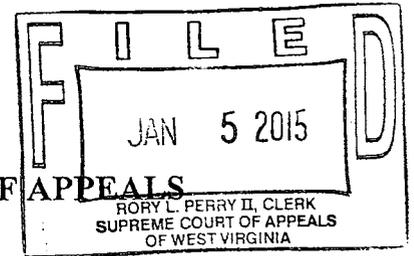


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



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,

REPLY BRIEF ON BEHALF OF PETITIONER ALLIED WASTE SERVICES
OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA
TO THE STATEMENT OF THE RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF OCTOBER 3, 2014

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Statement of the Case

To begin with, it is interesting to note that counsel for the Respondent in the Statement Of The Respondent Public Service Commission Of West Virginia Of Its Reasons For The Entry Of Its Order Of October 3, 2014 (Statement of Reasons) under Statement of the Case, when discussing West Virginia Code §24A-2-4a entitled Motor carriers transporting solid waste; pass through of landfill tip fees as rate surcharge, states, “By its express terms, the statute intended to create an expedited process for a motor carrier to recover increases ‘in the disposal rate charged by the landfill at which the solid waste is disposed by the motor carrier, commonly known as the tip fee’. W. Va. Code 24A-2-4a. In considering the intent of the statute, it is important to note that the legislation does not deal with the situation where the tip fee decreases either at the landfill used by the motor carrier or because the motor carrier switches to another landfill.” (pg. 3). Allied Waste Services of North America, LLC d/b/a Republic Services of West Virginia (Allied) agrees with this statement. W. Va. Code §24A-

2-4a allows a motor carrier to pass-through an increase in the tipping fee “charged by the landfill at which solid waste is disposed by the motor carrier.” This is precisely what Allied is attempting to do in these cases. The Statement Of Reasons further states that when discussing the certificates obtained from Suburban Sanitation, Inc., namely Certificate Nos. 4865 and 4879, “Allied submitted the required documentation with the Tariff Rule 30E applications that showed customers were paying a rate based on disposal at Meadowfill Landfill (\$58.35 per ton) but Allied was paying a much lower rate based on the switch it made to dispose at its own Short Creek Landfill (\$49.50 per ton), a difference of \$8.85 per ton. Allied had a duty not only under Tariff Rule 30E but under common rules of fairness and equity to report the decrease in tip fees so that its rates could be adjusted to ensure its customers were paying just and reasonable rates and the true cost of service. Instead, through its dealings with its affiliated interests, Allied pocketed the tip fee savings that were generated by overcharging its customers on the collection of its business.” (pg. 6, 7). However, counsel for the Respondent has already admitted in its Statement Of Reasonings that W. Va. Code §24A-2-4a only required Allied to report to the Commission an increase in the tip fee of a solid waste facility that it was using. Now counsel for the Respondent is stating that Allied had a duty to report the decrease in the tip fee under Tariff Rule 30E. Counsel for Respondent states that “[t]he Commission relied on Tariff Rule 33.7.f. in ordering refunds to Allied’s customers for the time period they were overcharged for disposal costs.” (pg. 15). However, as set forth in Statement Of Reasons, Tariff Rule 33.7.f. specifically states, in part, “When any motor carrier which has increased its rates pursuant to proceedings under this rule receives a reduction, or a refund, on the tip fees of any

commercial solid waste facility whose rates and charges were the basis for the rate increase proceedings under this rule, it shall report promptly to this Commission the new reduced rates and charges so ordered and the annual savings in costs resulting to the motor carrier from such reduction from the date said commercial solid waste facility increased its rates under this rule, or the amount of refund and the period to which it relates.” (emphasis added) (pg. 17). In other words, 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 at the same solid waste facility which was the basis for a rate increase under 30E filing. That is not the case here.

As further set forth in the Statement Of Reasons, Suburban Sanitation, Inc. was using its transfer station and then was taking its waste to the Meadowfill Landfill. When Allied obtained the Suburban Sanitation, Inc. certificates it was not taking its waste to the Meadowfill Landfill but was taking its waste to a totally separate solid waste facility, Short Creek Landfill. Therefore, contrary to what counsel for Respondent has argued, Allied did not violate Tariff Rule 33.7.f.

Finally, counsel for the Respondent states, “Since its rates were not based on disposal at Mountaineer Transfer Station (rather, they were based on the tipping fees at Meadowfill Landfill and S & S Landfill) the Commission properly denied Tariff Rule 30E relief and recommended that Allied file a Tariff Rule 42 application (a general rate case) to determine rates based on disposal at Mountaineer Transfer Station with subsequent disposal at Short Creek. A general rate case would allow Allied to recover the costs associated with switching

to its own transfer station and landfill while passing cost savings through to customers. Today, Allied has declined to seek rate relief through the filing of a Tariff Rule 42 application.” (pg. 8). This statement is not true. On December 29, 2014, Allied filed a Rule 42 application entitled Case Nos. 14-2010-MC-42A, 14-2011-MC-42A, 14-2012-MC-42A, 14-2013-MC-42A and 14-2014-MC-42A. However, this does not affect the argument of Allied that it had no requirement to make a Rule 30E filing when it switched from using the Meadowfill Landfill to Short Creek Landfill based on a reduction in tip fees.

Summary of Argument

In the Statement of Reasons, Summary of Argument, counsel for the Public Service Commission argues that, “Beginning in November, 2011, Allied stopped disposing of waste at Meadowfill and S & S and began using its own landfill, Short Creek, which had a tipping fee of \$36.50 per ton for a total tipping fee of \$49.50 per ton. Nonetheless, until November, 2013 the rates paid by Allied’s customers reflected a tipping fee cost of \$58.35 per ton. Thus, Allied overcharged its customers by \$8.85 per ton. Although by order dated November 13, 2013, the Commission granted 30E relief, Allied appeals the Commission requirement in its November 14, 2013 Order that Allied refund this overcharge to its customers.” (pg. 9). However, as set forth in the tariff of Allied, its commercial rates were negotiable. In addition, according to the Rules Governing Motor Carriers, Private Commercial Carriers, And The Filing Of Insurance And Financial Responsibility By Motor Carriers (150 CSR 9), Rule 6.7.a. states “Every common carrier by motor vehicle of solid waste shall, on an annual basis, enter into a written agreement with each of its commercial customers.” As such,

Allied is required to have yearly commercial contracts with its commercial customers. Due to this requirement, Allied enters into a contract with its commercial customers annually and the fee that it negotiates is partially based upon the tip fee. Therefore, the Commission cannot properly argue that Allied should refund all of its customers for the period from November, 2011 until November, 2013 because there have been commercial contracts that had been negotiated based upon the cost of service including the tip fee charge at the Short Creek Landfill.

Counsel for the Public Service Commission also states that, "Finally, Allied makes a convoluted and misplaced argument suggesting that the Commission has engaged in impermissible flow control. This argument ignores the statute, W. Va. Code §24-2-1h that gives the Commission the authority to require a motor carrier to dispose of solid waste at a particular solid waste facility. But relative to the issues in this case, the argument is misplaced since the Commission orders have nothing to do with flow control. The Orders are restricted to the issue of the proper recovery of tip fees." (pg. 11). If the Commission does not allow a motor carrier to pass through its tip fees based upon the solid waste facility that it is using, it is engaging in flow control because it is economically forcing the motor carrier to dispose of its waste at a specific landfill contrary to its business plan.

Under Argument, counsel for the Commission states that the Commission has broad authority to establish rates that are just, reasonable and based primarily on costs of service. However, the Commission should not force and does not have the authority to force common carriers to file a Rule 42 rate application which is expensive and time consuming every time

the carrier changes the place where it deposits its solid waste. Furthermore, although the Commission does have jurisdiction over the rates charged by the motor carrier, this does not change the fact that there is no requirement either under West Virginia Code or the Commission Rules and Regulations that mandate that a motor carrier must file a 30E application regarding a reduction in its tip fee when it changes the solid waste facility that it had used in the past. Again, counsel for the Commission states, “Allied has no intention of filing a rate increase that would eliminate that cost savings.” (pg. 14). However, as previously stated, Allied has recently filed a Rule 42 rate application case.

Next, counsel for the Public Service Commission argues that, “the Commission properly construed W. Va. Code §24A-2-4a and granted Tariff Rule 30E relief to two certificates and denied Tariff Rule 30E relief to eight other certificates and permits.” (pg. 15). However, as previously stated, counsel for the Petitioner cannot point to any statute nor rule or regulation that specifically mandates that Allied file a Rule 30E application when the tipping fee at a solid waste facility is less than the tipping fee of another solid waste facility that the carrier had used in the past. In fact, counsel for the Public Service Commission, in discussing W. Va. Code 24A-2-4a and the Tariff Rule 30E states, “The statute and Tariff Rule 30 intend that the motor carriers current rates reflect disposal at the solid waste facility that has increased its tip fee.” (pg. 16). As previously stated, that is not the situation that has occurred in these cases with Allied.

Next, counsel for the Public Service Commission states that, “The Commission’s Tariff Rule 30E faithfully reflects the intent of the Legislature to provide expedited rate relief

to motor carriers of solid waste when tip fees at their solid waste facilities are increased.” (pg. 18). Opposing counsel then states “However, the statute did not address those instances in which the tip fee actually decreases, as in the present case.” (pg. 18). Counsel for the Public Service Commission then states that “If the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap[,] and the agency is entitled to deference on the question.” (pg. 19). Id., quoting Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 589, 466 S.E.2d 424, 440 (1995). However, there was no “gap” in W. Va. Code §24A-2-4a. That code section, as previously stated and as admitted by opposing counsel, only pertains to a decrease in tip fees and Tariff Rule 30E only pertains to increases at solid waste facilities which are used by the motor carrier and which was the basis for a prior 30E filing by that motor carrier. As previously stated, neither is the case here.

It is remarkable that counsel for the Public Service Commission states, “there is no inconsistency - Tariff Rule 30E, Section f is consistent with W. Va. Code §24A-2-4a” when counsel had previously stated that W. Va. Code §24A-2-4a is silent as to decreases in tipping fees and Tariff Rule 30E.f only applies to increases at solid waste facilities “whose rates and charges were the basis for rate increase proceedings under this rule.” Obviously, the two are inconsistent. Counsel for the Public Service Commission is intending to create a law that does not exist; that is, that somehow either W. Va. Code §24A-2-4a or Tariff Rule 30E mandates that a motor carrier must file a 30E application when its tipping fee increased from

a prior 30E filing that it made which pertains to the same solid waste facility. As previously stated *ad nauseam*, that is not the case here.

Next, opposing counsel states that Allied “voluntarily chose to haul the waste gathered under these certificates and permits to Mountaineer Transfer Station which, in turn, disposed of the waste at Short Creek Landfill.” (pg. 26). This totally ignores the argument as stated at the evidentiary hearing by Keith Koebley, a representative of Allied, 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. The Respondent’s Statement Of Reasons does not even address this fact.

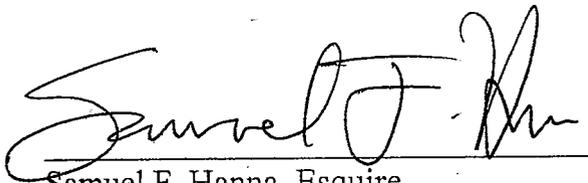
Finally, opposing counsel argues that the Commission is not engaging in flow control or acting as Allied's Board of Directors by denying Tariff Rule 30E relief to the eight certificates and permits. Opposing counsel argues that "Quite simply, the Commission is not dictating where Allied chooses to dispose of waste collected under its certificates and permits; it is primarily concerned that Allied recover its true cost of service and that Allied's customers are paying just and reasonable rates for the service being rendered." (pg. 30). However, by not allowing Allied to recoup its costs in taking its waste from Mountaineer Transfer Station to Short Creek Landfill, the Commission is engaging in *de facto* flow control. The Commission should not be allowed to dictate where a carrier deposits its solid waste when that carrier has valid reasons for doing so as in this case.

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

A handwritten signature in black ink, appearing to read "Samuel F. Hanna", written over a horizontal line.

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

CERTIFICATE OF SERVICE

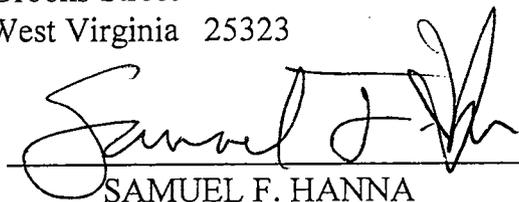
I, SAMUEL F. HANNA, counsel for Allied Waste Services of North America, LLC d/b/a Republic Services of West Virginia, do hereby certify that service of the foregoing **REPLY BRIEF ON BEHALF OF ALLIED WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF WEST VIRGINIA TO THE STATEMENT OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF OCTOBER 3, 2014** has been made upon the following party by depositing same, postage prepaid, on this the **5th day of January, 2015**:

Andrew Smith
426 Drummond St.
Morgantown, WV 26505

and via hand delivery to:

Richard Hitt, Esquire
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SAMUEL F. HANNA