this Court issue a rule to show cause why the Respondents should not be required to immediately comply with the Public Service Commission’s Order of October 13, 2011, by supplying the information and records detailed on page 11 of this Petition.

*Respectfully submitted,*

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA and WETZEL  
COUNTY SOLID WASTE AUTHORITY

*By counsel,*



RICHARD E. HITT (State Bar No. 1743)  
GENERAL COUNSEL  
Public Service Commission of West Virginia  
201 Brooks Street  
Post Office Box 812  
Charleston, West Virginia 25323  
(304) 340-0450  
[rhitt@psc.state.wv.us](mailto:rhitt@psc.state.wv.us)

DARRELL V. MCGRAW, JR.,  
ATTORNEY GENERAL



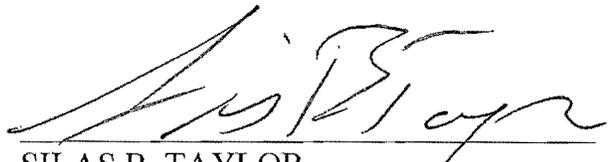
SILAS B. TAYLOR (State Bar No. 3712)  
SENIOR DEPUTY ATTORNEY GENERAL  
Counsel for the Wetzel County Solid Waste Authority  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
(304) 558-2021  
[silastaylor@yahoo.com](mailto:silastaylor@yahoo.com)

VERIFICATION

STATE OF WEST VIRGINIA,

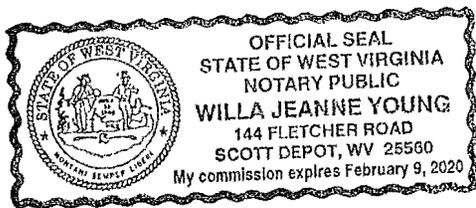
COUNTY OF KANAWHA, to-wit:

Silas B. Taylor, a credible person over the age of 21, does hereby depose and say that he has read the foregoing Petition for Mandamus and Note of Argument, that the historical facts alleged therein are believed by him to be true and are based on the official records of the Public Service Commission, accurate copies of which records are provided in the Appendix.

  
\_\_\_\_\_  
SILAS B. TAYLOR

Taken, subscribed and sworn to before me this 27<sup>th</sup> day of April, 2012.

My commission expires February 9, 2020.

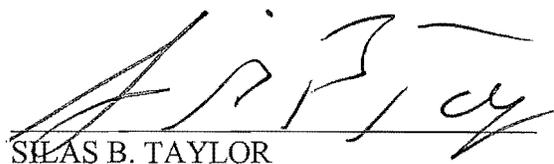


  
\_\_\_\_\_  
Notary Public

**CERTIFICATE OF SERVICE**

I, Silas B. Taylor, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Petition for a Writ of Mandamus to Enforce an Order of the Public Service Commission" was served upon Logan Hassig, the attorney who represents both of the Respondents in the underlying proceedings before the Public Service Commission, by depositing the same postage prepaid in the United States mail, on this the 27th day of April 2012, addressed as follows:

Logan Hassig, Esq.  
Snyder & Hassig  
Post Office Box 189  
New Martinsville, West Virginia 26155

  
\_\_\_\_\_  
SILAS B. TAYLOR