IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

Metro Tristate, Inc.
Petitioner

v. **No. 20-0766**

The Public Service Commission of West Virginia and
Community Pastor Care, LLC
Respondents

STATEMENT OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF SEPTEMBER 4, 2020 IN CASE NOS. 18-1315-MC-FC AND 19-0006-MC-CC

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

The Respondent, Public Service Commission of West Virginia (hereafter "Commission"), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of September 4, 2020 in Case Nos. 18-1315-MC-FC and 19-0006-MC-CC that is the subject of this appeal.

I. STATEMENT OF THE CASE

In these cases, the Commission ordered that federal law preempts state contract carrier permitting requirements when the United States Department of Veterans Affairs (VA) seeks to enter into a contract with a veteran-owned small business or a service disabled veteran-owned small business to provide non-emergency medical transportation (NEMT). Metro Tristate, Inc. (Metro) appeals.

Case No. 18-1315-MC-FC

On October 1, 2018, Metro filed a verified Complaint and Motion for Interim Relief (Complaint) against Community Pastor Care (CPC) alleging that CPC was unlawfully providing transportation of passengers for hire by transporting veterans in Cabell and Wayne Counties to the Huntington VA Medical Center (HVAMC). Metro requested an interim order requiring CPC to cease and desist from providing the HVAMC transportation services until it obtained authority from the Commission.

On October 12, 2018, CPC filed an Answer and Motion to Dismiss. CPC admitted that it entered into a contract with the VA for the sole purpose of providing NEMT exclusively and on behalf of the VA. CPC asserted, however, that the

Commission lacks jurisdiction to regulate the transportation of veterans on behalf of the VA.

On October 16, 2018, Metro filed a Motion for Cease and Desist Order and a Response in Opposition to Defendant's Answer and Motion to Dismiss Complaint.

On October 26, 2018, CPC filed a Preliminary Response to Metro's Motion, a Reply to Metro's Response and a motion for referral to the Division of Administrative Law Judges (ALJ).

On November 5, 2018 and December 28, 2018, Staff filed memoranda recommending that the Commission order CPC to immediately cease and desist operations until it obtained a certificate from the Commission. By letter filed on January 3, 2019, Metro concurred with the Staff recommendation.

Case No. 19-0006-MC-CC

On January 4, 2019, CPC filed an Application for a permit to operate as a contract carrier for NEMT of United States veterans to and from the HVAMC and outpatient clinics in Charleston and Lenore, West Virginia, Gallipolis, Ohio, and Prestonsburg, Kentucky, under the terms of its contract with the VA. The proposed service area included the states of West Virginia, Kentucky, Ohio, Virginia and the District of Columbia. The Commission Executive Secretary designated the CPC Application as Case No. 19-0006-MC-CC.

On January 4, 2019, the Commission issued an Order referring Case No. 19-0006-MC-CC to the ALJ.

On January 9, 2019, Metro protested the CPC Application, petitioned to intervene and moved for an order directing CPC to cease operation.

On January 11, 2019, the ALJ issued an Order granting Metro's petition to intervene and set the matter for hearing on May 9, 2019.

On January 15, 2019, CPC filed a Motion to Consolidate Case No. 18-1315-MC-FC and Case No. 19-0006-MC-CC.

By Orders issued in February through April, 2019, the ALJ granted motions to intervene filed by C&H Company, D&L Limousine, Inc., R and R Transit, Inc., and Motown Taxi, LLC. Comm'n Orders dated February 22, 2019, March 15, 2019, April 16, 2019, and April 23, 2019.

Both Cases

On January 18, 2019, the Commission issued an Order granting the Motion to Consolidate filed by CPC and referred the cases to the ALJ.

On February 4, 2019, the ALJ issued an Order denying interim relief because Metro did not allege extraordinary facts of immediate and irreparable injury or public interest justifying interim relief. Order Regarding Interim Relief dated Feb. 4, 2019, Concl. of Law No. 1.

On February 20, 2019, Metro filed a Motion to Rescind Commission Referral Orders, Request for Expedited Consideration and Motion requesting that the Commission direct CPC not to operate until it has a permit. CPC responded to the Metro Motion to Rescind on February 26, 2019, and Metro filed a Reply to CPC's Response on March 12, 2019.

On March 27, 2019, the Commission issued an Order denying Metro's Motion to Rescind Referral Orders.

On July 9, 2019, the ALJ held an evidentiary hearing. All parties except Motown Taxi, LLC, appeared.

On September 4, 2019, the ALJ issued a Recommended Decision making the following Conclusions of Law:

> 1. The VA has a comprehensive purchasing mechanism including a mandated statutory preference for contracting with service-disabled veteran-owned small businesses whenever two or more qualified businesses are available to provide a particular service. (38 U.S.C. §8127, Kingdomware Technologies, Inc., v. United States, 136 S. Ct. 1969, 195 L. Ed 2d 334 (2016).)
>
> 2. West Virginia requires that contract carriers meet a number of requirements including that the contract carrier permit does not (i) endanger the public, (ii) unduly interfere with highway use or impair highway maintenance or (iii) impair existing common carriers serving the same territory. (W. Va. Code §24A-3-3.)
>
> 3. The state contract carrier regulatory system to protect existing common carrier services conflicts with the federal contracting mechanism to promote federal contracting with service-disabled veteran-owned small businesses in this matter.
>
> 4. This Commission has no jurisdiction to regulate intrastate transportation services procured exclusively by VA for its use and must dismiss these cases because the state regulatory mechanism conflicts with federal contracting goals. (United States v. Virginia, 139 F. 3d 984 (4th Cir., 1998)).

On September 19, 2019, Metro filed Exceptions to the ALJ's Recommended Decision asserting that Conclusions of Law No. 3 and No. 4 were erroneous.

On September 30, 2019, CPC responded by referring to its Initial and Reply Post-Hearing Briefs. CPC asserted that Commission jurisdiction is preempted by the Supremacy Clause and the principle of implied conflict preemption.

On September 4, 2020 the Commission issued an Order denying the Exceptions filed by Metro and adopting the Recommended Decision as modified and supplemented. (hereafter "Commission Order").

On October 2, 2020, Metro filed an appeal of the Commission Order.

The pertinent facts regarding the issue under appeal in Case No. 18-1315-MC-FC are not in dispute. CPC is a qualified service disabled veteran owned small business (SDVOSB). The VA awarded CPC a contract to provide NEMT services exclusively for veterans in the area of Cabell County, West Virginia, for transportation primarily to and from the HVAMC. Applicant Exs. 1-3, Tr. at 24-25, 37. CPC provides some transportation service in other parts of the state. Tr. at 52-53, 65-68, 90-93. All assignments are made by the HVAMC. Tr. at 101-102. The VA awarded CPC the contract as part of a federal set-aside program for SDVOSBs governed by federal statutes and regulations. Applicant Ex. 4-Sherrin statement, Tr. at 104-105. CPC does not have a contract carrier permit in West Virginia.

Metro is an authorized common carrier that previously provided NEMT under contract with the VA for veterans receiving care at the HVAMC. Tr. at 113, 116-121. Metro is a registered contractor but did not qualify for the solicitation that was awarded to CPC because Metro is not a SDVOSB and the "Rule of Two," as provided in section 8127(d) of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C.S. § 8127, 8128 (Veterans Benefits Act), applied because at least two SDVOSBs submitted bids. Tr. at 135-136, 143-146, Applicant Ex. 4-Sherrin statement.

II. SUMMARY OF ARGUMENT

The Commission correctly decided that implied conflict preemption applied to state contract carrier permitting requirements. This Honorable Court has held that implied conflict preemption occurs when state regulation is an obstacle to the accomplishment or execution of congressional objectives. Morgan v. Ford Motor Co., 224 W.Va. 62, 680 S.E. 2d 77 (2009). The congressional objective at issue here is Congress' program to increase contracting opportunities for veteran owned small businesses (VOSB) and SDVOSBs set forth in the Veterans Benefits Act, 38 U.S.C. §§ 8127, 8128. The Veterans Benefits Act requires the VA to award contracts to VOSBs or SDVOSBs if a contracting officer has a reasonable expectation that two or more VOSBs or SDVOSBs will submit offers. 38 U.S.C. § 8127(d). Consistent with the Veterans Benefits Act, the VA contracted with CPC, a SDVOSB, to provide NEMT service to veterans for transportation to a VA facility which is transportation completely within the federal sphere of operations.

Congress clearly stated its objective in passing the Veterans Benefits Act - "to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities". 38 U.S.C. §8127(a)(1).

The issue before the Commission was whether the state's contract carrier permitting requirements were in conflict with the Veterans Benefit Act. West Virginia contract carrier permitting requirements are far from perfunctory. In addition to filing an application with the Commission and providing public notice, an applicant must prove, among other things, that its operation will not "impair the efficient public service" of any

authorized common carrier serving the same territory. W.Va. Code §24A-3-3(a). The Commission and this Honorable Court have recognized the high burden of proof that applicants for a contract carrier permit must meet. See, Weirton Ice & Coal Co. v. Public Service Commission, 161 W.Va. 141, 240 S.E.2d 686 (1977); Bates Recycling, LLC, Commission Case No. 13-0554-MC-CC, Recommended Decision final Nov. 4, 2013.

The Commission determined that the enforcement of state contract carrier permitting requirements on CPC would be an obstacle to the accomplishment of the Veterans Benefits Act objective to increase contracting opportunities for VOSBs and SDVOSBs.

III. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 19 of the Rules of Appellate Procedure the Court, by Order entered November 2, 2020, set oral argument on the appeal for February 9, 2021.

IV. STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the West Virginia Supreme Court of Appeals is set forth in W.Va. Code §24-5-1, which provides in part:

> Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order.

In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276

S.E.2d 179 (1981). In Syllabus Point 1of Sexton this Court reiterated previous holdings: [A]n order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles. (Citations and quotation marks omitted). In Monongahela Power Company, this Court adopted the comprehensive standard of review applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

> In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. . . The Court's responsibility is not to supplant the Commission=s balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Monongahela Power Company, Syllabus Point 2 (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Company in Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981) may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and (3) whether the substantive result of the Commission's order is proper.

Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 420; 438 S.E.2d 596, 600-601 (1993).

Similarly, in C & P Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), this Court reiterated the three-pronged standard of review established in the Monongahela Power case, supra, and went on to hold generally that:

> The Court's responsibility is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."

Id. at 611.

In Mountain Communities for Responsible Energy v. Public Service Commission, 222 W. Va. 481, 665 S.E.2d 315 (2008) and Sierra Club v. Public Service Commission, 241 W.Va. 600, 827 S.E.2d 224 (2019) this Court reaffirmed the use of the standard of review set forth in the Monongahela Power case.

V. ARGUMENT

A. The Commission correctly concluded that state permitting requirements for CPC's operation as an SDVOSB are preempted by federal law because implied conflict preemption applies when state regulation is an obstacle to congressional objectives.

1. The Veterans Benefits Act established a federal scheme to increase contracting opportunities for small businesses owned and controlled by veterans and veterans with service-connected disabilities.

The goal of the Veterans Benefits Act is clear. The first section states:

a) Contracting Goals –

(1) *In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns*

owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

38 U.S.C § 8127(a) (Emphasis added). In furtherance of its goal, Congress established what is commonly referred to as the "Rule of Two" at 38 U.S.C § 8127(d) which provides:

(d) Use of Restricted Competition.
Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that

offers best value to the United States.

The congressional objective is clear. Congress passed the Veterans Benefits Act "to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities". Congress reinforced this objective by restricting competition for VA contracts to veteran owned small businesses by establishing the Rule of Two at subsection (d) of the Veterans Benefits Act. The Commission Order correctly concluded at Conclusion of Law No. 1 that:

> The VA has a comprehensive purchasing mechanism including a mandated statutory preference for contracting with service-disabled veteran-owned small businesses whenever two or more qualified businesses are available to provide a particular service. (38 U.S.C. §8127, Kingdomware Technologies, Inc., v. United States, 136 S. Ct. 1969, 195 L. Ed 2d 334 (2016)).

The Supreme Court stated in the Kingdomware decision that Congress, in 1999, expanded small business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act which established a three percent government-wide contracting goal with SDVOSBs. The Court noted that the government continually fell behind in meeting that goal and Congress enacted the Veterans Benefits Act to correct that situation. The Veterans Benefits Act 1) requires the Secretary of Veterans Affairs to set specific annual goals as set forth in section 8127(a), and 2) establishes the Rule of Two. See Kingdomware 136 S. Ct. at 1973. In addressing the Rule of Two, the Supreme Court stated:

> [T]hat §8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has

> already met its contracting goals or on the grounds that the Department has placed an order through the FSS.

Id. at 1975.

In addition to establishing the objective to increase contracting opportunities for VOSBs and SDVOSBs, Congress took the additional step of establishing the Rule of Two which requires the VA to give preference to these businesses whenever at least two qualified VOSBs or SDVOSBs bid on VA work.

The objective of Congress to increase contracting opportunities for VOSBs is further enforced by the priorities for contracting Congress specifically included in the Veterans Benefits Act. Metro argues, however, that state contract carrier permitting requirements should apply because Congress included a list of potentially eligible entities for VA NEMT contracts and placed non-veteran owned businesses on the list. "Priority for Contracting Preferences" at 38 U.S.C. §8127(h). The list sets forth SDVOSBs and VOSBs, however, as the number one and two preferences. 38 U.S.C. §8127(h)(1) and (2). Congress assigned non-veteran owned businesses the lower preferences of third and fourth. Id. at §8127(3) and (4). Congress' inclusion of non-veteran owned businesses at the end of the priority list does nothing to negate the implied conflict preemption that is apparent in this case. As explained in section B of this Statement of Reasons, the requirement that SDVOSBs and VOSBs comply with state permitting requirements would interfere with and frustrate Congress' objective to provide more VA contracting opportunities to VOSBs and SDVOSBs.

2. Decisions of the U.S. Supreme Court, the West Virginia Supreme Court of Appeals, the Kentucky Court of Appeals and the federal courts have held that federal law preempts state law when application of state regulation interferes with federal objectives.

(a) The presumption against preemption is not as strong in this case because VA contracting is not a field occupied by the states.

This Honorable Court recognizes a presumption against preemption. Morgan v. Ford Motor Co., 224 W.Va. 62, 680 S.E. 2d 77 (2009). However, the Veteran Benefits Act legislates in the field of VA operations, a field not occupied by the states. The United States District Court for the Southern District of West Virginia has also recently addressed preemption principles and the presumption against displacement of state law. Huskey v. Ethicon, Inc., 29 F. Supp. 3d 736 (2014). The Huskey court stated that the presumption against displacing state law is strongest when Congress legislates 'in a field which the States have traditionally occupied.' Id. at 740, citing S. Blasting Servs., Inc. v. Wilkes Cnty., N.C., 288 F.3d 584, 590 (4th Cir. 2002) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470 at 485, 116 S. Ct. 2240 (1996)). Because VA operations are principally governed by federal law and regulations, the presumption against preemption enunciated by this Honorable Court in Morgan, is not as strong in this case.

(b) A specific expression of congressional or agency intent is not required to find that implied conflict preemption applies.

Specific and explicit evidence of congressional intent to preempt, such as a preemption clause or explicit agency regulation or pronouncement, is not required in order for the Commission or this Court to perform a conflict determination and conclude that implied conflict preemption applies in this case. The U.S. Supreme Court, in Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913 (2000), stated that

"conflict preemption is different in that it turns on the identification of 'actual conflict', and not on an express statement of preemptive intent." Id. at 1926. The Court also stated:

> ...the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. ... To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended."

Id. This Honorable Court's opinion in Morgan supports the Commission's finding of preemption because the Court found that implied conflict preemption occurs when state regulation is an obstacle to the accomplishment and execution of congressional objectives. Morgan, 680 S.E. 2d at 84. The Morgan Court stated that "a court must not rely on mere agency proclamations that the federal regulation preempts state law, but must perform its own conflict determination, relying on the substance of state and federal law. Id. at 85, citing Wyeth v. Levine 555 U.S. 555, 129 S. Ct. 1187, (2009).

In Morgan, the West Virginia Supreme Court of Appeals held that federal regulations on motor vehicle safety standards preempted a glass defect claim against Ford Motor Company under state common law. The Court noted that the defendant Ford presented little agency history to suggest that the federal regulation at issue was intended to preempt state common law, and no agency explanations identified a clear federal objective that would be corrupted by allowing the plaintiff's claim. Morgan, 680 S.E. 2d at 93. The Court found the federal government policy to be that manufacturers could choose to install either tempered or laminated glass in side windows. An intent to preempt state common law tort actions was implied because permitting a state tort action would foreclose that choice and interfere with federal policy. Morgan, 680 S.E.2d at 94.

While the Commission relied primarily on the West Virginia Supreme Court of Appeals decision in the Morgan case and cases cited therein, the Commission found the cases cited in the Recommended Decision to be applicable, instructional and persuasive on the issue. The Commission did not "carelessly disregard" the so-called distinctions between those cases and the case at hand, as asserted by Metro. The issue in all of the cases discussed in the Commission Order was whether or not state regulations should apply to federal operations when those regulations frustrated federal objectives.

In Carter, the Supreme Court of Florida determined that state rate regulation interfered with the goals of the federal Career Compensation Act.[1] The Court held that, "when so acting within the scope of its delegated constitutional powers the conduct of the federal government should not be unduly burdened or circumscribed by the imposition of state-imposed restrictions." United States v. Carter, 121 So. 2d 433, 437 (FL 1960).

In the Virginia case, the United States Court of Appeals for the Fourth Circuit affirmed a decision by the United States District Court for the Eastern District of Virginia permanently enjoining the Commonwealth of Virginia from enforcing licensing regulations against investigators hired by the Federal Bureau of Investigation (FBI). Virginia's enforcement of its licensing requirements for investigators caused investigators to stop working for the FBI. The Fourth Circuit found that the Virginia regulatory scheme frustrated the objectives of federal procurement laws by allowing the state to second guess the FBI's responsibility determination. United States v. Virginia, 139 F. 3d 984, 989 (4th Cir. 1998).

[1] The Career Compensation Act provides, among other things, for the transportation of household goods for servicemen. 37 U.S.C. § 253(c).

Furthermore, in the Lafferty case, the Court of Appeals of Kentucky found that enforcement of Kentucky certificate of need and licensure requirements "would deprive the VA of its right to select the provider of its choice and would effectively allow the Commonwealth of Kentucky to select the provider instead." Lafferty Enterprises v. Commonwealth, 572 S.W. 3d 85, 91 (KY App. 2019). The Kentucky Court of Appeals upheld the finding of the Franklin Circuit Court that:

> ... But so long as the medical services at issue are limited to VA patients, and paid for fully by VA appropriations, there is no legal basis to require a CON. After reviewing the record, this Court finds that the federal government's procurement process should not be disturbed, and there is no valid reason under state law to impose a requirement for a CON for the services at issue, so long as those services are limited to VA patients, paid for by VA funds. Requiring a CON would frustrate the federal government's objectives and subvert the federal government's procurement process. Thus, Jan-Care did not violate Kentucky CON and licensing laws by transporting VA patients who happen to reside in Kentucky to receive VA services under its 2012 contract with Jan-Care.
>
> Lafferty, 572 S.W.3d at 89.

The overarching theme in all of these cases is the presiding courts' finding that, notwithstanding the absence of express preemption, federal law preempted state regulations that interfered with or frustrated the objectives of federal programs. The fact that these cases addressed rate regulation, state certificate of need requirements, requirements for licensure for investigators, or the fact that the federal agency was a party amount to distinctions without a difference.

B. State regulation of market entry of VOSBs or SDVOSBs would stand as an obstacle and interfere with the accomplishment of the objectives of the Veterans Benefits Act.

1. Under state permitting, the VA would be limited to contracting only with VOSBs or SDVOSBs that could overcome a high burden of proof required by statute.

As explained in the Commission Order, application of the state statute governing contract carrier permitting would interfere with the congressional objective. Commission Order at 13-14. Metro acknowledges the challenges faced by permit applicants in its lengthy discussion in section E of its Argument. The permitting requirements are contained in W. Va. Code §24A-3-3(a):

> (a) Required; application; hearing; granting. — It shall be unlawful for any contract carrier by motor vehicle to operate within this state without first having obtained from the commission a permit unless the contract carrier is an emergency substitute carrier. Upon the filing of an application for such permit, the commission shall fix a time and place for hearing thereon: Provided, That the commission may, after giving notice as hereinafter provided and if no protest is received, waive formal hearing on such application. Said notice shall be by publication which shall state that formal hearing may be waived in the absence of protest to such application. Such notice shall be published as a Class I legal advertisement in compliance with the provisions of §59-3-1 et seq. of this code and the publication area for such publication shall be the area of operation. Such notice shall be published at least 10 days prior to the date of hearing, but not more than 30 days after the filing of the completed application. After hearing or waiver of hearing as aforesaid, as the case may be, the commission shall grant or deny the permit prayed for or grant it for the partial exercise only of the privilege sought, and may attach to the exercise of the privilege granted by such permit such terms and conditions as in its judgment are proper and will carry out the purposes of this chapter. *No permit shall be granted unless the applicant has established to the satisfaction of the commission that the privilege sought will not* endanger the safety of the public or unduly interfere with the use of the highways or impair unduly the condition or unduly increase the maintenance cost of such highways, directly or indirectly, or *impair the efficient public service of any authorized common carrier or common carriers adequately serving the same territory.* (emphasis added)

Obtaining a contract carrier permit in West Virginia is unlike obtaining a business

license, insurance, driver's license or other requirements for operating a business. The contract carrier permitting process is very involved, carries a high burden and typically results in extended litigation as a result of protests by existing common carriers. See, Bates Recycling, LLC, Case No. 13-0554-MC-CC, Recommended Decision final Nov. 4, 2013, TLC Property Maintenance, Inc., Case No. 18-1246-MC-CC, Recommended Decision final April 2, 2019. The chief challenge is overcoming the "impairment" test of W. Va. Code §24A-3-3(a), which protects common carriers from unfettered competition. Under the impairment test, if a certificated common carrier operates in the territory where a VA facility is located, then a VOSB or a SDVOSB must show that its provision of service to the VA will not economically impair that common carrier. The Commission has acknowledged this high burden of proof:

> A review of the law and precedent on contract carriers reveals that the Commission clearly has an obligation to protect common carriers from unreasonable competition by contract carriers. The showing required to obtain a permit to operate as a contract carrier is significantly greater than that required to obtain a certificate to operate as a common carrier (footnote omitted). W. Va. Code §24A-3-3(a), 24A-3-5 and 24A-3-6; Weirton Ice & Coal Co. v. Public Service Commission, 240 S.E.2d 686 (1977); Mountain Trucking Co. v. Public Service Commission, 216 S.E.2nd 566 (1975); Webb Trucking, M.C. 21703-CC (April 27, 1984).

Bates Recycling, LLC, Case No. 13-0554-MC-CC, Recommended Decision final Nov. 4, 2013 at 6.

This Honorable Court recognized the high burden for a contract carrier permit applicant as compared to the lesser burden for a common carrier certificate applicant, in the Weirton Ice and Coal case cited above:

> One applying for a common carrier certificate, pursuant to W. Va. Code, 1931, 24A-2-5(a) however, need only establish to the satisfaction of the Commission that public convenience and necessity require the proposed service. He is not required to assume the burden of

> proof imposed upon the seeker of a contract carrier permit. The former need only show an affirmative need; the latter must show, not only a need, but must show that his proposed service will not be a negative influence in certain areas. We think this is a significant difference. It should be noted that this Court reversed in *Mountain Trucking, supra*, a contract carrier case, for the principal reason that the applicant had not proved its case. The applicant had not proved that the granting of the permit would not impair the efficient public service of authorized common carriers serving the same territory. *See*, Points 1 and 2 of the Syllabus in that case [216 S.E.2d 566].

Weirton Ice & Coal Supply Co. v. Public Serv. Comm'n, 161 W.Va. 141, 240 S.E.2d 686, 689 To limit the VA to contracting only with VOSBs or SDVOSBs that are able to satisfy the impairment test of W. Va. Code §24A-3-3(a), would frustrate the goal of the Veterans Benefit Act to increase contracting opportunities for VOSBs or SDVOSBs.

2. **Application of the State's impairment test could leave the VA with no VOSBs or SDVOSBs to choose in West Virginia.**

State regulation of NEMT market entry by VOSBs or SDVOSBs for the VA would interfere with federal contracting objectives by applying regulatory requirements that could leave the VA with no VOSBs or SDVOSBs to choose in West Virginia. This is because a VA facility located in an area served by a non-VOSB certificated common carrier would be prohibited from contracting with a VOSB or SDVOSB that is unable to show that the common carrier provides inefficient service. W.Va Code §24A-3-3(a). The result of applying the State's permitting requirements are analogous to the result of applying state tort law in the Morgan case, leaving the VA without the choice intended by federal law.

The Commission, in this case, performed a conflict analysis that considered the federal scheme for increasing contracting opportunities for certain veteran owned businesses established by federal law and how application of state contract carrier

permitting requirements would affect the federal objectives. The Commission determined that application of state permitting requirements would interfere with congressional objectives, a result that would not increase contracting opportunities, but would very likely decrease contracting opportunities for veteran owned businesses.

C. The actions and statements of CPC and the VA in this case have no impact on whether implied conflict preemption does or does not apply.

Metro argued that the VA contracting officer's inquiry of Commission staff about compliance with West Virginia law and the VA's lack of involvement in the litigation before the Commission are somehow significant in determining that state permitting requirements should apply to CPC. They are not determinative. The Commission cannot reach legal conclusions based on statements and conversations between personnel of CPC and the VA. CPC has asserted consistently in its pleadings that it is not subject to state contract carrier permitting requirements. The Commission reviewed and analyzed the applicable law and the actual results in applying the law and determined that implied conflict preemption applies in this case. CPC was and is in compliance with the state permitting requirements at issue because the Commission determined that permitting requirements are preempted.

Furthermore, we cannot infer from the VA's lack of participation in the case that the VA believed that state permitting requirements should apply to CPC. What the VA may or may not have thought on the issue is not relevant. Moreover, the question of preemption is not determined by the VA's assertions or non-assertions. As the Court stated in Morgan, an adjudicator must not rely on agency proclamations to determine if

implied conflict exists. Likewise, the Commission cannot rely on VA non-assertions or lack of participation.

Also, contrary to Metro's contention, the provision of the VA contract cited by Metro that requires bidders to comply with all codes regarding operation of vehicles is not evidence that the VA intended to require contract carriers to obtain state required contract carrier permits. That provision of the contract specifically addresses "operation of vehicles," not licensing requirements for operation of a business. Applicant Exh. No. 3 at 6.

D. Small Business Administration regulations 13 C.F.R. 125.12(e)(1)(iii) and (f) and 125.13(g) do not create a requirement that CPC obtain a contract carrier permit.

Nothing in the Small Business Administration (SBA) regulations 13 C.F.R.§§125.12(e)(1)(iii) and (f) and 125.13(g) require that CPC obtain a contract carrier permit. Metro's argument otherwise is incorrect. These regulations address eligibility requirements for the SBA to conclude that a firm is an SDVOSB owned and controlled by a service-disabled veteran. No provision in 13 C.F.R. 125.12 addresses state permitting requirements.

Section 125.13 contains the SBA requirements for determining who controls a SDVOSB and states at section 125.13(g), "A firm must obtain and keep current any and all required permits, licenses, and charters, required to operate the business." The Commission reviewed the Federal Register, found no commentary regarding this provision contained in the section dealing with control of an SDVOSB, and determined that the agency did not intend this regulation to conflict with the goals of the Veterans Benefit Act. Generally, obtaining a business permit or license is not a lengthy, complex,

and litigious process like the contract carrier permitting process in West Virginia. The Court stated in Geier, "Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." Geier, supra at 1926. Therefore, SBA regulation 125.13(g) requires CPC to register its business with the Secretary of State, but does not require CPC to obtain a contract carrier permit because the contract carrier permitting requirement of W. Va. Code §24A-3-3(a) is preempted.

E. The Commission properly concluded that implied conflict preemption does not apply in the case of a contract carrier that is not a qualified VOSB or SDVOSB.

Metro asserted that the Commission erred in concluding that implied conflict preemption does not apply in the case of a contract carrier that is not a qualified VOSB or SDVOSB. Assignment of Error No. 5. The Commission correctly concluded that because permitting requirements as applied to non-VOSB/SDVOSB applicants do not interfere with the goals of the Veterans Benefit Act, state permitting requirements are not preempted for those applicants. The Metro Petition does not explain this Assignment of Error. It seems incongruous that Metro takes issue with the Commission's determination that non-veteran owned carriers remain subject to state permitting requirements when Metro objects to implied conflict preemption as to CPC. Perhaps Metro objects to Conclusion of Law No. 7 because Metro believes implied conflict preemption should not apply to any carrier. In any event, consistent with the Court's finding in the Huskey case that the scope of preemption must be addressed, the Commission was correct in narrowing the scope of preemption to give effect to the objectives of the Veterans Benefits Act and limit the federal displacement of state law.

F. The Commission properly denied the Exceptions filed by Metro and adopted the Recommended Decision as modified and supplemented by the Commission Order.

For the foregoing reasons the Commission did not err in denying Metro's Exceptions and adopting the Recommended Decision as modified and supplemented by the Commission Order.

G. Metro's request that this Court deny CPC a contract carrier permit is improper because the Commission did not issue an appealable order in CPC's permit application, Case No. 19-0006-MC-CC.

Metro devotes Section E of its argument to a discussion of CPC's permit application in Commission Case No. 19-0006-MC-CC. Metro concludes by asking this Court to order the Commission to deny CPC's permit application.

The Commission, however, did not issue an appealable order on CPC's permit application because the Commission found that federal law preempted state permitting requirements as applied to CPC. The Commission did not make findings of fact or conclusions of law for this Court to review on appeal. If the Court determines that the Commission erred in finding that implied conflict preemption applies in this case, the Court should remand the matter for a Commission decision on the merits in Case No. 19-0006-MC-CC.

V. CONCLUSION

As explained in this argument, the Commission properly applied applicable law in rendering its decision in this case and respectfully requests that the Court affirm the Commission Order's finding that application of state permitting requirements to the operation of CPC as a provider of NEMT services for the VA is preempted by federal law.

Public Service Commission of West Virginia

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CERTIFICATE OF SERVICE

I, Robert M. Adkins, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent Public Service Commission of West Virginia of its Reasons for the Entry of its Order of September 4, 2020 in Case Nos. 18-1315-MC-FC and 19-0006-MC-C has been served upon the following parties of record by First Class United States Mail, postage prepaid or as otherwise noted, this 25th day of November 2020.

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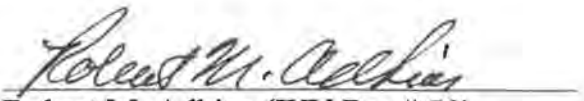

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