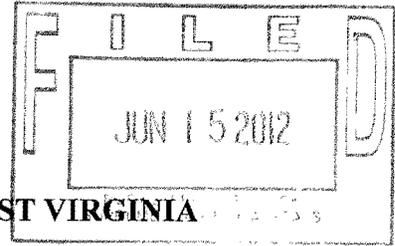


No. 12-0527



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.

REPLY BRIEF

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REPLY BRIEF

FACTS

The only issue presented by Petitioners to this Court is whether the Commission's discovery Order of October 13, 2011 is "lawful" so that it may be enforced by this Court pursuant to West Virginia Code § 24-2-2(a).¹ Respondents admit the only facts pertinent to that question. For

¹In pertinent part, Code §24-2-2(a) provides:

(a) The commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter; to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law; and to require copies of all reports, rates,

(continued...)

instance, at page 13 of their Response, they provide one example of how SWS, for 20 years, collected tipping fees directly from customers of the Wetzel County Landfill, thereafter transferring (in the example) \$28.75 per ton to the landfill (its approved tariff rate) while keeping the remainder – \$8.75 per ton – for itself. This arrangement secured a profit from the operation of a West Virginia utility that 1) was *not* disclosed on the utility's books and records, 2) was *not* disclosed to the commission until multiple orders compelling discovery had been entered, 3) apparently evaded the maximum charges allowed by the PSC approved tariff, and 4) resulted in the diversion of utility revenues to an affiliated corporation. This kind of relationship between affiliated corporations, one of which is a rate-regulated utility, is certainly within the domain of the Commission's statutory investigative powers.²

Although the example from Respondent's brief is representative of one *type* of transaction that concerns the Petitioners, it is *not* representative of the magnitude of the problem. For instance, in the year 2000, SWS retained more than half of the tipping fees that it charged to customers of the

¹(...continued)

classifications, schedules and timetables in effect and used by the public utility *or other person*, to be filed with the commission, and all other information desired by the commission relating to the investigation and requirements, including inventories of all property in such form and detail as the commission may prescribe. *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. (Emphasis supplied.)

² See Code § 24-2-2, *supra*; Code § 24-2-3 (the Commission may "audit and investigate management practices" impacting rates, and, "in determining just and reasonable rates, the commission shall investigate and review transactions between utilities and affiliates"); and Code § 24-2-7 (the Commission shall "fix reasonable measurements, regulations, acts, practices or services . . . in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter . . .").

Wetzel County Landfill.³ And, in the year 2009, LTC transferred *all* of its booked revenues to SWS. (APP 43, 51-52.)

Respondents chastise the Commission for presuming to invoke this Court’s discretionary jurisdiction to resolve an issue that is now four years old (Response at 15), and for seeking “confidential” financial records going back ten years (*id.* at 16), but the delays and the age of the needed records are attributable to the Respondents’ own recalcitrance and secrecy: first, to their successful evasion of PSC scrutiny for more than sixteen years through the use of undisclosed transactions between a utility and its out-of-state affiliate and second, to their multi-year refusal to cooperate in discovery throughout the 2007 rate case and the resulting investigation below.⁴

³ The binder described in the next footnote reveals that LTC allowed SWS to deposit its own waste and its customers’ waste for \$16.50 per ton (well below the tariff rate of \$28.75) from 1987 until 2002 and at tariff rates thereafter (until 2008), and that SWS charged tipping fees to users of the landfill of up to \$65.00 per ton, keeping the difference. (Binder at page 2 and the 6th through 9th leaves behind Tab A.) For instance, in the year 2000, SWS collected \$200,070 in tipping fees for waste deposited by users of the Wetzel County Landfill but paid LTC only \$93,689, keeping the remaining \$106,000 for itself (9th leaf behind Tab A).

⁴ A binder of discovery documents entitled “Answers of LTC and SWS to Revised Discovery Requests” was belatedly by Respondents with the Commission in February of 2012, in response to discovery requests filed in July of 2010. Respondents have lodged a copy of that binder with the Clerk of this Court in an effort to demonstrate the lack of any need for further discovery. The binder consists almost entirely of documents that were originally disclosed in the 2007 rate case and re-packaged for disclosure in the investigation below. In both proceedings, the disclosures were made only after the entry of multiple orders to compel discovery. In neither proceeding were *any* of the requested financial records of SWS disclosed – hence this mandamus proceeding; hence the dismissal of LTC’s 2007 rate case; hence the Respondents’ request that this Court approve of their repeated failures to cooperate with the PSC.

LEGAL DISCUSSION

A. The Commission Has Authority to Investigate Transactions with an Affiliate That Have the Potential to Influence any Matter Pertaining to the Utility’s Rates, Public Obligations, and Services.

In their Response (at page 2), Respondents claim that SWS has not deposited its own refuse in the Landfill since 2005 and that SWS, not having been determined to be a West Virginia utility, is beyond the regulatory jurisdiction of the Commission, regardless of its continuing umbilical relationship with LTC. (Response at 2.) Consequently, they say, inter-company transactions whereby utility revenues are transferred to SWS cannot be scrutinized by the Commission.⁵

According to LTC and SWS, a West Virginia landfill can simply assign its service-capacity to an out-of-state affiliate and thereby escape rate regulation, escape the duty to disclose utility revenues to the Commission, and nonetheless remain immune from the power of the Commission to investigate transactions with affiliates. (Response at 13.) However, they cite no authority for that proposition.⁶

⁵ Respondents also claim that they have mooted the issues below by ceasing to engage in the “brokering” transactions described in footnote 3 after they were brought to light in the 2007 rate case, now allowing LTC to keep the brokering revenues previously retained by SWS. (Response at 14.) If true, this suggests that LTC is now collecting more from users of the landfill than is allowed by its tariff. More importantly however, the pre-existing diversions of utility revenues to SWS remain relevant due to the WCSWA’s position that they should be used to partially fund an escrow account for LTC’s closure and post-closure costs. Further, there are numerous *other* mechanisms whereby Wetzel County Landfill revenues *continue* to be transferred to SWS, and these transactions need to be explored as well. (*Cf.* \$1.6 million was “paid” by LTC to SWS in 2009 for “administrative services.” APP 43, 51-52.)

⁶ LTC and SWS also argue that a 1987 “contract” whereby LTC assigned the landfill’s “capacity” to SWS (Respondent’s Appendix at 71) cannot be countermanded by the PSC because it preceded the enactment (in 1989) of the Code provision giving the PSC jurisdiction over landfill rates. (Response at 12-14.) This issue has not yet been addressed by the Commission, nor is its relevance explained in Respondent’s Response. Are Respondents asserting that an affiliate cannot
(continued...)

However, there is authority to the contrary – that the Commission *may* obtain discovery from non-utility affiliates – including an opinion from the Circuit Court of Kanawha County where exactly the same arguments that Respondents make here were rejected when presented on behalf of another of Steptoe & Johnson’s clients. In that case, the operation and maintenance of a West Virginia water company’s systems was being performed in large part by an affiliated non-utility, and the Commission was investigating whether the affiliate should, consequently, be deemed to be a utility and regulated. The affiliate was ordered to produce records pertinent to the investigation and sought a writ of prohibition in circuit court claiming that, until it was determined to be a utility, the Commission could not seek its records, by subpoena or otherwise. Based largely on the statutes cited in the Petition herein – particularly Code § 24-1-1 – the argument was rejected by the circuit court in July of 2011:

[T]he Court concludes that under the applicable law the PSC has jurisdiction to investigate and determine whether Snyder is a public utility providing a public service in association with Jefferson. Furthermore, the PSC has jurisdiction over Snyder, whether a public utility or not, if it deems such necessary to the exercise of its mandate set forth in W. Va. Code § 24-1-1.

(Opinion Attached as Exhibit A.)

⁶(...continued)

be investigated because it has a contract with the utility? The opposite would seem to be the more logical conclusion.

Without saying so, Respondents are apparently arguing that the Impairment of Contract Clause would preclude the Commission from investigating transactions made pursuant to the contract. No authority is cited for this proposition, which runs counter to the opinions of this Court and the United States Supreme Court: “One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.” *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908).” *Berkeley County Public Service Sewer Dist. v. West Virginia Public Service Com’n*, 204 W.Va. 279, 512 S.E.2d 201 (1998). (By the way, the WCSWA asserts below that the contract has never been submitted by LTC for approval in accordance with “Rule 39,” despite LTC’s habit of referring to it as a “Rule 39 contract.”)

The cited statute – Code § 24-1-1 – grants to the PSC general jurisdiction over utilities and lists numerous duties of the Commission, including to “ensure that rates and charges for utility services are just, [and] reasonably applied without unjust discrimination or preference.” (Code § 24-1-1(a)(4).) Subsection (e) of the same statute provides, in pertinent part, as follows:

[I]n carrying out the provisions of this section the commission shall have jurisdiction over such persons, *whether public utilities or not*, as may be in the opinion of the commission necessary to the exercise of its mandate and may . . . compel the production of papers or other documents. . . .(Emphasis supplied.)

B. Enforcement of Subpoenas is Not the Sole Means by Which the Commission May Obtain Judicial Enforcement of Its Discovery Orders.

The PSC’s current discovery rules, first promulgated in 2001 (Exhibit B), allow all parties to seek information via interrogatories and document requests without the prior consent of the Commission. That was the mechanism used by the Wetzel County Solid Waste Authority (WCSWA), whose discovery requests were thereafter deemed appropriate and pertinent to the investigation by the Commission, resulting in the order for which enforcement is now sought – not only by the WCSWA but by the Commission itself.

The Respondents argue that the Petition herein should nonetheless be denied because the same information *could have* been obtained by subpoena issued by the Commission followed by judicial enforcement in circuit court per W. Va. Code §24-2-10,⁷ thereby providing an “adequate

⁷ With respect to judicial enforcement, Code § 24-2-10 states:

In all hearings or proceedings before the commission the evidence of witnesses and the production of documentary evidence may be required at any designated place of hearing; and in case of disobedience to a subpoena or other process the commission or any party to the proceedings before the commission may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses and the production of papers, books and documents.

remedy at law.”. Query: If the WCSWA had used a subpoena, would Respondents now be arguing that the aforesaid discovery rules would be an adequate remedy?

Assuming, *arguendo*, that the Commission has authority to issue subpoenas in aid of a party’s *pre-trial* discovery requests, the delay entailed in starting all over again after four years of discovery disputes renders this “remedy” wholly inadequate. “While it is true that mandamus is not available where another specific and adequate remedy exists, if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie.” Syl. pt. 4, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

Respondents then make a more detailed argument that the subpoena procedure is the *exclusive* legal remedy for the Petitioners to obtain judicial enforcement of pre-trial discovery orders. Their argument might have merit when, and if, subpoenas are issued when the investigation comes to hearing, for it is *only in that context* that the statutory language expressly contemplates circuit court enforcement of a Commission subpoena. (*See* fn. 7.) It is not at all clear that the statute authorizes subpoenas for pre-trial discovery.

Indeed, on behalf of another client, the same law firm that now represents Respondents filed a Petition for Writ of Prohibition in the Circuit Court of Kanawha County, just last year, seeking a Court order prohibiting the Commission from obtaining information from a non-utility affiliate of a West Virginia utility. (Civil Action No. 11-MISC-272; *Snyder Environmental Services, Inc. v. Public Service Commission of West Virginia*.) During that prohibition proceeding, counsel moved to quash a pending PSC subpoena because it was not returnable to a scheduled Commission proceeding, as Code § 24-2-10 apparently requires. (*See* Exhibit C.) The Circuit Court ultimately denied the Writ of Prohibition and ruled that the Commission had the authority under W. Va. Code

§24-1-1 to obtain information from the non-utility entity (Exhibit A). (However, the specific issue of whether a subpoena could be used for pre-trial discovery became moot before it was addressed.)

In addition, the Respondents argue (without citing any authority) that W. Va. Code § 24-2-2, which generally allows this Court to enforce Commission orders, is not intended and has never been used to resolve discovery disputes before the PSC. It is true that this may be the first petition to this Court seeking enforcement of a Public Service Commission Order compelling pre-trial discovery. However, given the arguably limited scope of the subpoena procedure under Code § 24-2-10, a ruling that Code § 24-2-2 is also not available to address pre-trial discovery completely emasculates the efficiencies of interrogatories and document requests – efficiencies that prompted the Commission to promulgate its discovery rules in 2001. (Exhibit B.)

The express provisions of W. Va. Code § 24-2-2 do not limit the kind of order for which the Commission may invoke this Court's assistance. The Commission's duly promulgated rules contemplate pre-trial discovery via interrogatories and documents requests. Code § 24-2-10 addresses only subpoenas. Thus, Code § 24-2-2 is the only statute available to obtain judicial enforcement of pretrial discovery.

The Respondents cite this Court's decision in *Wilhite v. Public Service Commission*, 149 S.E.2d 273 (1966) for the proposition that Code § 24-2-10 is available to enforce the Commission's pre-trial discovery rules. The language relied upon by Respondents from *Wilhite* to this effect was *dicta*, in that this Court had not been asked to resolve, nor did it resolve, the issue of whether the interrogatories in that case should have been answered. Nor did the Court analyze or discuss the language of Code § 24-2-10 that apparently limits its applicability to subpoenas. More importantly, the discovery process at issue here did not even exist when *Wilhite* was decided.

At the time of the *Wilhite* decision, the Commission had limited provisions regarding discovery in its Rules of Practice and Procedure, and none analogous to the discovery rules at issue here that permit *any* party to a Commission proceeding to obtain discovery from *any* other party without a prior order of the Commission. As noted by the Court in its *Wilhite* decision, the Commission's procedure at that time included then Rule 6 dealing with complaints against public utilities whereby interrogatories could be filed with a complaint *against a public utility* or with an answer *by the utility* in response to a complaint. In its decision, the Court stressed that the Rule 6 interrogatory process, by express provision of the Commission's own rule, could *only be used by or against a public utility*. *Wilhite*, 149 S.E.2d at 280. Following the submission of interrogatories, the Commission would issue an order directing the party to either answer or not answer the interrogatories. Rules of Practice and Procedure, 52 Annual Report Public Service Commission, 1964-1965 at 390.

At the time of the *Wilhite* decision, the only other provision in the Commission's Rules regarding discovery was Rule 14 which pertained to the application of a subpoena for witnesses and documents *at any designated place of hearing* before the Commission. These same rule provisions existed at the time of the *Appalachian Power*⁸ decision in 1982, also cited by the Respondents as an example of the use of Code § 24-2-10 to enforce a subpoena. However, that case had nothing to do with the enforcement of pre-trial discovery orders or the availability W. Va. Code § 24-2-2 for that purpose. It is of no value to Respondents other than to serve as an example of the use of Code § 24-2-10 to enforce a subpoena, an issue not present in this case.

⁸ *Appalachian Power Co. v. Public Service Commission*, 170 W. Va. 757, 296 S.E.2d 887 (1982).

In 2001, the Commission completely revamped its discovery process so that it would be available to all parties, who could proceed with discovery against any other party and without a commission order allowing them to do so. *See* General Order No. 182.4, June 29, 2001, effective August 28, 2001. (Exhibit B.)

That rule-making gave rise to the current discovery rules at the Commission. 150 C.S.R. 1, Rule 13.6, which are analogous to and interpreted in accordance with the *West Virginia Rules of Civil Procedure*. Although the Commission retained the process for the issuance of subpoena in Rule 14, whether such a subpoena can be used for pre-trial discovery remains unresolved. Given that pre-trial discovery can indisputably be obtained from parties through interrogatories and document requests as provided in Rule 13.6, there is no longer any reason to resolve whether a subpoena would also work for that purpose, nor to limit judicial enforcement to the subpoena process. To suggest, based on a decision issued nearly 50 years ago (*Wilhite*) that the discovery processes in effect at that time remains the exclusive means for securing documents is insupportable in light of the complete restructuring of the discovery process that has since occurred.

Petitioners ask that this Court vindicate that process by requiring Respondents to provide the missing financial records.

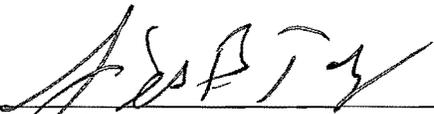
Respectfully submitted,

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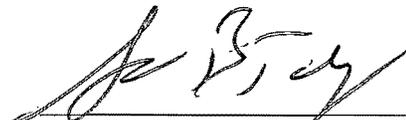
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CERTIFICATE OF SERVICE

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 "Reply Brief" 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 15th day of June 2012, addressed as follows:

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Exhibits on File in Supreme Court Clerk's Office