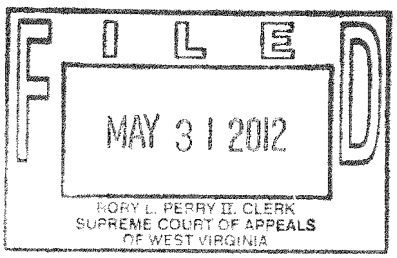
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0527



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

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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I. QUESTIONS PRESENTED

Does the availability of an adequate remedy at law pursuant to W. Va. Code § 24-2-10 render inappropriate the issuance of a writ of mandamus in this case under W. Va. Code § 24-2-2?

Does W. Va. Code § 24-2-2, which generally provides that the Public Service Commission may enforce its lawful orders through petitions for writ of mandamus, or W. Va. Code § 24-2-10, which specifically provides that the Public Service Commission may invoke the aid of circuit courts in compelling discovery, apply to circumstances where the Public Service Commission is seeking to compel discovery?

Does the Public Service Commission have jurisdiction to compel production of the corporate tax returns and audited financial statements of a non-resident non-utility, particularly where the Public Service Commission has identified no specific and valid justification for the production of the non-resident non-utility's tax returns and audited financial statements?

Does the Public Service Commission have jurisdiction to compel the production of corporate tax returns and audited financial statements of a non-resident non-utility before it has determined whether a resident utility lacks the financial resources to satisfy a legal obligation which remains to be calculated when those tax returns and audited financial statements are not needed to determine either the resident utility's financial resources or the amount of funds required for it to satisfy its legal obligations?

II. STATEMENT OF THE CASE

A. THE PARTIES.

Respondent, Lackawanna Transport Company ("LTC") is a West Virginia corporation and the owner and Department of Environmental Protection ("DEP") permittee of the Wetzel County Landfill. [**App. Ex. 1 at 3, 5, 7**]. As a commercial solid waste facility owner, LTC is a public utility subject to the jurisdiction of the Public Service Commission ("PSC"). W. Va. Code § 24-2-1 and § 24-2-1(f).[1]

Respondent, Solid Waste Services, Inc., d/b/a J.P. Mascaro & Sons ("SWS") is a privately-owned Pennsylvania corporation providing waste services primarily in Pennsylvania.[2] SWS has no business operations or offices in West Virginia. In the past, SWS did dispose of waste at the Wetzel County Landfill, but it has not done so since 2005. SWS is not a West Virginia public utility and not subject to the jurisdiction of the PSC.

Petitioner, Wetzel County Solid Waste Authority ("WCSWA") is a statutorily created local public agency under W. Va. Code § 22C-4-3 whose primary duty is to establish a "litter and solid waste control plan" and a "commercial solid waste facilities siting plan" for Wetzel County. W. Va. Code § 22C-4-8(a) and § 22C-4-24(a).[3]

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[1] Pat Mascaro, named by Petitioners as an "interested party," is the President and sole shareholder of LTC.

[2] Pat Mascaro is the President of SWS and he and his four brothers, Joseph, Michael, Louis and Frank, are each twenty percent minority shareholders of the company. Pat, Joseph and Michael serve as company officers and directors.

[3] Like any statutorily created local public agency, the WCSWA only has the powers and duties granted by its enabling statute, and under that statute (i.e., W. Va. Code Chapter 22C,

This mandamus case has nothing to do with either of those plans. Indeed, the inclusion of the WCSWA is surplusage as the relief sought does not rely upon any right or authority in that body.[4] Rather, the sole authority for the petition is W. Va. Code § 24-2-2 which applies to the PSC, not to the WCSWA.

Petitioner, PSC is the state agency responsible for establishing rates for and regulating public utilities in West Virginia. W. Va. Code § 24-2-1 and § 24-2-2(a).

B. PROCEDURAL HISTORY.

The underlying General Investigation Case before the PSC (Case No. 08-2129-SWF-GI) was initiated by the WCSWA and not by the PSC or its Staff. The only issue remaining in that case relates to establishment and funding of a PSC closure escrow account for the Wetzel County Landfill.

In accordance with generally accepted accounting principles, LTC has "accrued" dollar amounts for the closure and post-closure activities at the Wetzel County Landfill in its books and records and in its tax returns which have been provided to the WCSWA [Petition at 7 n.8], but as of this date no PSC closure escrow account has been established to receive funds for that purpose.

As acknowledged by PSC Staff, however, LTC is up-to-date on all of its DEP closure obligations at the Wetzel County Landfill. Additionally, as required by

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Article 4) the WCSWA has no powers or duties relating to the permitting, operation, maintenance, bonding/financial security, closure or post-closure care of the Wetzel County Landfill. Those powers and duties belong to the DEP with some involvement of the PSC. W. Va. Code § 22-15-5 and § 22-15-12.

[4] Likewise, the Petition concedes that it seeks no relief against Pat Mascaro [Petition at 5] and his inclusion is surplusage.

DEP, LTC has posted with DEP and the State a $676,000 landfill closure surety bond from the Safeco Insurance Company of America as a financial guarantee for required closure activities in the event that LTC does not perform them itself. [**App. Ex. 2 at 11-12**]. Thus, any dispute over LTC's financial ability to satisfy its closure and post-closure obligations is a red herring.

Furthermore, LTC has been ready and willing for almost a decade and remains ready and willing to enter into a PSC closure escrow account agreement for its landfill. In fact, in December 2003, at the PSC's request, LTC signed and returned to the PSC a Closure Escrow Account Agreement in the per-ton dollar amount established by the PSC. [**App. Ex. 3 at 13-31**].

LTC does not know why the PSC did not act upon and approve the Closure Escrow Account Agreement that it requested and that was submitted by LTC. Thereafter, in 2007, as part of a Rule 42A rate case, LTC and PSC Staff entered into a Stipulation of Settlement Agreement that included the establishment of a PSC closure escrow account and agreement for the Wetzel County Landfill. [**App. Ex. 4 at 35-36**]. Although that rate case did not proceed to its conclusion, the PSC could have provided, but did not provide, to LTC for signature its standard closure escrow account agreement in the per-ton dollar amount referenced in the signed "Stipulation of Settlement."

Lastly, in a February 14, 2012, letter to counsel for the WCSWA, which was copied to the PSC, LTC advised that it remains ready and willing to execute a PSC closure escrow account agreement provided for in the 2007 Stipulation of Settlement. [**App. Ex. 5 at 46-47**].

In the underlying General Investigation Case, Respondents answered fully and without objection all of the discovery requests made by the PSC Staff.[5] Those PSC Staff discovery requests and responses thereto are not a part of this mandamus case.

Also, in the General Investigation Case, LTC and SWS, in response to WCSWA discovery requests, provided about one thousand pages of discovery responses, including answers and requested documents.[6] Among the voluminous information and documents that LTC and SWS provided in its discovery responses are the following:

- A copy of the August 1987 Disposal Agreement between LTC and SWS entered into before the PSC had any jurisdiction over solid waste facilities in West Virginia. [**February 10, 2012 Discovery Binder, Exhibit C, and Answer to Revised Discovery Request No. 1**].

- A copy of LTC's initial PSC Tariff Filing of July 1, 1989, which was approved by the PSC, which remains in effect today, and which on the next to last page lists the 1987 Disposal Agreement with SWS as an "Existing Rule 39 Special Contract." [**February 10, 2012 Discovery Binder, Exhibit B, and Answer to Revised Discovery Request No. Request No. 1**].[7]

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[5] The discovery provided to the PSC Staff contained about 300 pages. It is worth noting that in dealing with the "closure escrow account issue," PSC Staff did not find it necessary to attempt through discovery to obtain the federal tax returns and audited financial statements of SWS, a non-public utility entity.

[6] A copy of the large binder containing LTC's and SWS's discovery responses dated February 10, 2012, and titled "ANSWERS OF LACKAWANNA TRANSPORT COMPANY ('LTC') AND SOLID WASTE SERVICES, INC. ('SWS') TO REVISED DISCOVERY REQUESTS OF THE WETZEL COUNTY SOLID WASTE AUTHORITY ('WCSWA')" is being submitted to this Court as part of LTC's and SWS's Response. In this Response, that binder will be cited as "February 10, 2012 Discovery Binder, Ex. ___." Copies of this Binder are already in the possession of Petitioners.

[7] Detailed information regarding the August 1987 Disposal Agreement between LTC and SWS was testified to by LTC's General Counsel, William F. Fox, Jr., in LTC's 2007 rate case, and a copy of that transcript is in the possession of the WCSWA. Also, LTC submitted a copy of this Rule 39 Special Contract and an explanatory letter to the PSC on June 26, 1996 in Case No.

- Copies of the Monthly Tonnage Reports of the Wetzel County Landfill for the years 1997 through 2011 filed by LTC with the West Virginia DEP. Those monthly reports show the tonnage, type and geographic origin (i.e., in-shed/in-state and out-of-shed/out-of-state) of all waste disposed of at the Wetzel County Landfill, including waste disposed of by SWS. [**February 10, 2012 Discovery Binder, Exhibits A and E**].

- Detailed information relating to LTC's accrued accounting reserve for landfill closure and post-closure; relating to the methodology for calculating accounting reserves for closure and post-closure; relating to closure activities at the Wetzel County Landfill; and relating to calculation of LTC's current accounting reserves for closure. [**February 10, 2012 Discovery Binder, Exhibits G, H, I and J, and Answer to Revised Discovery Request No.** 2].

- LTC's Federal Tax Returns with detailed Schedules for the years 1993 through 2009 containing detailed information relating to income, assets, liabilities, expenses, depreciation, beginning and ending balances for accrued accounting reserves for landfill closure, and capital contributions made to the corporation by its sole shareholder. [**February 10, 2012 Discovery Binder, Exhibits F and P**].

- Detailed financial statements for LTC for the years 1993 through 2009 showing current assets, current liabilities and shareholders' equity, line item operating costs and expenses, including general administrative expenses. [**February 10, 2012 Discovery Binder, Answers to Revised Discovery Requests Nos. 6, 7 and 9 and Exhibits M and O attached thereto**].

- Detailed information regarding the tonnage of waste disposed of by SWS at the Wetzel County Landfill for the years 2001 through

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96-0587-SWF-GI (General Investigation of capacity contracts), a copy of which has been provided to the WCSWA in this case.

2011.[8] [**February 10, 2012 Discovery Binder, Answer to Revised Discovery Request No. 1**].

- The per ton amount paid by SWS for waste disposed of by SWS at the Wetzel County Landfill for the years 1989 through 2011. [**February 10, 2012 Discovery Binder, Answer to Revised Discovery Request No. 1 and the exhibits referenced therein**].

- Information requested regarding what the WCSWA characterizes as "off-book revenues" for the years 2001 through 2011.[9] [**February 10, 2012 Discovery Binder, Answer to Revised Discovery Request No. 1 and the exhibits referenced therein**].

- Detailed information for the years 2002 through 2009 for "amounts paid, transferred or reimbursed by LTC to any Mascaro-owned company as payment, rental, or consideration for services, insurance, or tangible property (real or personal) other than fuel and lubricants, vehicle repair and maintenance." [**February 10, 2012 Discovery Binder, Answer to Revised Discovery Request No. 7 and Exhibits L, M and O attached thereto**].

The voluminous amount of financial and other information provided by LTC and SWS in response to WCSWA discovery requests, which is in addition to the almost 300 pages of responses to the PSC Staff discovery requests, is overwhelmingly sufficient and more than is needed to properly address the establishment and funding of a PSC escrow account for the Wetzel County Landfill, which is the only issue remaining in the underlying General Investigation Case. Not only is it not lawful for the PSC to order SWS to produce its privileged and confidential tax returns and audited financial

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[8] SWS disposed of no waste at the Wetzel County Landfill during 2006, 2007, 2008, 2009, 2010 and 2011.

[9] There were no such "off-book revenues" for the years 2008, 2009, 2010 and 2011.

statements, but also those documents are simply not needed to address the PSC closure escrow account issue at hand.

C. FACTUAL BACKGROUND.

1. The 1987 Disposal Agreement between LTC and SWS.

In its Petition, the WCSWA first asserts that contracts between SWS, an out-of-state non-utility entity and other out-of-state non-utility entities ("Third Party Contracts"), and the revenue SWS received from such contracts, where SWS, pursuant to a 1987 Disposal Agreement it has with LTC, arranged for the disposal of waste from the Third Party Contracts at the Wetzel County Landfill and paid LTC the PSC approved tariff rate for that disposal, entitles the PSC to order SWS, an out-of-state non-utility entity, to provide its tax returns and audited financial statements to the WCSWA. [WCSWA Petition, p. 6-7].

This assertion is incorrect as a matter of law, but just as importantly, the financial information at issue according to the WCSWA – Third Party Contract revenues retained by SWS – has already been specifically provided to the WCSWA by LTC and SWS in response to other detailed discovery requests the WCSWA made. [**February 10, 2012 Discovery Binder, Answer to Revised Discovery Request No. 1 and the Exhibits referenced therein**].

There are no line items or individual notations or entries in SWS's tax returns and audited financial statements identifying what the WCSWA characterizes as "off-book revenues" from Third Party Contracts that were retained by SWS. As noted above, the so-called "off-book revenues" from Third Party Contracts retained by SWS

have been specifically identified in LTC's and SWS's discovery responses to the WCSWA.

Therefore, there is absolutely no need for the production of the privileged and confidential tax returns and audited financial statements of SWS, a private Pennsylvania corporation that is not subject to PSC jurisdiction. As it relates to the assertion made by the WCSWA, certain facts relating to a 1987 Disposal Agreement between LTC and SWS and to SWS's Third Party Contracts need to be brought to this Court's attention.

The Wetzel County Landfill did not have its start with LTC and Pat Mascaro. The Landfill was owned and operated by West Virginians for thirty or more years before LTC purchased the facility in 1987.

The former West Virginia owners operated the Landfill as an "open dump" without any environmental protection systems whatsoever and with toxic leachate from the Landfill being discharged directly into the Peach Ford Creek, killing all aquatic life. Also, the former West Virginia owners for decades disposed of waste in the Landfill without making any provisions for the proper environmental closure of the disposal area and without closing any portion of the Landfill in accordance with proper environmental standards.

This Court has previously described the Wetzel County Landfill as it was operated by its former West Virginia owners before being purchased by LTC and Pat Mascaro as a "mere hole-in-the-ground dump." Solid Waste Services of West Virginia, Inc. v. Public Service Commission, 188 W. Va. 117, 121, 422 S.E.2d 839, 843 (1992).

With millions of dollars advanced by SWS under a disposal contract with LTC, LTC and Pat Mascaro ended years of environmental neglect and stream pollution by turning this "mere hole-in-the-ground dump" into a modern sanitary landfill that exceeds West Virginia regulatory standards and contains all of the advanced environmental protection systems that a landfill should have. In that regard, this Court wrote:

> Mr. Mascaro . . . has invested substantial money in West Virginia. At the Wetzel County Landfill, Mr. Mascaro has installed a state-of-the-art lined landfill in place of what was formerly a mere hole-in-the-ground dump. Not only did these improvements prevent environmental problems at the landfill, but these improvements have probably ended over 15 years of stream pollution. This landfill is now one of the top five landfills in the state.

Id. at 121, 422 S.E.2d at 843.

In 1987, when LTC purchased the Wetzel County Landfill, landfills in West Virginia were not public utilities and were not in any way regulated by the PSC. It was not until a legislative enactment in 1989 that landfills became subject to the rate making jurisdiction of the PSC. W. Va. Code § 24-2-1(f).

In August 1987, shortly after LTC purchased the Wetzel County Landfill and about one and a half years before the PSC had any jurisdiction over landfills, SWS entered into a contract with LTC for the disposal of waste at the Wetzel County Landfill. [**App. Ex. 6 at 51**].

In consideration of the millions of dollars advanced by SWS to LTC for the acquisition, development, improvement, and permitting of the Wetzel County Landfill,

that contract reserved for SWS the disposal capacity at the Wetzel County Landfill, with the exception that at all times local waste from Wetzel County and Tyler County, West Virginia, had priority preference at the Landfill and LTC was required to dispose of all such local waste from those counties. Also, LTC had the absolute right to accept and dispose of waste from third parties for any disposal capacity that was not used by SWS. [**App. Ex. 6, ¶ 1 at 52-53, ¶¶ 3, 4, and 7**].

The 1987 Disposal Agreement provided that LTC would establish the disposal rates for local waste and for third party waste and SWS would establish the rate for waste that it delivered or arranged for delivery. The term of the Disposal Agreement was for the life of the Landfill and it provided that LTC shall be solely "responsible for the development, management, maintenance and operation of the Landfill and SWS shall have no responsibility or obligation, whatsoever, in that regard." [**App. Ex. 6 at 52-53, ¶¶ 3, 4 and 7**].

The 1987 Disposal Agreement was a contract between two private corporate entities for good and valid consideration before the PSC had any jurisdiction over landfills in West Virginia. The millions advanced by SWS in consideration of the Disposal Agreement enabled LTC to change the Wetzel County Landfill from an environmental nightmare into a modern sanitary landfill with all the necessary environmental protection systems.

2. Twenty Years of Absence of Any Dispute.

When the PSC obtained rate making jurisdiction over landfills in 1989, LTC, made its initial Tariff Filing with the PSC, as required, on or about July 1, 1989.

[**App. Ex. 7 at 59-68**]. That initial Tariff Filing was approved by the PSC and has remained the approved PSC Tariff Filing for the Wetzel County Landfill since 1989. LTC has not had a disposal rate increase for twenty-three years.[10]

Included in LTC's approved PSC Tariff Filing are LTC's "EXISTING RULE 39 SPECIAL CONTRACTS" of which the 1987 Disposal Agreement with SWS is one. [**App. Ex. 7, p. 67, Section V**]. A "Rule 39 Special Contract" under PSC regulations is a contract with an entity for rates that are different (sometimes less and sometimes more) than the base rates contained in the approved PSC Tariff Filing.[11] LTC's PSC approved Tariff Filing specifically designates LTC's contract with SWS as an "EXISTING RULE 39 SPECIAL CONTRACT."

Of course, the PSC had the right, if it chose to do so, to review any of LTC's existing Rule 39 Special Contracts that were included and approved in LTC's initial Tariff Filing, including the 1987 Disposal Agreement with SWS, but at no time did the PSC ever request to do so, and therefore, LTC and SWS continued to perform under that contract in accordance with its original terms.

Additionally, in 1996, when the PSC was conducting a General Investigation of "landfill capacity contracts," as the PSC defined that term, LTC, in a June 28, 1996 letter, provided the PSC with its initial 1989 approved Tariff Filing where the Disposal Agreement between LTC and SWS was listed as an "EXISTING RULE 39

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[10] Today, LTC's disposal rates are among the lowest, if not the lowest, in the state.

[11] Under its Rule 39 Special Contract with LTC, SWS paid a rate less than the base PSC tariff rate until 2003. Since 2003, SWS has paid to LTC at least the base PSC tariff rate for waste it disposed or arranged for the disposal of at the Wetzel County Landfill.

SPECIAL CONTRACT," and also provided it with a copy of the August 1987 Disposal Agreement between LTC and SWS. [**App. Ex. 8 at 70-78**]. At no time thereafter did the PSC suggest or state that the August 1987 Disposal Agreement between LTC and SWS was not a valid or enforceable Rule 39 Special Contract under LTC's approved PSC Tariff Filing.

Also, as part of the same General Investigation, LTC, in an April 4, 1997 letter, explained to the PSC its position regarding one aspect of the 1987 Disposal Agreement with SWS. [**App. Ex. 8 at 79-80**]. In that letter, LTC wrote:

> If a West Virginia landfill [LTC] enters into a disposal capacity agreement with an entity that is located and does business outside of the state of West Virginia [SWS], and if that out-of-state entity pays the West Virginia landfill the PSC approved tariff rate for all waste that is disposed of at the landfill under its account and under the disposal agreement, the Public Service Commission of West Virginia has no jurisdiction to regulate or control the business arrangement that the out-of-state entity [SWS] makes with its customers that are also located outside of the state of West Virginia.

["Third Party Contracts"][12]

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[12] By way of example, in 2007, SWS, a Pennsylvania entity, had an agreement with the Monroe County Commission, an Ohio entity, to arrange for the disposal of Commission waste for the sum of $37.50 per ton paid to SWS. Thereafter, pursuant to its 1987 Disposal Agreement with LTC, SWS arranged for the disposal of Monroe County Commission waste at the Wetzel County Landfill and SWS paid LTC the approved PSC tariff rate of $28.75 per ton for the disposal of that waste. As it explained in its April 4, 1997 letter, the PSC does not have any jurisdiction over the contractual arrangement between SWS and the Monroe County Commission, both of whom are out-of-state entities and neither of whom is a West Virginia public utility or over the $8.75 per ton retained by SWS under its contract with the Monroe County Commission.

Neither the Commission nor the PSC staff responded to LTC's April 4, 1997 letter suggesting or stating that the above-quoted position of LTC regarding SWS's Third Party Contracts was incorrect or contrary to PSC regulation.

3. Manufacture of Controversy by WCSWA.

In LTC's 2007 Rate Case, however, the WCSWA for the first time asserted that the $8.75 per ton retained by SWS under its Third Party Contracts such as SWS's contract with the Monroe County Commission was "off book revenue" that should have been credited to LTC.

Both LTC and SWS disagree with this assertion for the reasons set forth in LTC's April 4, 1997 letter to the PSC and for the reasons set forth in other pleadings in the underlying case, but without waiving any of their legal rights and in an effort to compromise, commencing in 2008 and continuing until today the $8.75 per ton previously retained by SWS from third party customers such as the Monroe County Commission is now being credited to LTC.

As part of its discovery responses to the WCSWA in the underlying case, LTC and SWS have provided to the WCSWA and PSC staff the total dollar amount of what the WCSWA characterizes as "off book revenue" for the years 2000 through 2011, with there being no such off book revenues for the years 2008 through 2011.

Contrary to its assertion on page 6 of its Petition, the WCSWA does not need SWS's tax returns and audited financial statements to obtain the so-called "off book revenue." The WCSWA has already been provided with that information in the

discovery responses by LTC and SWS, and furthermore, that information is not contained separately in any line items on the SWS tax returns or audited financial statements.

Accordingly, the ostensible reasons for the compelled production of SWS's tax returns and audited financial statements – the need to ensure LTC's financial responsibility for any potential closure or post-closure costs and the need to learn what "off book revenue" was received by SWS as a result of its Third Party Contracts – have already been satisfied. LTC is up-to-date on its closure obligations at the Wetzel County Landfill, there is a surety bond in place in the amount required by DEP to ensure the availability of funds for potential closure or post-closure costs and all of the information regarding the so-called "off book revenue" has been provided.

If the Court will notice, the Petition makes reference to the dismissal of the 2007 Rate Case ***on September 4, 2008***, almost four years ago. [Petition at 7]. Accordingly, this is not legitimately about any rate case. If it were, the PSC would not have waited almost four years to bring the matter to this Court.[13]

Additionally as referenced above, this is not legitimately about the establishment of any escrow over and above the surety bond already posted to the satisfaction of DEP. LTC has been ready and willing for almost a decade and remains ready and willing to enter into a PSC closure escrow account agreement for its landfill. In fact, ***in December 2003***, over eight years ago, at the PSC's request, LTC signed and returned to the PSC a Closure Escrow Account Agreement in the per-ton dollar amount

[13] Indeed, as referenced in the Petition, none of the parties to the 2007 Rate Case even bothered to take exception to its dismissal. [Petition at 7, n.7].

established by the PSC. [**App. Ex. 3 at 16, 29-31**]. Rather than simply following West Virginia law to require LTC to deposit into an escrow account whatever amount is deemed appropriate, Petitioners would rather involve this Court so they can peer into the financial records of SWS even though those records are completely irrelevant to their stated objective.

Nowhere in the Petition does either the PSC or WCSWA offer any specific justification for compelling the production of ten years of SWS's federal tax returns (2000-2009) and ten years of SWS's audited financial statements (2000-2009), particularly where they already have LTC's tax returns and financial statements from 1993 through 2009, and documentation regarding transactions between LTC and SWS.

This dispute is not about the PSC's exercise of jurisdiction over LTC with respect to its rates or anything else within the PSC's purview;[14] rather, it is about the PSC's and WCSWA's attempted exercise of jurisdiction to discover confidential information by SWS completely unrelated (1) to whether LTC has "inadequate funding . . . for closure and post-closure costs;" (2) to whether LTC "should be required to establish an escrow

[14] Indeed, the discovery requests for SWS's tax returns and audited financial statements in the underlying General Investigation Case were not made by the PSC Staff. SWS has complied fully and completely with all of the discovery requests of the PSC Staff in the underlying case. The discovery requests for SWS's tax returns and audited financial statements were made by the WCSWA, a local agency with limited jurisdiction and powers, and a local agency that has no jurisdiction or powers related to the permitting, operation, maintenance, bonding/financial security, closure or post-closure care of the Wetzel County Landfill. That power belongs to the DEP with some involvement of the PSC. W. Va. Code §§ 22-15-5(a), (b), and (d-h); W. Va. Code § 22-15-12. Essentially, the PSC is seeking to use its power over utilities to compel the production of confidential tax and financial information of a non-resident, non-utility to a local entity that has no powers with respect to the alleged purposes for which that information is sought.

account to fund those costs;" or (3) to whether SWS "may be liable for some portion of the unfunded liability,"[15] which are the only purposes identified in the petition. [Petition at 2-3].

SWS's tax returns and audited financial statements will not shed any light on whether LTC has sufficient funds for closure and post-closure costs; whether LTC should be required to establish an escrow account to fund those costs; or whether SWS should be liable for some portion of the unfunded liability.

The Public Service Commission simply needs to calculate the funds necessary for closure and post-closure costs as it already did in its November 7, 2003 letter to LTC [**App. Ex. 3 at 14**] and in a September 2007 Stipulation of Settlement Agreement with LTC [**App. Ex. 4 at 33-37, ¶ 2-3**], and, if within its authority, to order LTC to establish an escrow account to fund those costs. SWS's tax returns and audited financial statements are wholly unnecessary to that endeavor.

III. SUMMARY OF ARGUMENT

The third prong of the elements required for issuance of a writ of mandamus is not present in this case as there is an adequate remedy at law under W. Va. Code § 24-2-10. The specific statute regarding compelling document production in cases before the Public Service Commission, W. Va. Code § 24-2-10, and not the general

[15] This issue is ostensibly based upon WCSWA's position that SWS "should provide some funding for any escrow account" because "waste [was] deposited at the landfill by Solid Waste Services or its customers" [Petition at 8] as if this Court should provide funding for any escrow account at which its waste is deposited. Closure and post-closure costs are a liability of the utility, not the utility's customers, and Petitioners cite no legal authority for the proposition that SWS should be liable for LTC's liability even if LTC has the financial capability of satisfying that liability.

statute regarding enforcing orders of the Public Service Commission, W. Va. Code § 24-2-2, governs this dispute over the compelled production of tax returns and audited financial statements and unless this Court wants to the be the forum of first resort for discovery disputes in administrative agency proceedings, it will require Petitioners to comply with the specific statute and seek relief in the Circuit Court of Wetzel County.

Finally, under the circumstances of this case, Public Service Commission has no jurisdiction to compel production of the corporate tax returns, which are protected by qualified privilege, and audited financial statements of SWS, since they have absolutely nothing to do with the ability of LTC to satisfy its closure and post-closure obligations, a since SWS is a non-resident non-utility over which the PSC has no jurisdiction.

IV. STATEMENT OF ORAL ARGUMENT

On the one hand, Petitioners argue that "no evidence will be required to resolve this matter" when they need to convince this Court that it should accept jurisdiction even when the statute upon which Petitioners rely establishes concurrent jurisdiction. [Petition at 5]. On the other hand, Petitioners argue that they "anticipate that the Respondents' Response will raise a multitude of factual . . . defenses" when they need to convince this Court to set this case for Rule 20 argument. [Petition at 12]. Finally, even though the ostensible reasons for securing SWS's tax returns and audited financial statements have been pending for four to eight years, Petitioners request that this Court issue something called a "pre-opinion mandate" giving Petitioners what they want apparently even before the Rule 20 argument they request.

In any event, Respondents believe that this Court should decline to issue a rule to show cause as SWS's tax returns and audited financial statements have absolutely no relevance to calculating the amount needed for an escrow account to satisfy LTC's closure and post-closure obligations or to determine whether LTC has the financial ability to secure those yet to be calculated obligations. Alternatively, this Court should decline to issue rule to show cause in mandamus without prejudice to Petitioners to seek relief under W. Va. Code § 24-2-10.

V. ARGUMENT

A. BECAUSE THERE IS AN ADEQUATE REMEDY UNDER W. VA. CODE § 24-2-10, IT IS INAPPROPRIATE TO ISSUE A WRIT OF MANDAMUS UNDER W. VA. CODE § 24-2-2.

In Syllabus Point 1 of State ex rel. Boley v. Tennant, 2012 WL 1253274 (2012), this Court recently reaffirmed, "'A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.' Syllabus Point 2, State ex rel. Kucera v. The City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969)."

Because there is another adequate remedy in this dispute which will be discussed in the next section of the Response, this Court should refuse to issue a rule to show cause, but should require Petitioners to purse that remedy.

B. PETITIONERS' REMEDY, IF ANY, LIES IN W. VA. CODE § 24-2-10 AND NOT W. VA. CODE § 24-2-2.

W. Va. Code § 24-2-2(a) provides:

> 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, 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[16] 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 . . . .

It is a general statute providing for (1) the PSC's authority over the "rates, methods and practices of public utilities" subject to the PSC's jurisdiction; (2) the PSC's authority to require "public utilities" to provide "reports, rates, classifications, schedules and timetables in effect and used by the public utility or other person, to be filed with the

[16] The PSC suggests "by common law, this Court has original jurisdiction to compel a utility to perform its legal duties to the public" [Petition at 15], but SWS is a non-utility and this proceeding involves no "duty to the public. The case cited by the PSC, State ex rel. Allstate Ins. Co. v. Union Public Service Dist., 151 W. Va. 207, 151 S.E.2d 102 (1966), not only involved a public utility, but involved a statutory specifically conferring a right in the petitioner to the relief requested: "Under Section 17, Article 13A, Chapter 16, Code, 1931, as amended, any holder of the bonds of the Union Public Service District shall have the right by mandamus to enforce and compel the performance of all the duties required by the statute or undertaken by the district in connection with the issuance of bonds by such district." Syl. pt. 3, Allstate Ins., supra. Obviously, no such specific authority exists in this case and "The traditional use of mandamus has been to confine an administrative agency or an inferior court to a lawful exercise of its prescribed jurisdiction or 'to compel it to exercise its authority when it is its duty to do so.'" State ex rel. Frazier v. Meadows, 193 W. Va. 20, 31, 454 S.E.2d 65, 76 (1994), quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). It is not a tool for administrative agencies to compel discovery against private corporations.

commission" in conjunction with its regulation of "public utilities;" and (3) the PSC's right to seek judicial intervention in order to enforce "its lawful orders." It was never intended and has never been used to resolve discovery disputes before the PSC.

Indeed, until this case, the only time the PSC has invoked this Court's mandamus jurisdiction under W. Va. Code § 24-2-2 have involved the enforcement of dispositive and/or substantive orders against utilities subject to the PSC's jurisdiction.

In State ex rel. Public Service Commission v. Gore Water Association, 193 W. Va. 555, 457 S.E.2d 492 (1995), for example, this Court issued a writ of mandamus to compel a water utility to comply with PSC's unappealed order finding that association was public utility and requiring association either to apply for certificate of public convenience and necessity or to explore having governmental water board acquire and operate association's water system..

In State ex rel. Public Service Commission v. Indian Creek Gas Co., 154 W. Va. 835, 179 S.E.2d 574 (1971), this Court refused to issue a writ of mandamus involving the PSC's effort to secure enforcement of an order requiring a gas utility to elect someone to direct the operations of the utility; to provide a continued and uninterrupted supply of gas to its customers; and to meet its obligations to its gas supplier so gas would be available to provide to its customers where the utility was in the process of complying with the PSC's order at the time of this Court's proceedings.

In State ex rel. Public Service Commission v. Willis, 150 W. Va. 175, 144 S.E.2d 630 (1965), this Court issued a writ of mandamus to compel a water utility to connect with another water system.

In State ex rel. Public Service Commission v. Southern West Virginia Oil & Gas Corp., 141 W. Va. 551, 91 S.E.2d 737 (1956), this Court refused to issue a writ of mandamus involving the PSC's effort to compel a utility to set meters and lay certain lines so that gas produced from wells in certain areas could be placed into a certain gas line, concluding that the PSC had no authority to direct such conduct.

All of these cases involve utilities and dispositive and/or substantive orders. None involve non-utilities and discovery orders. The purpose of W. Va. Code § 24-2-2 is to provide a tool for the enforcement of orders against utilities over which the PSC has jurisdiction. It presupposes that the object of the mandamus proceeding is subject to the PSC's jurisdiction. It is that jurisdiction which warrants this Court's involvement by writ of mandamus in the face of non-compliance.

The purpose of this statute is not to provide a tool for resolving discovery disputes over non-utilities and/or third parties. Rather, the Legislature has provided for an alternative remedy arising from discovery disputes in PSC proceedings.

W. Va. Code § 24-2-10 provides:

> 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***. And such court, in case of refusal to obey the subpoena issued to any person or to any public utility subject to the provisions of this chapter, shall issue an order requiring such public utility or any person to appear before such commission and produce all books and papers, if so ordered, and give evidence

> touching the matter in question. Any failure to obey such order of the court may be punished by such court as contempt thereof.

[Emphasis supplied].

If the PSC wants to compel SWS, a non-utility, to produce its tax returns and audited financial statements, its remedy is to issue a subpoena or other process; to allow SWS to move to quash such subpoena or other process; and to either allow SWS to seek a petition for writ of prohibition if it is still compelled to produce the documentary evidence required or the PSC or other party to invoke the aid of the circuit court to compel such production.

In Appalachian Power Co. v. Public Service Commission, 170 W. Va. 757, 761 n.8, 296 S.E.2d 887, 891 n.8 (1982), this Court observed, "The traditional method of enforcing administrative agency subpoenas is for the agency to be empowered to apply to the courts if there is a refusal to respond to the subpoena. . . . The Public Service Commission has such authority under W. Va. Code, 24-2-10." In that same case, this Court held that because the PSC's jurisdiction is entirely statutory, it has no contempt power. Rather, "it has the power to impose a civil penalty for the refusal to comply with rules or orders entered under W. Va. Code, 24-2-3, 24-2-7 or 24-2-9." Id. at 761, 296 S.E.2d at 891.[17]

Accordingly, in Wilhite v. Public Service Commission, 150 W. Va. 747, 149 S.E.2d 273 (1966), where as in this case there was a dispute over an alleged non-

[17] Obviously, the PSC elected not to pursue any of these potentially alternative remedies to seeking this Court's intervention by petition for a writ of mandamus.

utility's failure to respond to discovery requests, this Court held that W. Va. Code § 24-2-10, not W. Va. Code § 24-2-2, is the appropriate vehicle:

> Wilhite timely answered the complaint but refused to answer the Interrogatories on the ground that it was not a public utility. Thereafter, Consolidated asked the Public Service Commission to issue a rule to be served on the defendants requiring them to show cause why they should not be found and held to be in contempt of the Commission for the failure and refusal to answer the Interrogatories. Such procedure, if appropriate, ***can only be accomplished by the Commission invoking the aid of a circuit court and the contempt, if any, may be punishable by such court as contempt thereof. Code, 24-2-10.***

[Emphasis supplied].

Recently, this Court noted, "As a rule, when both a specific and a general statute apply to a given case, the specific statute governs." In re Chevie V., 226 W. Va. 363, 371, 700 S.E.2d 815, 823 (2010).

In Chevie V., for example, this Court held, "W. Va. Code § 29–21–13a(e), being a more general statute pertaining to several different types of cases, necessarily must yield to the more specific statute, W. Va. Code § 49–7–33, whose scope is limited solely to abuse and neglect and juvenile proceedings." Id.

Likewise, in the instant case, W. Va. Code § 24-2-2, being a more general statute pertaining to the enforcement of lawful orders of the Public Service Commission must yield to the more specific statute, W. Va. Code § 24-2-10, whose scope is limited solely to compelling the production of evidence before the Public Service Commission.

The Legislature did not intend this Court to serve as discovery commissioner for the Public Service Commission, but intended for the PSC to resort to circuit court to resolve discovery disputes.[18]

C. THE PUBLIC SERVICE COMMISSION HAS NO JURISDICTION, UNDER THE CIRCUMSTANCES OF THIS CASE, TO COMPEL THE DISCLOSURE OF THE TAX RETURNS AND AUDITED FINANCIAL STATEMENTS OF A NON-UTILITY.

W. Va. Code § 24-1-1 provides, "It is the purpose and policy of the Legislature in enacting this chapter to confer upon the public service commission of this state the authority and duty to enforce and regulate the practices, services and rates of public utilities . . . ."

"The Public Service Commission was created by the legislature," this Court observed in Boggs v. Public Service Commission, 154 W. Va. 146, 154, 174 S.E.2d 331, 336 (1970), "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."

"The Public Service Commission of West Virginia has no inherent jurisdiction, power or authority and can exercise only such jurisdiction, power or authority as is authorized by statute." Syl. pt. 1, Eureka Pipe Line Co. v. Public Service Commission, 148 W. Va. 674, 137 S.E.2d 200 (1964).

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[18] The logical extension of the Petitioners' argument that this Court should intervene because "any order issued by a circuit court would be appealed" [Petition at 5] is that all contestants should first apply to this Court for relief as a lower tribunal's decision would be subject to appeal.

Accordingly, "The jurisdiction, power and authority of the Public Service Commission of West Virginia are confined to the regulation of public utilities." Syl. pt. 2, Eureka Pipe, supra.

For example, the Public Service Commission has no authority to interfere with the police power of a municipality in the control of its streets. City of Bluefield v. Public Service Commission, 94 W. Va. 334, 118 S.E. 542 (1923).

In its Petition, the PSC concedes "Solid Waste Services has not yet been found by the Commission to be a utility." [Petition at 13].[19] It relies, however, upon W. Va. Code § 24-1-1(e)(3) in support of its efforts to compel SWS to produce its tax returns and audited financial statements.

W. Va. Code § 24-1-1(e)(3) provides, "In 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 attendance before it, take testimony under oath and compel the production of papers or other documents," but the Legislature certainly never intended this statute to afford the PSC carte blanche to compel, for example, the production of the tax returns of members of this Court merely because "in the opinion of the commission," such information is "necessary to the exercise of its mandate," and so, too, with SWS's

[19] And, most certainly, that issue is not before this Court as the law is plain that "A writ of mandamus will be issued only upon a showing that the petitioner has a clear legal right to the relief sought, and such right cannot be established in the proceeding itself, but must exist when the proceeding is instituted." Syl pt. 2, State ex rel. Jarrell v. Walker, 145 W. Va. 815, 117 S.E.2d 509 (1960). The Petitioners cannot use this proceeding to establish the PSC's jurisdiction over SWS.

tax returns and audited financial statements, particularly where the PSC, in its own discovery requests, never sought SWS's tax returns and audited financial statements.

And, Petitioners' argument that even if the PSC lacked jurisdiction over SWS to directly compel it to produce its tax returns and audited financial statements, because "the underlying discovery requests[ ] were worded so as to require *both* Respondents to provide *one-another's* records" [Petition at 13] speaks for itself. There has been no finding or even an allegation that LTC and SWS are alter egos of one another as it is undisputed that they are separately incorporated, in two different states, with different ownership. The idea that the PSC can compel LTC, over which it has jurisdiction, to compel SWS, over which it lacks jurisdiction, to produce SWS's separate tax returns and audited financial statements is absurd, which is why no legal authority is cited for the proposition.

The PSC cites several statutes in support of their efforts to secure the tax returns and audited financial statements of a non-resident, non-utility, but none have even the remotest application.

First, the PSC cites W. Va. Code § 24-2-3 [Petition at 14], but that statute states, "In determining just and reasonable rates, the commission shall investigate and review ***transactions between utilities and affiliates***" [Emphasis supplied], and SWS's tax returns and audited financial statements are not "transactions between" LTC and SWS. LTC and SWS have already produced documentation reflecting "transactions" between them. Certainly, the PSC has the right to examine transactions between utilities and their affiliates as part of the rate-making process, for example, "to verify that non-utility

expenses are not being allocated to utility cost of service," [Petition at 14 (citation omitted)] but the manner in which to achieve that legitimate objective is "to review the non-utility affiliate expenses," [Id.] which will be reflected on the utility's books, not to examine the affiliate's tax returns and audited financial statements, which will reveal nothing about whether non-utility expenses are being allocated to the utility cost of service.[20] Again, LTC and SWS have already produced all of that information.[21]

Second, the PSC cites W. Va. Code § 24-2-9 [Id.], but that statute states:

> 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, ***and the form of all reports required under this chapter shall be prescribed by the commission*** (except as provided in section five, article three of this chapter). ***The commission shall collect, receive and preserve the same, and shall annually tabulate and publish the same in statistical form***.

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[20] Moreover, as previously noted, it is undisputed that when SWS utilized LTC's services, it paid approved rates for those services. Where an affiliate pays a utility approved rates, it has been held that it is inappropriate to inquire into the reasonableness of those rates. Harding Glass Co. v Arkansas Public Service Com., 229 Ark. 153, 313 S.W.2d 812 (1958)(state regulatory commission properly refused to investigate the reasonableness of the price paid by the utility to a wholly owned subsidiary for gas where the purchase was made pursuant to a long–term contract that had been approved by the commission at the time the utility acquired the subsidiary);

[21] Indeed, the PSC can make reference, for example, to the fact that "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,'" [Petition at 15 n.13], because LTC and SWS produced that information.

[Emphasis supplied]. Obviously, SWS is not "subject to the provisions" of this statute "respecting rates, tolls, charges or practices in conducting their service" and is not being asked to provide "reports" on a "form . . . prescribed by the commission" for the purpose of tabulating its tax returns and audited financial statements and publishing the same in statistical reports.

Again, SWS's tax returns and audited financial statements are unnecessary for the PSC to (1) determine the amount necessary to satisfy LTC's potential closure and post-closure obligations and (2) order LTC to deposit sufficient funds in an escrow account to secure those obligations. The PSC's argument to the contrary is analogous to a public university demanding the personal tax returns and financial statements of a student's parents in conjunction with the student's loan application without first determining (1) the amount of the loan and (2) the student's ability to repay the loan independently of his or her parents. Moreover, the PSC is demanding not only SWS's tax returns, but "each entry therein that includes transfers from or to Pasquale Mascaro and the purpose thereof" [Petition at 11] as if that had anything remotely to do with LTC's financial ability to satisfy its potential closure and post-closure obligations.

Finally, the PSC argues that even if it does not have jurisdiction over SWS as a non-resident, non-utility, it has jurisdiction over LTC and LTC should be compelled to produce SWS's tax returns and audited financial statements. [Petition at 15-16]. Other that citing itself as authority, however, the outside authority cited does not support the PSC's position in this case.

First, in a portion of Section 2210 of Wright & Miller's FEDERAL PRACTICE AND PROCEDURE 3RD not referenced in the Petition, it is observed, "Under the revised procedure introduced in 1970, only a request for inspection is needed, and the party believed to have the documents or things can respond by saying that they are not in its possession, custody, or control should this be the case." [Footnote omitted]. Thus, pursuant to a request for the production of SWS's tax returns and audited financial statements, LTC can properly respond and did respond that such documents are not in its possession, custody, or control.

Second, it is observed, "In parent–subsidiary 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." [Footnote omitted]. None of these circumstances are present here because LTC is not the "alter ego" of SWS; LTC did not act as SWS's agent for purposes of some act that resulted in litigation; LTC would not need SWS's tax returns or audited financial statements to meet its own business needs; LTC is not a wholly-owned subsidiary of SWS; and LTC is not controlled by SWS with respect to SWS's tax returns and audited financial statements.

D. SWS'S TAX RETURNS AND AUDITED FINANCIAL STATEMENTS ARE IRRELEVANT TO THE CALCULATION OF LTC'S CLOSURE AND POST-CLOSURE OBLIGATIONS OR TO LTC'S FINANCIAL ABILITY TO SECURE THOSE OBLIGATIONS AND ARE PROTECTED BY QUALIFIED PRIVILEGE.

Speculation and conjecture about LTC's financial inability to satisfy yet to be calculated obligations are woefully inadequate to compel it to produce years of tax returns and financial statements of SWS.

First, a "qualified privilege" exists that disfavors the disclosure of income tax returns in discovery as a matter of general policy.[22] Terwilliger v. York International Corporation, 176 F.R.D. 214, 216-17 (W.D. Va. 1997); Susko v. City of Weirton, 210 WL 4554189 (N.D. W. Va. 2010).[23]

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[22] Although "audited financial statements" were not specifically addressed in the cited cases, SWS asserts that the same legal principle applies.

[23] See also United Food and Commercial Workers Union v. Chesapeake Energy Corp., 2012 WL 32910 at *4 n.4 (W.D. Okla.)("Tax returns are subject to a qualified privilege, and should not be produced where, as here, the information sought is readily available from other sources.")(citation omitted); Pacific Coast Steel v. Leany, 2011 WL 4572008 at *6 (D. Nev.)("Federal case law recognizes a qualified privilege disfavoring the disclosure of tax returns as a matter of general federal policy."); Cattegno v. Pricewaterhousecoopers, LLP, 205 F.R.D. 70, 72 (D. Conn. 2001)(recognizing a "qualified privilege" for tax returns in civil discovery); Eastern Auto Distributors, Inc. v. Peugeot Motors of America, 96 F.R.D. 147, 148-49 (D. Va. 1982)(A "'qualified' privilege emerges from the case law that disfavors the disclosure of income tax returns as a matter of general federal policy."); Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993)("Not only are the taxpayer's privacy concerns at stake, but unanticipated disclosure also threatens the effective administration of our federal tax laws given the self-reporting, self-assessing character of the income tax system."); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 190–91 (C.D. Cal .2006)("Tax returns and related documents 'do not enjoy an absolute privilege from discovery.' Nevertheless, a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns." (citations omitted)); Stone v. State Farm Mutual Automobile Ins. Co., 185 P.3d 150 (Colo. 2008)(The "general reluctance of courts to compel the disclosure of tax returns is due to 'both the private nature of the sensitive information contained therein' and 'the public interest in encouraging the filing by taxpayers of complete and accurate returns.' ").

In Terwilliger, which was relied upon by Judge Stamp is his decision in Susko, the court held:

> Judicial consensus exists that, as a matter of policy, great caution should be exercised in ordering the disclosure of tax returns. Unnecessary disclosure of tax returns is to be avoided. Examination of case law reveals the emergence of a judicially developed qualified privilege . . . that disfavors the disclosure of income tax returns as a matter of general federal policy. A two-prong test has been utilized to assess whether the qualified privilege should be overcome and a party's income tax returns should be disclosed. The court must determine whether (1) the tax return is relevant to the subject matter in dispute; and (2) a compelling need exists for the return, because the information sought is not obtainable from other sources."

Terwilliger, 176 F.R.D. at 216-17. Judge Stamp in Susko, supra, added: "Courts are reluctant to order the disclosure of tax returns as part of discovery."[24]

Here, the issue in the underlying PSC administrative proceeding is the establishment and funding of a PSC closure escrow account for LTC's Wetzel County Landfill. As will be further shown below (1) the SWS tax returns and audited financial statements contain no line item information whatsoever relevant to or related to the Wetzel County Landfill or to the establishment and funding of a closure escrow account at LTC's Wetzel County Landfill and (2) LTC and SWS in their almost one thousand pages of discovery responses to the WCSWA have already provided all of the financial and other information necessary to address the "closure escrow account issue" which is

[24] This "qualified immunity" applicable to tax returns in a judicial proceeding most certainly is applicable in an administrative proceeding such as the underlying PSC proceeding where the WCSWA, through discovery, has sought the production of SWS's tax returns and audited financial statements.

the only remaining issue in the underlying General Investigation proceeding. Certainly, no compelling need exists for the disclosure of SWS's tax returns and audited financial statements.

LTC and SWS, in the underlying General Investigation Case, have provided voluminous amounts of financial and other information in response to WCSWA discovery requests, and that information is entirely sufficient for the PSC to address the "closure escrow account issue" which is the only remaining issue in the underlying General Investigation proceeding. [**February 10, 2012 Discovery Binder**]. SWS's tax returns and audited financial statements are completely unnecessary as it relates to the formation and funding of a PSC landfill closure escrow account agreement.

For years, a large majority of landfills in West Virginia were nothing more than "open dumps" with very few, if any, environmental protection systems, and the local owners took no steps to close completed disposal cells in accordance with accepted environmental standards.

For example, the Wetzel County Landfill, before LTC purchased it in 1987, was operated by local West Virginians as an "open dump" for more than thirty years and no portion of the landfill had been closed in accordance with accepted environmental standards.

To be sure, West Virginia has come a long way since 1987 by enacting comprehensive solid waste management regulations regarding permitting, design, operation, and closure of sanitary landfills. Unfortunately, a large majority of the landfills and many of the publicly-owned landfills did not have the financial wherewithal

to meet their closure obligations under the new regulations. As will be discussed in more detail below, LTC's Wetzel County Landfill was not in that group.

The West Virginia Legislature enacted a special Landfill Closure Assistance Fund that used public monies to meet the landfill closure obligations for facility owners that did not have the money to pay for their own closure. W. Va. Code §§ 22-16-1, et seq. Portions of many landfills in West Virginia have been closed with the use of such public monies. LTC's Wetzel County Landfill is not one of them. LTC has met and will continue to meet its own closure obligations, paying its own way and not using public funds.

Notwithstanding representations in the Petition to the contrary, LTC has not been derelict in meeting its landfill closure obligations. In fact, LTC is up-to-date on its DEP closure obligations. In that regard, PSC Staff in a March 27, 2009 Staff Memorandum in the underlying case wrote: "LTC is up-to-date on all of its closure activities and has posted a $676,000 surety bond as required by DEP for that purpose."

In that same Memorandum, PSC staff further wrote that DEP:

> Permitting Rule 3.13 requires the funds necessary to meet the costs of closure...will be available when needed. Further, Permitting Rule 3.13.c.1.A states that a surety bond is an acceptable type of financial assurance. LTC currently has a surety bond posted with DEP for $676,000 to meet closure/post-closure requirements. Staff does not believe LTC to be in violation of Permitting Rule.

It must be understood that a landfill does not close all at one time when the landfill is completely full. Rather, closure occurs in "phases." The way it works under

DEP regulations is that as part of the permitting process, a closure plan is submitted that provides for the closure of older disposal cells that have been filled while other disposal cells remain active and available for the disposal of solid waste. This "phased closing" method assures that when a landfill becomes one hundred percent full, only a small portion of that landfill remains to be closed or capped. In short, the current regulations require a landfill owner to "close as it goes."

For decades, West Virginia landfill owners did not meet their closure obligations and therefore, the current landfill owners, such as LTC, are obligated to pay for the "sins of the past" as it relates to closure. This is exactly what has happened at the Wetzel County Landfill. The former West Virginia owners disposed of waste at the Wetzel County Landfill for more than thirty years without meeting any closure obligations. That burden has fallen on LTC which it has accepted.

At all times since the Wetzel County Landfill received its first DEP Solid Waste Facility Permit in November 1992, with subsequent DEP Permit Renewals in 1998, 2004 and 2009, LTC has had in place with DEP and the state a $676,000 landfill closure surety bond from an approved surety company (currently the Safeco Insurance Company of America, an A-rated surety company) to assure compliance with future closure and post-closure obligations [**See App. Ex. 1 at 3-9; Ex. 2 at 11-12**].

It is also undisputed that LTC is up-to-date with all of its closure obligations at the Wetzel County Landfill, having closed to DEP's satisfaction approximately eighteen acres of the landfill's active disposal area. LTC met these

closure obligations without any money having to be drawn against its $676,000 surety bond and without the establishment of a PSC closure escrow account.[25]

It was not until late 2001-early 2002 that the PSC became involved in establishing closure escrow accounts for West Virginia landfills. [**See, PSC Staff January 10, 2011 Memorandum of Law in the underlying case, p. 6**]. At that time, as a result of an Interagency Cooperation Memorandum between the DEP and the PSC, the PSC assumed some responsibility relating to landfill closure.

Specifically, under the Interagency Cooperation Memorandum, the PSC, with concurrence from the DEP, became responsible for establishing landfill closure escrow accounts to be funded prospectively by a per-ton surcharge on top of a landfill's PSC approved tariff, with such per-ton amount being deposited into a third party escrow account to guarantee the availability of funds, when needed, for future closure and post-closure obligations at the landfill.

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[25] As previously discussed and as noted by this Court, LTC and Mr. Mascaro have already made a considerable financial commitment to the Wetzel County Landfill and the West Virginia environment. Further demonstrative of that commitment is the sixteen years' worth of tax returns and financial statements LTC provided in response to WCSWA's discovery requests. Mr. Mascaro, as the sole shareholder in LTC, has made capital cash contributions to LTC and the Wetzel County Landfill in excess of $28 million. [**February 10, 2012 Discovery Binder, Ex. F and P, Tax Returns, Schedule L, Line 23; and Ex. M and O, Financial Statements, "Addition Paid in Capital"**]. A capital cash contribution is money paid by the shareholder for use by the corporation in running its business. It is not a loan or anything the corporation is obligated to repay. Capital cash contributions by a shareholder are not included in a utility's rate base and there is absolutely no detriment to West Virginia rate payers as the $28 million contributed by Mr. Mascaro over the last 25 years are not included in their rates. Accordingly, West Virginians get the full environmental and operational benefit of Mr. Mascaro's capital cash contributions without having even a penny of those contributions recovered through the landfill disposal rates paid.

Essentially, under the Interagency Cooperation Memorandum, it is the DEP and PSC jointly who have the responsibility for landfill closure bonding/financial assurance, but still, local solid waste authorities, such as the WCSWA, have no duties, responsibilities and/or obligations relating to the establishment of a landfill closure escrow account.

When established by the PSC, landfill closure escrow account agreements have always provided for the closure escrow accounts to be funded "prospectively" from current landfill revenues with the required per-ton escrow amount being an addition to the landfill's PSC approved tariff disposal rate. The PSC closure escrow accounts are not funded "retroactively" for waste that has already been disposed of at the landfill.

No landfill in West Virginia has had to "retroactively fund" its closure escrow account, nor should LTC be required to do so. This is particularly true since LTC is up-to-date on its DEP "phased closure obligations;" since LTC already has a $676,000 surety bond posted with DEP and the state to guarantee future phased closure obligations at the landfill; and since LTC has already assumed the financial obligations related to the "past closure sins" of the former owners of the Wetzel County Landfill who disposed of waste for more than thirty years without closing or making any provisions for the proper environmental closure of the Landfill disposal areas.

LTC's March 2004 DEP Permit Renewal on its face provided for a $676,000 closure bond "to be replaced by an escrow account that will be deemed acceptable to the DEP and PSC." [**See App. Ex. 1 at 7-9**].

Consistent with this requirement that first appeared in LTC's 2004 Permit Renewal, the PSC by letter dated November 7, 2003 advised LTC that after consultation with DEP it desired the establishment of a landfill closure escrow account to be funded prospectively at the rate of $1.53 per ton, with the $676,000 closure surety bond already in place to be released once the escrow account accumulated sufficient funds. [**See App. Ex. 3 at 14-15**].

In that letter, LTC was requested to sign a landfill Closure Escrow Account Agreement for a prospective $1.53 per ton escrow amount and to return the signed Agreement to the PSC. [**See Ex. 3 at 17-24 for a copy of the Closure Escrow Account Agreement LTC was requested to sign**].

Attached as part of App. Ex. 3 are the follow-up correspondences submitted by LTC to the PSC and DEP that show that LTC did sign and timely return to the PSC the requested Closure Escrow Account Agreement. [**App. Ex. 3 at 16, 27-31**].

LTC does not know why the submitted Closure Escrow Account Agreement was not acted upon by the PSC, but the fact remains that LTC, in compliance with its 2004 Permit Renewal and with the letter request of PSC Staff, did sign and submit to the PSC the Closure Escrow Account Agreement that the PSC Staff and DEP agreed upon. Since 2003, LTC has been agreeable and remains agreeable to establishing a landfill closure escrow account.

In that regard, LTC, as part of its 2007 Rate Case, executed a Stipulation of Settlement Agreement with PSC staff that provided for the establishment and funding of a closure escrow account for the Wetzel County Landfill, which Stipulation and

Settlement Agreement was largely based upon the $1.53 per ton closure amount previously agreed to between the DEP and PSC and contained in the signed Closure Escrow Account Agreement previously submitted by LTC to the PSC in December 2003. [**See App. Ex. 4 - 2007 at 33 Stipulation of Settlement Agreement, ¶¶ 2 and 3, and Ex. B attached thereto**].

As noted above, although that Rate Case did not proceed to its conclusion, the PSC could have provided, but did not provide, to LTC for signature its standard Closure Escrow Account Agreement in the per-ton dollar amount referenced in the signed "Stipulation of Settlement."

Lastly, pursuant to a Commission Order in the underlying case, LTC in a February 14, 2012 letter to counsel for the WCSWA, advised the PSC and the WCSWA that LTC's plan for the establishing and funding of a closure escrow account was the same as that which was agreed to by LTC and PSC staff in the September 17, 2007 Stipulation of Settlement Agreement and that LTC remained ready and willing to execute a PSC closure escrow account agreement as previously agreed in the "Stipulation of Settlement." [**See App. Ex. 5 at 46-47**].

The Petitioners would have this Court believe that from the time in November 2003 that the PSC first requested LTC to execute a Closure Escrow Account Agreement with a prospective escrow amount of $1.53 per ton (which LTC promptly did) that SWS has disposed of large volumes of waste at the Wetzel County Landfill. However, the detailed discovery information that LTC and SWS have already provided to the WCSWA in the underlying proceeding shows that not to be the case.

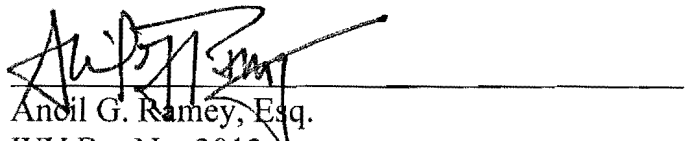
For the years 2006, 2007, 2008, 2009, 2010 and 2011, ***SWS disposed of no waste at the Wetzel County Landfill.*** In 2004, SWS disposed of only 7,030 tons at the Wetzel County Landfill, and in 2005 SWS disposed of only 1,668 tons at the Landfill. [**See February 10, 2012 Discovery Binder, Answer to WCSWA's Revised Discovery Request No. 1 and Ex. A attached thereto**]. In each of those years the total annual permitted tonnage for the Landfill was 119,988 tons. In reality, SWS has made almost no use of the Wetzel County Landfill since the end of 2003.

VI. CONCLUSION

Respondents request that this Court decline to issue a rule to show cause either with prejudice for the reasons discussed in this Response or, in the alternative, without prejudice to Petitioners to seek relief under W. Va. Code § 24-2-10

LACKAWANNA TRANSPORT CO.;
SOLID WASTE SERVICES, INC.; and
PASQUALE MASCARO

By Counsel



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VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, TO-WIT:

I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing RESPONSE TO PETITION FOR WRIT OF MANDAMUS, that the factual representations contained therein are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

Ancil G. Ramey

Taken, subscribed and sworn to before me this 30th day of May, 2012.

My commission expires: February 7, 2021

Official Seal
Notary Public, State of West Virginia
Lisa A. Ruley
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Huntington, WV 25701
My commission expires February 7, 2021

Lisa A. Ruley
Notary Public

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on May 30, 2012, I served the foregoing "RESPONSE TO PETITION FOR WRIT OF MANDAMUS" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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