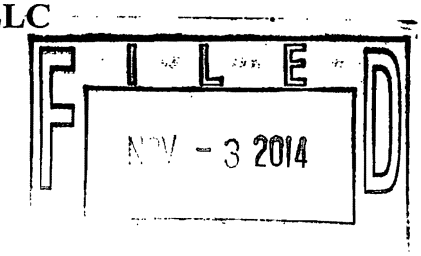
14-1136

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case Nos. 13-1662-MC-30E, 13-1663-MC-30E, 13-1664-MC-30E,
13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E
13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and
13-1672-MC-30E

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC
d/b/a REPUBLIC SERVICES OF WEST VIRGINIA,



PETITION ON BEHALF OF ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA

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November 3, 2014

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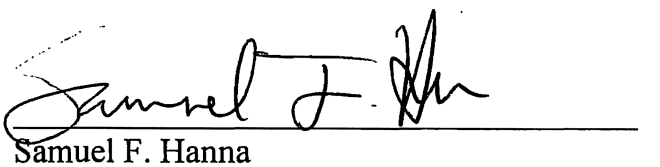
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case Nos. 13-1662-MC-30E, 13-1663-MC-30E, 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA,

CERTIFICATION

I, Samuel F. Hanna, counsel for the Petitioner do hereby certify that the contents of the appendix are true and accurate copies of items contained in the record of the West Virginia Public Service Commission and that I have conferred in good faith with all parties to this matter in order to determine the contents of the appendix.



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November 3, 2014

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Case Nos. 13-1662-MC-30E, 13-1663-MC-30E, 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA,

BRIEF ON BEHALF OF PETITIONER ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA

Assignments Of Error

This is an appeal from the Commission Order of October 3, 2014, which denied the Petition For Reconsideration of Allied Waste Services of North America, LLC d/b/a Republic Services of West Virginia (Allied or Petitioner) and affirmed the Commission Order of November 14, 2013. In the Commission Order of October 3, 2014, the first assignment of error is the Conclusion Of Law in which the Public Service Commission (or Commission) stated that, "Because the arguments presented by Allied do not warrant any change in our Order of November 14, 2013, the Commission will deny the Petition For Reconsideration."

The second assignment of error in the Commission Order of October 3, 2014 is under the ORDER section that stated, " IT IS THEREFORE ORDERED that the November 25, 2013, Petition For Reconsideration is denied. The Commission Order of November 14, 2013, remains in full force and effect."

Because the Commission Order of October 3, 2014, referenced the Commission Order of November 14, 2013, and held that it was in full force and effect, the third assignment of

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA,

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Because the Commission Order of October 3, 2014, referenced the Commission Order of November 14, 2013, and held that it was in full force and effect, the third assignment of

error is contained in the November 14, 2013, Commission Order in the Conclusions Of Law which states,

> "1. In Case Nos. 13-1662-MC-30E (Certificate No. F-4865) and 13-1663-MC-30E, (Certificate No. F-4879) Allied failed to report to the Commission, as required by Tariff Rule 33.7.f, a reduction in the rate it paid at MTS, resulting in an overcharge to its customers under Certificate Nos. F-4865, F-4879.
>
> 2. It is reasonable to require Allied to credit its tariff by $0.47 per monthly residential bill and 1.84 percent on commercial bills effective October 8, 2013, an amount equal to the 30E surcharge increase granted to Allied in the Commission Order dated November 13, 2013.
>
> 3. It is reasonable to deny the Rule 30E applications of Allied in Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E."

It is the position of the Petitioner that the Public Service Commission erred in each of the aforementioned Conclusions Of Law and in the ORDER section of the Commission Order of November 14, 2013, when it was stated that,

> "IT IS THEREFORE ORDERED that Case Nos. 13-1662-MC-30E and 13-1663-MC-30E are reopened and modified as set forth in this Order. As a closed entry in this case, Allied shall file notice that it has completed a return of the overcharge.
>
> IT IS FURTHER ORDERED that the 30E applications filed by Allied Waste Services of North America, LLC in Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E are denied."

Statement of Case

On November 1, 2013, Allied filed M.C. Rule 30E applications for the following Motor Carrier Certificates: P.S.C. M.C. Certificate Nos. F-4865 (designated Case No. 13-1662-MC-30E), F-4879 (designated as Case No. 13-1663-MC-30E), F-5619 (designated as

Case No. 13-1664-MC-30E), F-5620 (designated as Case No. 13-1665-MC-30E), F-7737 (designated as Case No. 13-1666-MC-30E), F-7439 (designated as Case No. 13-1668-MC-30E), F-7498 (designated as Case No. 13-1669-MC-30E), and Permit Nos. H-10155 (designated as Case No. 13-1670-MC-30E), H-10824 (designated as Case No. 13-1671-MC-30E), and H-10840[1] (designated as Case No. 13-1672-MC-30E). (Exhibit 4 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1). In addition, Allied filed a Motion For Protective Order to prevent disclosure of confidential business information.

The aforementioned applications were based upon the fact that tipping rates at the Mountaineer Transfer Station (MTS) which Allied was using increased effective October 8, 2013, from $45.35 per ton to $62.25 per ton for P.S.C. M.C. Certificate F-5619, F- 5620, F-7337, F-F-7439 and F-7498 and Permit Nos. H-10155, H-10824 and H-10840; and from $58.35 per ton to $62.25 per ton for P.S.C. M.C. Certificate Nos. F-4865, and F-4879.

On November 8, 2013, the Commission Staff filed its Initial and Final Joint Staff memorandum in which it recommended that the 30E applications for Certificate Nos. F-4865 and F-4879 be approved. (Appendix 2). Staff recommended a surcharge be approved and an order entered allowing the imposition of a monthly surcharge of $0.47 on residential bills and 1.84 percent on commercial bills effective October 8, 2013. Staff recommended that the

---

[1] In its November 1, 2013 application, Allied stated that it was applying for a surcharge for Permit No. H-10864. This designation had previously appeared in cases involving the applicant's predecessor, BFI Waste Systems of America, Inc., and on Allied's tariff relating to a contract for solid waste disposal with the Town of Worthington, Marion County. Commission records indicate, however, that the correct permit designation for the contract the applicant has with the Town of Worthington is Permit No. H-10840. The Commission restyled the instant proceeding to include the proper permit designation.

30 E applications for Certificate Nos. F-5619, F- 5620, F-7337, F-F-7439, F-7498 and Permit Nos. H-10155, H-10824 and H-10840 be denied. Staff stated that the waste streams from these latter certificates and permits were previously deposited at Meadowfill Landfill, Inc. (Meadowfill) and S&S Landfill, Inc. (S&S) at an average weighted rate of $45.44 per ton. The rate per ton currently charged by MTS is $62.25.

By Commission Final Order dated November 13, 2013 (Exhibit 5 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), the Commission authorized Allied to place a monthly surcharge of $0.47 on residential bills and 1.84 percent for commercial customers effective October 8, 2013 for P.S.C. M.C. Certificate Nos. F-4865 and F-4879 in Case Nos. 13-1662-MC-30E and 13-1663-MC-30E.

However, by Commission Order dated November 14, 2013 (Exhibit 6 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), the Commission reopened Case Nos. 13-1662-MC-30E and 13-1663-MC-30E. As previously stated, the first, second and third Conclusions Of Law in the Order of November 14, 2014, stated,

> "1. In Case Nos. 13-1662-MC-30E (Certificate No. F-4865) and 13-1663-MC-30E, (Certificate No. F-4879) Allied failed to report to the Commission, as required by Tariff Rule 33.7.f, a reduction in the rate it paid at MTS, resulting in an overcharge to its customers under Certificate Nos. F-4865, F-4879.
>
> 2. It is reasonable to require Allied to credit its tariff by $0.47 per monthly residential bill and 1.84 percent on commercial bills effective October 8, 2013, an amount equal to the 30E surcharge increase granted to Allied in the Commission Order dated November 13, 2013.
>
> 3. It is reasonable to deny the Rule 30E applications of Allied in Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-

30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E."

The Commission Order of November 14, 2013, then ordered as follows:

> "IT IS THEREFORE ORDERED that Case Nos. 13-1662-MC-30E and 13-1663-MC-30E are reopened and modified as set forth in this Order. As a closed entry in this case, Allied shall file notice that it has completed a return of the overcharge.
>
> IT IS FURTHER ORDERED that the 30E applications filed by Allied Waste Services of North America, LLC, in Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E are denied."

On November 25, 2013, Allied filed a Petition For Reconsideration of all of these cases. (Exhibit 7 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1) .

On April 1, 2014, the Commission held a hearing on the Petition For Reconsideration.(Appendix 1). The respective parties appeared at the hearing and submitted evidence and post-hearing briefs. By Commission Order dated October 3, 2014, the Commission denied Allied's Petition For Reconsideration of the Commission Order of November 14, 2013, and held that the Commission Order of November 14, 2013, remains in full force and effect. (Appendix 3). It is from this decision that the Petitioner appeals.

Summary Of Argument

The West Virginia Legislature has codified what is required under a 30E filing in W. Va. Code §24A-2-4a which states:

> "Any common carrier transporting solid waste in this state pursuant to authority granted under section five [§24A-2-5], article two, chapter twenty-

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

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

Allied purchased Certificate Nos. F-4865 and F-4879 from Suburban Sanitation, Inc. which was finalized by Recommended Decision entered on July 11, 2011, in Case Nos. 10-1757-MC-TC and 10-1758-MC-TC. Suburban Sanitation, Inc. was taking its waste under these certificates to Meadowfill which has a tip fee of $45.35 per ton. When Allied purchased these certificates, it began to take its waste to MTS and ultimately to Short Creek Landfill which has a tip fee of $36.50 per ton. Consequently, there was no reduction in the tipping fee of the landfill Allied was using, and which had been the basis for a prior 30E increase, and therefore no refund should be authorized.

Regarding Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E for P.S.C. Certificates Nos. F-5619, F-5620, F-7337, F-7439, F-7498, and Permit Nos. H-10155, H-10824 and H-10840 a representative of Allied, Keith Koebley, testified at the evidentiary hearing that the reason Allied used MTS was because it was in the middle of Allied's certificated area and that the turn around time was quicker at MTS than to take the trash to Meadowfill. In addition, as previously stated, W. Va. Code §24A-2-4a in part states that "Any common carrier transporting solid waste in this state...may make application to the commission for approval of a rate surcharge to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed by the motor carrier." That is exactly what Allied did. The Public Service Commission has no authority to dictate to Allied that it must use a certain solid waste facility, and if it fails to do so, any 30E rate increase application based upon taking the waste to another solid waste facility will be denied.

Statement Regarding Oral Argument And Decision

The Petitioner believes that oral argument is necessary pursuant to Rule 20 as it involves the interpretation of a statute which the Petitioner believes is a case involving an issue of first impression. Further, this case involves an issue of fundamental public importance as it pertains to all motor carriers of the State of West Virginia.

Argument

Where an administrative agency is required to find facts or state reasons for the basis for its order, the order must contain findings of fact rather than conclusory statements so as

to withstand judicial scrutiny. Mountain Trucking Company v. Public Service Commission, 158 W. Va. 958, 216 SE2d 566, 1975 WV LEXIS 252 (1975).

The standard of review followed by the West Virginia Supreme Court of Appeals establishes a three-pronged analysis which focuses on (1) whether the Public Service Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commissions findings; and (3) whether the substantive result of the Commission's order is proper. C & P Telephone Company v. Public Service Commission, 175 W. Va. 494, 300 SE2d 607, 1982, WV LEXIS 687 (1982).

In reviewing a Public Service Commission order, the Court first determines whether the Commission's order abused or exceeded the authority granted to the Commission. The Court examines the manner in which the Commission has employed the methods of regulation which it has itself selected, and it must decide whether each of the order's essential elements is supported by substantial evidence. Finally, the Court determines whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. Cox v. Public Serv. Comm'n, 188 W. Va. 736, 426 SE2d 528, 1992 WV LEXIS 268 (1992).

The Public Service Commission is not a super board of directors for the public utility company in the state and has no right of management. The Commission is not the financial manager of the corporation and is not empowered to substitute its judgment for that of the

directors of the corporation; nor can it ignore items charged by the utilities operating expenses unless there is an abuse of discretion in that regard by the corporate officers. United Fuel Gas Company v. Public Service Commission, 154 W. Va. 221, 174 SE2d 304 1969 WV LEXIS 153 (1969).

The Public Service Commission has no inherent jurisdiction, power or authority and can exercise only such jurisdiction, power or authority as is authorized by statute. Eureka Pipe Line Company v. Public Service Commission, 148 W. Va. 674, 137 SE2d 200 (1964).

The Public Service Commission derives its authority and jurisdiction wholly from statute and has no arbitrary discretion, so that its powers are not to be exercised in a manner that is controlled by what, in its judgment, the expediency of the situation with what it is confronted requires. Atlantic Greyhound Corporation v. Public Service Commission, 132 W. Va. 650, 54 SE2d 169 (1949); Bridgeport v. Public Service Commission, 125 W. Va. 342, 24 SE2d 285 (1943). As the Public Service Commission operates only by virtue of statutory mandate and as its powers and duties are set forth specifically in the statutes governing its operation, the Commission has no inherent power to operate in a manner contrary to its own statutory mandate. VEPCO v. Public Service Commission, 162 W. Va. 202, 248 SE2d 322 (1978).

Regarding the construction of statutes, where the legislative language is free from ambiguity, its plain meaning must be accepted by the Courts without resort to the rules of interpretation or construction. Nor is it within the power of the Court to create an ambiguity in the statute, where none exists, for the purpose of reading into it by means of interpretation

or construction a meaning that which is refuted by the clear language of the statute itself. State v. Garner, 148 W. Va. 92, 133 SE2d 82 (1963).

Where the language in a statute is unambiguous, no ambiguity can be authorized by interpretation. Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it. Crockett v. Andrews, 153 W. Va. 714, 172 SE2d 384 (1970).

Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation. State ex rel. Underwood v. Silverstein, 167 W. Va. 121, 278 SE2d 886 (1981).

Where a statute is clear and unambiguous, it should be applied and not construed or interpreted. UMW v. Miller, 170 W. Va. 177, 291 SE 2d 673 (1982).

In this case, the Petitioner contends that the Public Service Commission exceeded its statutory jurisdiction and powers, was without adequate evidence to support the Commission's findings in both the Commission Order of October 3, 2014 (Appendix 4) and also the Commission Order of November 14, 2013 (Exhibit No. 6 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), and the substantive result of the aforementioned Commission's Orders are not proper.

Assignment of Error 1: The Commission erred in the October 3, 2014 Order when it denied Allied's Petition for Reconsideration and ordered that the November 14, 2013 Commission Order remain in full force and effect. Because the Commission affirmed the

findings and conclusions in the Commission Order of November 14, 2013, the assignment of errors contained therein will be discussed below.

Assignment of Error 2: The Commission erred in the November 14, 2013 Commission Order under the Conclusions Of Law when it stated as follows:

> "1. In Case Nos. 13-1662-MC-30E (Certificate No. F-4865) and 13-1663-MC-30E, (Certificate No. F-4879) Allied failed to report to the Commission, as required by Tariff Rule 33.7.f, a reduction in the rate it paid at MTS, resulting in an overcharge to its customers under Certificate Nos. F-4865, F-4879.
>
> 2. It is reasonable to require Allied to credit its tariff by $0.47 per monthly residential bill and 1.84 percent on commercial bills effective October 8, 2013, an amount equal to the 30E surcharge increase granted to Allied in the Commission Order dated November 13, 2013.

In the Commission Order of November 14, 2013 (Exhibit 6 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), the Commission uses Tariff Rule 33.7.f as the sole authority for requiring a hauler to file a 30E application for a reduction in the tip fee of the solid waste facility it uses. However, Tariff Rule 33.7.f mandates, "When any motor carrier which has increased its rates pursuant to proceedings under this rule receives a reduction, or a refund on the tip fees of any commercial solid waste facilities whose rates and charges were the basis for the rate increase proceedings under this rule, it shall report promptly to this Commission the new reduced rates and charges so ordered from an annual savings and costs resulting to the motor carrier from such reduction from the date said commercial solid waste facility increased its rates under this rule, with the amount of refund in the period to which it relates." (emphasis added). Moreover, W. Va. Code §24A-

2-4a entitled Motor Carrier transporting solid waste; pass through of landfill tip fees as rate surcharge, which gives the Public Service Commission its sole authority over 30E applications of common carriers, states as follows,

> "Any common carrier transporting solid waste in this state pursuant to authority granted under section five [§24A-2-5], article two, chapter twenty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, may make application to the commission for approval of a rate surcharge to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed by the motor carrier, commonly known as the tip fee, to commercial and residential customers, including increases which are the direct result of fees, charges, taxes, or any other assessment imposed upon the landfill by a governmental body. The commission shall within fourteen days of receipt of said application notify the motor carrier of approval of the request rate surcharge, or approval of a rate surcharge other than in the amount requested and the reason therefor. The effective date of the approved rate surcharge shall be the same date as the effective date of the increase in the tip fee to which the surcharge relates; except that in the event the application for approval of the rate surcharge is received by the commission more than sixty days after the effective date of the tip fee increase, then the effective date of the approved rate surcharge shall be the date said application was received by the commission.
>
> The commission shall immediately promulgate emergency rules which set forth the procedures for the filing of the tip fee rate surcharge application. It is the purpose of this statute to provide an expedited process which will allow the subject motor carriers to pass through tip increases to all customers. Only that data necessary to review in accordance with this statute may be required by the commission to be submitted by the motor carrier." (emphasis added).

The doctrine of administrative interpretation will not be allowed to change the plain meaning of a statute. Hodge v. Ginsberg, 303 SE2d 245 (W.V. 1983). In this case, Tariff Rule 33.7.f is inconsistent with W. Va. Code §24A-2-4a. Tariff Rule 33.7.f does allow for a reduction in the rate of the carrier which had a decrease in the tip fee, but it is only in those

instances in which the tip fee was reduced in the same solid waste facility which was the basis for a rate increase under a 30E filing. That is not the case here. In addition, W. Va. §24A-2-4a which gives the Public Service Commission jurisdiction, as previously stated, over 30E applications pertains solely to increases in a tipping fee of a solid waste facility. Furthermore, as previously stated, W. Va. Code §24A-2-4(a) mandates that "Only that data necessary to review in accordance with this statute may be required by the Commission to be submitted by the motor carrier." As W. Va. Code §24A-2-4(a) only applies to an increase in tip fees and this is conceded by the Public Service Commission in the Commission Order of October 3, 2014 (Appendix 3, Page 4) the Public Service Commission cannot request information pertaining to a decrease in tip fees of a solid waste facility which was not the basis of a prior increase. However, Allied has not violated Tariff Rule 33.7.f because, as previously stated, it only pertains to a decrease in the tip fee of a specific solid waste facility which was the basis for a prior 30E increase, which is not present in Case Nos. 13-1662-MC-30E and 13-1663-MC-30E.

Allied purchased Certificate Nos. F-4865 and F-4879 from Suburban Sanitation, Inc. which was finalized by Recommended Decision entered on July 11, 2011 in Case Nos. 10-1757-MC-TC and 10-1758-MC-TC. (Exhibit 2 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1). Suburban Sanitation, Inc. was taking its waste under these certificates to Meadowfill which has a tip fee of $45.35 per ton. When Allied purchased these certificates, it began to take its waste to MTS and ultimately to Short Creek

Landfill which has a tip fee of $36.50 per ton. Consequently, there was no reduction in the tipping fee of the landfill Allied was using and which had been the basis for a prior 30E increase, and therefore no refund should be authorized. Furthermore, as set forth in the Pre-filed Direct Testimony of Keith Koebley (Allied Exhibit No. 1 of the Hearing Transcript designated as Appendix 1):

> "The statute does not state that the motor carrier must use the least expensive or the closest landfill to its operations. In fact, W. Va. Code 24A-2-4a specifically states that a motor carrier can file a 30E application "for approval of a rate surcharge to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed by the motor carrier." In this case, Allied chose to use Mountaineer Transfer Station not only because of the proximity to its operations but also because of the better service and reduced turn around time versus disposal at Meadowfill Landfill. The Commission does not have the authority to mandate that a motor carrier can only pass through a rate less than the disposal rate charged at the solid waste facility that it uses. In fact, in M.C. Case No. 26356-30E which was entered as a Final Order on February 21, 1995, this Commission allowed a 30E rate increase by General Refuse Service, Inc. which was taking it waste to Disposal Services Landfill but switched to Sycamore Landfill although the Sycamore Landfill was located only half mile away from the Disposal Services Landfill and had a higher tipping fee.
>
> As set forth in the confidential filing in these cases on November 11, 2013, the average time for disposal at Meadowfill Landfill is several times longer than the time for disposal at Mountaineer Transfer Station. This results in increased costs to Allied. Specifically, Mountaineer Transfer Station is located in Morgantown, West Virginia. Taking the waste under the certificates which are the subject of the 30E applications to Mountaineer Transfer Station allows for better service to customers as the turn around time for the Allied truck to dispose of the waste is decreased.
>
> In summary, according to W. Va. Code 24A-2-4a, a motor carrier is only required to file a 30E application if the landfill tipping fee has been increased. In this case, the landfill tipping fees had not increased from November 11, 2011 through October 8, 2013 (the dates of the alleged

overcharge) and therefore there was no requirement to file a 30E application at the Public Service Commission."

At the evidentiary hearing in this case, Mr. Koebley stated that Allied "assumed Suburban customers at their current rates and we didn't change them after we opened the transfer station because we weren't allowed to." (Appendix 1, Pg. 30). As set forth in the Recommended Decision in Case No. 10-1757-MC-TC and 10-1758-MC-TC entered on July 11, 2011, (Exhibit No. 2 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), the Administrative Law Judge ordered that "Allied Waste Services of North America, LLC charge existing Suburban Sanitation rates for services at the transfer station for a period of 18 months after it comes into service." MTS began to operate on November 7, 2011 and therefore Allied was ordered to charge the same rates as Suburban Sanitation, Inc. which were based upon the tip fee at Meadowfill for 18 months or until May 7, 2013.

Assignment of Error 3: The Commission erred in its November 14, 2013 (Exhibit No. 5 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1) Commission Order under it third Conclusion Of Law when it stated, "It is reasonable to deny the 30E applications in M.C. Case Nos. 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E."

The Commission Order of November 14, 2013 (Exhibit No. 5 attached to Allied Exhibit 1 of the Hearing Transcript designated as Appendix 1), denied these applications, as previously stated, for the following reason:

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

In Case No. 11-0239-SWF-CN, Allied indicated that it would adopt at MTS the same rates used by Suburban at the Station for at least eighteen months and not file for a rate increase for that period of time. Soon thereafter, Allied obtained a substantial rate increase for MTS in Case No. 12-1532-SWF-42A. Even if Allied was not aware of precisely the level of rate increase it would need at MTS, Allied exposed its customers to that rate increase solely on the basis of its own decision to dispose of its solid waste at MTS instead of the landfills it had previously used. The Commission will, therefore, deny the 30E application of Allied with regard to Certificate Nos. F-5619, F-5620, F-7337, F-7439, F-7498, and Permit Nos. H-10155, H-10824 and H-10840. The Commission believes the request for a rate increase in these cases should instead be submitted and reviewed in a general Rule 42 rate filing."

As testified to by Keith Koebley at the evidentiary hearing, MTS is in the center of Morgantown, and "we are able to service our customers a lot faster. Our turn around time is much faster because of our location. Instead of going south to Fairmont, right in the middle of our business - our core business, so we are able to get there and service our customers. So yes, its faster, its more efficient, the service is better for our customers and we don't expend as much cost doing it." (Appendix 1, Transcript Pgs. 33, 34). In addition, in the Pre-filed Rebuttal Testimony of Keith Koebley To Direct Testimony of J.W. Flenner (Allied Exhibit No. 2 of the Hearing Transcript designated as Appendix 1) Mr. Koebley testified as follows:

"Q. Do you disagree with any of the other direct testimony of Mr. Flenner?

A. Yes. On page seven the question was asked, "Did the Commission suggest another method for Allied to recover the higher tipping fee at MTS?" Mr. Flenner answered, "Yes, the Commission stated that a rate increase for these certificates should be submitted and considered in a Rule 42 rate filing." However, Allied should not have to go through a Rule 42 rate increase which the Commission knows is very costly and time intensive. The purpose behind W. Va. Code §24A-2-4a was to allow motor carriers to easily and quickly recoup increased tipping fees at landfills in which the motor carrier deposits solid waste. Allied did that in this case and would request that the Commission approve the 30E applications. In addition, Mr. Flenner was asked on page 7 of his direct testimony, "In its petition for reconsideration, Allied claims it is more economical for it to dispose of waste at MTS rather than directly at the Meadowfill or S&S landfills. Is that a factor to be considered in a Rule 30E case?" Mr. Flenner answered, "M.C. Tariff Rule 30E cases deal solely with the recovery by waste haulers of increases in tip fees charged by solid waste disposal facilities where the waste hauler has no choice other than to pay the increased charge. Issues relating to whether the use of one facility over another is more economical are best dealt with in a different type of proceeding, as the Commission noted in its order." Mr. Flenner really did not answer the question which was should economics be a factor to be considered in a Rule 30E case? I have reviewed W. Va. Code §24A-4-2-4a dealing with tip fees and cannot find where "issues relating to whether the use of one facility or another is more economical are best dealt with in a different type of proceeding." W. Va. Code §24A-2-4a states, "Any motor carrier transporting solid waste in this state...may make application to the Commission for approval of a rate surcharge to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed of by the motor carrier..." (emphasis added). That is what Allied did. Allied is a motor carrier that asked for approval of a rate surcharge to pass through an increase in the disposal rated charged by the landfill in which it disposes of its solid waste.

Q. Do you have any other comments?

A. Yes. I don't agree with Mr. Flenner's opinion on page eight of his direct testimony that the Commission is not engaging in flow control by denying a 30E surcharge for these certificates. By denying the ability of Allied to charge its customers the tipping fee at Short Creek Landfill, the Commission effectively is forcing Allied to take its waste to another solid waste facility. This is flow control as the Commission will economically dictate where Allied can take its waste. Moreover, Mr. Flenner on that same page of his direct testimony states that, "The Commission simply believed that M.C.

> Tariff Rule 30E did not apply in this particular situation because the requested increase in rates was not an increase in a rate previously provided for under the various certificates and permits." However, as I previously state, W. Va. Code §24A-2-4a dealing with tipping fees states that any common carrier may make application to the Commission for approval of a rate increase to pass through any increase in the disposal rate charged by the landfill at which solid waste is disposed of by the motor carrier. There is no provision that the increase must be for a rate previously provided for under various certificates and permits issued by the Public Service Commission." (pgs. 2-4).

It should be noted that there is a West Virginia statute providing for a solid waste facility to control the flow of solid waste within a certain geographic area which must be approved by the Commission (W. Va. Code §24-2-1h) but this is not that type of proceeding. In fact, 30E applications should never be used by the Public Service Commission to engage in flow control and to force a carrier to use a specific landfill which was not the basis for the filing.

In the Pre-filed Direct Testimony of Keith Koebley (Allied Exhibit No. 1 of the Hearing Transcript designated as Appendix 1), Mr. Koebley stated that in M.C. Case No. 26356-30E which was entered as a Final Order on February 21, 1995, this Commission allowed a 30E rate increase by General Refuse, Inc. which was taking its waste to Disposal Services Landfill but switched to Sycamore Landfill although the Sycamore Landfill was located only a half mile away from the Disposal Services Landfill and had a higher tipping fee. Although the Public Service Commission tries to distinguish the General Refuse case in the Commission Order of October 3, 2014, by saying that General Refuse switched landfills because a "threat" existed in which a solid waste facility was attempting to force

General Refuse into signing a contract (Appendix 3, Pg. 5), the Public Service Commission could have mandated that the landfill not force General Refuse into signing a contract. It has long been the policy of the Public Service Commission that solid waste facilities cannot force customers into signing a contract in order to use that landfill. Therefore, the General Refuse case is not distinguishable but shows that there is Commission precedence for allowing a solid waste carrier to use a solid waste facility that has a higher tip fee than one which has a lower tip fee and is close in proximity.

Mr. Koebley testified at the evidentiary hearing in this matter that Allied is losing money on the disposal "right now because we haven't been able to pass through that disposal increase." (Appendix 1, Transcript pg. 38). He further testified that about a quarter of the volume going to MTS is non-Allied customers. (Appendix 1, Transcript pg. 26). Consequently, if Allied is forced to take its waste to Meadowfill instead of MTS, then approximately 75% of the volume of trash at MTS will be diverted. Obviously, this would result in either MTS going out of business or another Rule 42 application being filed with a huge increase in rates at MTS. The Court should not force this to happen.

In fact, as set forth in Exhibit 3 of the Hearing Transcript designated as Appendix 1, the Administrative Law made the following Findings Of Fact regarding the rate increase of MTS,

> 2. "The old transfer station operated by Suburban was deplorable. It was an area that was next to a strip mall. There were environmental issues related to the old transfer station and the West Virginia Department of Environmental Protection was investigating the issue. The applicant did not want to assume the environmental problems at the old transfer station site. (Transcript Pgs. 47, 57).

> 3. The Applicant purchased the certificate from Suburban Sanitation then opened a brand new state of the art transfer station, investing $5,400,000.00 in land and buildings and bringing in $400,000.00 worth of new equipment." (Transcript Pg. 27, 46).

As such, Allied has provided a much improved disposal site for the community compared to the transfer station that Suburban Sanitation, Inc. had and Allied should be able to pass those costs to the customers since they are the ones benefitting from the investment. Mr. Koebley testified at the hearing in these cases that Allied spent approximately $10,000,000.00 in purchasing Suburban Sanitation, Inc.'s certificates and building a new transfer station. (Appendix 1, Transcript Pg. 44). As set forth in Exhibit 3 attached to Allied Exhibit 1 attached to Appendix 1, MTS was losing $870,345.00 each year. (Pg.5). Mr. Koebley testified that even though there was an 18 month moratorium on increasing the rates at MTS it actually took 23 months from the time of the application until the time that the Commission finally approved the rates. (Appendix 1 Transcript Pg. 45). Consequently, MTS had already lost approximately 1.8 million dollars waiting for the Commission to increase the rates at MTS. Now, after all of this, the Commission is wanting Allied to refund to its customers an additional $383,277.00 for using MTS and taking the waste to Short Creek Landfill. Moreover, the Rule 42 application of MTS, which was ultimately approved, included waste from all of the Allied and Suburban Sanitation, Inc.'s certificates, which, as previously stated, Allied purchased. However, now the Public Service Commission is not allowing Allied to take its waste to MTS.

Further, and very importantly, Mr. Koebley testified at the evidentiary hearing that the waste disposed of at Short Creek Landfill from MTS is taken in a tipper, which is a container that uses hydraulics to empty the waste. Mr. Koebley stated that "and even though Short Creek is cheaper, it is substantially higher- more cost to get it there than to take it to Meadowfill. And Meadowfill does not have a tipper. So we will not be able to dispose of our waste at Meadowfill even if we took it there because they don't have a tipper. We have a tipper at Short Creek." (Appendix 1, Transcript Pg. 32, 33).

Mr. Koebley then testified as follows:

Question: But you could haul the waste to Meadowfill Landfill?

Answer: We wouldn't be able to unload it, though.

Question: If it went to the transfer station first?

Answer: If it went to the transfer station on a tipping trailer we couldn't unload it at Meadowfill because they do not have a tipper. (Appendix 1, Transcript Pg. 33).

Mr. Koebley stated that if Allied was economically forced to take its waste to Meadowfill by denying the 30E applications, Allied would have to change its operations and "we would have to go out and invest in a whole new fleet of trucks." (Appendix 1, Transcript Pg. 48). Mr. Koebley stated that the Public Service Commission had approved a charge for Allied to use the tipper. (Appendix 1, Transcript pg. 49, 50). Mr. Koebley explained that it was economically beneficial to use a tipper as a "garbage truck usually carries between 5, 6 tons. Our tipper can carry up to 20 tons. So it kinda is going to make

sense that you would use a transfer station, transload the material, put it on one trailer and take it to the landfill instead of having the garbage trucks drive that far. Drive to Meadowfill. Drive to Short Creek. That had to be much more time consuming." (Appendix 1, Transcript pg. 50). Consequently, by approving a 30E surcharge for the Allied certificates to take waste from the MTS to the Short Creek Landfill would allow Allied to conduct business the way it always has been by using a tipper and, as previously stated, Allied can transport approximately 4 times the trash in a tipper as compared to conventional methods.

Finally, Allied should not be forced to file a Rule 42 application solely because its 30E applications were denied. Even Mr. Flenner at the evidentiary hearing in this matter stated that a Rule 42 filing is more cumbersome, expensive and time consuming than a standard 30E application. (Appendix 1,Transcript pg. 74-76). The purpose of the 30E applications was to pass through increases in tip fees from commercial solid waste facilities on an expedited basis and that is exactly what Allied has tried to do in these cases.

These cases are a perfect example of the Public Service Commission trying to become a board of directors or managers of Allied and this Court should not allow this to happen.

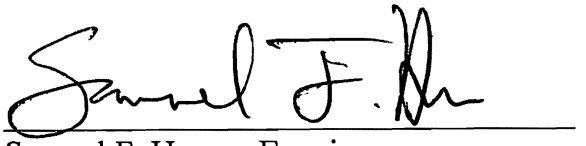
Conclusion

The Petitioner prays that the Commission Order of October 3, 2014 be reversed, that the Commission Order of November 14, 2013 be reversed, and that the 30E applications in Case Nos. 13-1662-MC-30E, 13-1663-MC-30E, 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E, 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-

MC-30E be granted, that the refunds ordered in Case Nos. 13-1662-MC-30E and 13-1663-MC-30E be reversed and for such further relief as this Court deems fit and proper.

Respectfully submitted,

Allied Waste Services of North America, LLC
d/b/a Republic Services of West Virginia
By Counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case Nos. 13-1662-MC-30E, 13-1663-MC-30E, 13-1664-MC-30E, 13-1665-MC-30E, 13-1666-MC-30E, 13-1668-MC-30E 13-1669-MC-30E, 13-1670-MC-30E, 13-1671-MC-30E and 13-1672-MC-30E

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA,

CERTIFICATE OF SERVICE

I, SAMUEL F. HANNA, counsel for Allied Waste Services of North America, LLC d/b/a Republic Services of West Virginia, do hereby certify that service of the foregoing **PETITION ON BEHALF OF ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA** has been made upon the following party by depositing same, postage prepaid, on this the **3rd day of November, 2014:**

Andrew Smith
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Morgantown, WV 26505

and via hand delivery to:

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