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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WASTE MANAGEMENT OF WEST VIRGINIA, INC., LCS SERVICES, INC., ALLIED
WASTE SERVICES OF NORTH AMERICA, LLC d/b/a REPUBLIC SERVICES OF
WEST VIRGINIA, and JEFFERSON COUNTY SOLID WASTE AUTHORITY,**

Petitioners,

v.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and APPLE VALLEY
WASTE SERVICES, INC. d/b/a APPLE VALLEY WASTE,**

Respondents.

**From the Public Service Commission of West Virginia
Case No. 23-0813-SWF-PW-CN**

PETITIONERS' BRIEF

**WASTE MANAGEMENT OF WEST
VIRGINIA, INC. and LCS SERVICES, INC.**

By Counsel

/s/ Clayton T. Harkins

Edward J. George (WVSB #5410)
Clayton T. Harkins (WVSB #13409)
Dinsmore & Shohl LLP
707 Virginia Street East, Suite 1300
Charleston, WV 25301
Phone: (304) 357-0900
Fax: (304) 357-0919
edward.george@dinsmore.com
clayton.harkins@dinsmore.com

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

By Counsel

/s/ Samuel F. Hanna

Samuel F. Hanna (WVSB # 1580)

Hanna Law Office

P.O. Box 2311

Charleston, WV 25328-2311

Phone: (304) 342-2137

shanna@hannalawwv.com

**JEFFERSON COUNTY SOLID WASTE
AUTHORITY**

By Counsel

/s/ Todd M. Swanson

Todd M. Swanson (WVSB #10509)

Kevin W. Hivick, Jr. (WVSB #14070)

Steptoe & Johnson PLLC

P.O. Box 1588

Charleston, WV 25326-1588

Phone: (304) 353-8000

todd.swanson@steptoe-johnson.com

kevin.hivick@steptoe-johnson.com

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Petitioners Waste Management of West Virginia, Inc. (“Waste Management”), LCS Services, Inc. (“LCS”), Allied Waste Services of North America, LLC d/b/a Republic Services of West Virginia (“Republic”), and Jefferson County Solid Waste Authority (“JCSWA”) (collectively, “Petitioners”) submit this brief in support of their appeal from a November 8, 2023 final order of the Public Service Commission of West Virginia (“PSC”) granting Apple Valley Waste Services, Inc.’s (“Apple Valley”) Petition for a Determination that No Certificate of Need is Required.

ASSIGNMENTS OF ERROR

1. Whether the PSC erred in granting Apple Valley’s Petition for a Determination that No Certificate of Need is Required?

2. Whether the PSC erred in concluding that consolidation of load operations limited to waste collected solely from a motor carrier’s customers, performed at no cost to customers other than the motor carrier’s existing rates, and occurring prior to transportation to a disposal facility, are functions included within the certificate authority granted to the motor carrier who collects solid waste? *See Appx. 72-73.*

3. Whether the PSC erred in concluding that the consolidation of loads operations of AVW of West Virginia, Inc. d/b/a Apple Valley Waste (“AVW”) does not constitute a solid waste disposal facility requiring a separate certificate beyond the authority to operate as a trash hauler already authorized for AVW in its motor carrier certificates? *See Appx. 73.*

STATEMENT OF THE CASE

This is an appeal from the November 8, 2023 Commission Order granting Apple Valley’s Petition for a Determination that No Certificate of Need is Required (the “Petition”).

In 2013, the PSC granted Entsorga West Virginia, LLC (“Entsorga”) a certificate of need to construct and operate a mechanical-biological treatment solid waste facility.¹ *See* Appx. at 3. Upon information and belief, the facility is owned by the Berkeley County Solid Waste Authority (“BCSWA”), and Entsorga had a lease agreement with the BCSWA to operate the facility. *See* Appx. at 4.

Apple Valley’s parent company has/had an ownership interest in Entsorga. *See* Appx. at 3-4. Apple Valley is an affiliate of AVW. *See* Appx. at 3, 69, 72. AVW has certificated authority to operate as a common carrier by motor vehicle in the transportation of solid waste in Berkeley, Grant, Hampshire, Jefferson, and Mineral Counties.² *See* Appx. at 3, 69. AVW previously disposed of a portion of the solid waste it collected at the Entsorga facility. *See* Appx. at 3, 69, 72.

The Entsorga facility was temporarily closed in May 2022 and later abandoned by Entsorga. *See* Appx. at 4, 69, 72. On February 6, 2023, Entsorga filed for bankruptcy, which filing was subsequently dismissed. *See* Appx. at 4, 70.

After the dismissal of the bankruptcy case, BCSWA purportedly terminated its lease with Entsorga. *See* Appx. at 4, 70. Apple Valley was allegedly the successful respondent in a request for proposal issued by the BCSWA to use the Entsorga facility on a short-term, month-to-month basis. *See* Appx. at 5, 70. According to Apple Valley, under the terms of the lease agreement with the BCSWA,³ AVW will use a portion of the Entsorga facility as “an internal transfer station to aggregate solid waste collected by AVW onto large roll off containers, which would then be transported to solid waste facilities when full.” Appx. at 5; *see* Appx. at 8 (Apple Valley will use

¹ *See Entsorga West Virginia, LLC*, Case No. 12-0803-SWF-CN, 2013 W. Va. PUC LEXIS 499 (Mar. 11, 2013).

² AVW’s certificated authority is more fully set forth in its tariff on file with the PSC. *See* AVW of West Virginia, Inc. d/b/a Apple Valley Waste, *Rates, Rules and Regulations Governing Transportation of Solid Waste* (Jun. 14, 2023), <https://www.psc.state.wv.us/scripts/utilities/ViewDocument.cfm?TariffID=13335>.

³ The lease agreement was not of record before the PSC. It is assumed for purposes of this Brief that the lease agreement is between Apple Valley and BCSWA.

the EntSORGA facility “solely to transfer waste from individual collection vehicles to transport trailers.”); Appx. at 71-72.

On October 16, 2023, Apple Valley filed the Petition requesting that the PSC determine that it lacks jurisdiction to grant a certificate of need to Apple Valley because the proposed Apple Valley facility “will not be a commercial solid waste facility and will not serve the public.” Appx. at 7; *see* Appx. at 45-46. PSC Staff filed a Response to the Petition on October 18, 2023. *See* Appx. at 11-18. Petitioners each filed a Motion to Intervene and Protest. *See* Appx. at 20-33, 39-43. On October 30, 2023, Apple Valley filed a Reply to PSC Staff’s Response and Petitioners’ Motions to Intervene. *See* Appx. at 44-58. PSC Staff filed a Sur-Reply to Apple Valley’s Reply on November 3, 2023. *See* Appx. at 60-68.

On November 8, 2023, the PSC granted the Petition.⁴ *See* Appx. at 69-73. The PSC found that “it does not appear that [Apple Valley] is operating any facility” because “[BCSWA] owns the facility and has entered into a lease agreement which allows [AVW], a certificated hauler of solid waste in West Virginia, to use a portion of the facilities to transfer waste it collects from customers from small trucks to larger trucks (consolidation operation).” Appx. at 71. The PSC also found that “[c]onsolidation of load operations limited to waste collected solely from a carrier’s customers, performed at no cost to customers other than the carrier’s existing rates, and occurring prior to transportation to a disposal facility, are functions included within the certificate authority granted to the motor carriers who collect solid waste.” Appx. at 72-73. The PSC further found that “consolidation of loads operations of [AVW] does not constitute a solid waste disposal facility requiring a separate certificate beyond the authority to operate as a trash hauler already authorized for [AVW] in its motor carrier certificates.” Appx. at 73.

⁴ The PSC also granted Petitioners’ motions to intervene. *See* Appx. at 73.

On December 6, 2023, Petitioners filed a Joint Motion to Stay Pending Appeal. *See* Appx. at 74-84. Petitioners' Joint Motion is pending before the PSC at this time.⁵

SUMMARY OF ARGUMENT

The PSC erred in granting the Petition. The PSC found that (1) the proposed Apple Valley facility is not a commercial solid waste facility, (2) Apple Valley is not a solid waste facility operator, and (3) a certificate of need is not required for the proposed Apple Valley facility. The PSC's findings, however, are inconsistent with the plain language of the relevant statutes and rules. The proposed Apple Valley facility meets the definition of a commercial solid waste facility because the facility will accept solid waste generated or created by sources other than the owner or operator of the facility. *See* W. Va. Code § 22-15-2. Moreover, the proposed Apple Valley facility meets none of the other requirements that would exempt it from the requirement of obtaining a certificate of need from the PSC. Apple Valley also meets the definition of a solid waste facility operator. Indeed, Apple Valley admits that it intends to operate a commercial solid waste facility. Under West Virginia law, any person applying for a permit to operate a commercial solid waste facility must obtain a certificate of need from the PSC. *See* W. Va. Code § 24-2-1c. Because the proposed Apple Valley facility is a commercial solid waste facility, and because Apple Valley is a solid waste facility operator, a certificate of need is required for the proposed Apple Valley facility.

The PSC also erred in finding that consolidation of load operations limited to waste collected solely from a motor carrier's customers, performed at no cost to customers other than the carrier's existing rates, and occurring prior to transportation to a disposal facility, are functions included within the certificate authority granted to a motor carrier who collects solid waste. The

⁵ If the PSC refuses to grant a stay or if the relief afforded is not acceptable, Petitioners intend to file a motion to stay the Commission Order pending appeal with this Court. *See* W. Va. R.A.P. 28(b).

PSC's findings in this case directly contradict the PSC's findings in prior cases. More specifically, the PSC found that the proposed facilities in those cases, which are substantially the same as the proposed Apple Valley facility, were commercial solid waste facilities and that the motor carrier in those cases was not the generator or creator of the solid waste being disposed of at the facilities.

Finally, the PSC erred in finding that consolidation of loads operations of AVW does not constitute a solid waste disposal facility requiring a separate certificate beyond the authority to operate as a trash hauler already authorized for AVW in its motor carrier certificates. The PSC based its finding entirely on the unsupported representations of Apple Valley. Given Petitioners' protest and PSC Staff's objection, the PSC should have allowed the parties to present evidence in support of their respective positions. Instead, the PSC denied Petitioners due process by hastily issuing an order that simply relied on the unsupported assertions of Apple Valley.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners submit that oral argument is necessary because the dispositive issues have not been authoritatively decided and the decisional process would be significantly aided by oral argument. *See* W. Va. R.A.P. 10(c)(6), 18(a)(3)-(4). Petitioners submit that the case should be set for a Rule 20 argument because the case involves issues of first impression and involves inconsistencies or conflicts among the decisions and/or positions of the PSC and West Virginia Department of Environmental Protection ("DEP") regarding the regulation of commercial solid waste facilities. *See* W. Va. R.A.P. 10(c)(6), 20(a). Should the Court set the case for a Rule 19 argument, Petitioners submit that the minimum time set forth in Rule 19 will not be sufficient given the number of parties and potential amicus curiae. *See* W. Va. R.A.P. 10(c)(6). Petitioners would request an additional ten (10) minutes per side, or an appropriate amount of time as

determined by the Court, so that each of the parties' arguments may be adequately presented and considered. *See* W. Va. R.A.P. 10(c)(6), 19(e).

ARGUMENT

I. Standard of Review.

“The detailed standard for [the Court’s] review of an order of the [PSC] . . . may be summarized as follows: (1) whether the [PSC] exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the [PSC’s] findings; and, (3) whether the substantive result of the [PSC’s] order is proper.”⁶ Syl. Pt. 1, *Equitrans, L.P. v. Pub. Serv. Comm’n of W. Va.*, 247 W. Va. 646, 885 S.E.2d 584 (2022) (citations omitted). Additionally, “[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. Pt. 2, *Mason Cnty. Pub. Serv. Dist. v. PSC of W. Va.*, 247 W. Va. 580, 885 S.E.2d 161 (2022).

II. The PSC Erred in Granting Apple Valley’s Petition for a Determination that No Certificate of Need is Required.

A. The Proposed Apple Valley Facility is a Commercial Solid Waste Facility.

A “commercial solid waste facility” is defined as

any solid waste facility *which accepts solid waste generated by sources other than the owner or operator of the facility* and does not include an approved solid waste facility owned and operated by a person for the sole purpose of the disposal, processing, or composting of solid wastes created by that person or such person

⁶ “In reviewing a [PSC] order, [the Court] will first determine whether the [PSC’s] order, viewed in light of the relevant facts and of the [PSC’s] broad regulatory duties, abused or exceeded its authority. [The Court] will examine the manner in which the [PSC] 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. Finally, [the Court] will determine 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. The [C]ourt’s responsibility is not to supplant the [PSC’s] balance of these interests with one more nearly to its liking, but instead to assure itself that the [PSC] has given reasoned consideration to each of the pertinent factors.” Syl. Pt. 2, *Monongahela Power Co. v. Public Serv. Comm’n*, 166 W. Va. 423, 276 S.E.2d 179 (1981).

and other persons on a cost-sharing or nonprofit basis and does not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation, and similar applications.

W. Va. Code § 22-15-2 (emphasis added); *see* W. Va. Code § 22C-4-2(b); W. Va. C.S.R. §§ 54-4-2.9, 54-5-2.6. A “solid waste facility” is defined as

any system, facility, land, contiguous land, improvements on the land, structures, or other appurtenances or methods used for processing, recycling, or disposing of solid waste, including landfills, *transfer stations*, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, commercial composting facilities, and other such facilities not herein specified, but not including land upon which sewage sludge is applied in accordance with [W. Va. Code § 22-15-20]. . . . Provided, [t]hat a salvage yard, licensed and regulated pursuant to the terms of [W. Va. Code § 17-23-1, *et seq.*], is not a solid waste facility and an advanced recycling facility is not a solid waste facility.

W. Va. Code § 22-15-2 (emphasis added). A “transfer station” is defined as

a structure, or combination of structures, machinery or devices at a place, location or facility where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility; Provided that when *the generator of solid waste disposes of said waste* into a container such as a roll-off, greenbox or bin that is temporarily positioned (i.e. not more than five days) at a specific location for transport by a transportation unit, such container will not be considered a transfer station. Under any circumstances, leachate, litter, and windblown materials must be properly managed.

W. Va. C.S.R. § 33-1-2.133 (emphasis added); *see* W. Va. C.S.R. §§ 54-3-2.15, 54-4-2.31.

Here, Apple Valley represented to the PSC that AVW would use a portion of the Entsorga facility as “an internal transfer station to aggregate solid waste collected by AVW onto large roll off containers, which would only be transported to solid waste facilities when full.” Appx. at 5; *see* Appx. at 71-72. The PSC found that the proposed Apple Valley facility is not a commercial

solid waste facility. *See* Appx. at 72-73. The PSC’s findings, however, are inconsistent with the plain language of the relevant statutes and rules.

The proposed Apple Valley facility meets the definition of a commercial solid waste facility, solid waste facility, and transfer station as the facility will accept solid waste generated or created by sources other than the owner or operator of the facility. *See* W. Va. Code § 22-15-2; W. Va. C.S.R. § 33-1-2.133. AVW will dispose of solid waste generated or created by its customers at a facility operated by Apple Valley and owned by the BCSWA. In other words, neither BCSWA, Apple Valley, nor AVW will generate or create the solid waste disposed of at the proposed Apple Valley facility.

Moreover, the proposed Apple Valley facility meets none of the other requirements that would exempt it from the requirement of obtaining a certificate of need. There is no evidence that the proposed Apple Valley facility is (1) “an approved solid waste facility owned and operated by a person for the sole purpose of the disposal, processing, or composting of solid wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis,” W. Va. Code § 22-15-2; (2) “land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation, and similar applications,” W. Va. Code § 22-15-2; (3) “land upon which sewage sludge is applied,” W. Va. Code § 22-15-2; (4) “a salvage yard,” W. Va. Code § 22-15-2; or (5) “an advanced recycling facility,” W. Va. Code § 22-15-2. There is also no evidence that solid waste will be disposed of in “a container such as a roll-off, greenbox or bin that is temporarily positioned (i.e. not more than five days) at a specific location for transport by a transportation unit.” W. Va. C.S.R. § 33-1-2.133. It should be noted that PSC Staff agreed with Petitioners as set forth in PSC Staff’s Sur-Reply to Apple Valley’s Reply wherein PSC Staff stated:

Apple Valley intends to collect solid waste generated by sources other than itself to bring to the Enstorga site until it is ready to be

taken to a landfill. These activities clearly fall within the Legislature's definition of a commercial solid waste facility. Apple Valley is a regulated entity that provides a service to the public. Apple Valley is attempting to usurp Commission jurisdiction by suggesting that its activities in collecting solid waste from the public should not be regulated.

Appx. at 64. Accordingly, the PSC erred in finding that the proposed Apple Valley facility is not a commercial solid waste facility.

B. Apple Valley is a Solid Waste Facility Operator.

A "solid waste facility operator" is defined as "any person or persons possessing or exercising operational, managerial, or financial control over a commercial solid waste facility, whether or not such person holds a certificate of convenience and necessity or a permit for such facility." W. Va. Code § 22-15-2. Apple Valley represented to the PSC that it would use the Entsorga facility to "operate a conventional, internal transfer station." Appx. at 8. A transfer station is a commercial solid waste facility. *See* W. Va. Code § 22-15-2; W. Va. C.S.R. § 33-1-2.133. By its own admission, Apple Valley is a solid waste facility operator. Accordingly, the PSC erred in finding that Apple Valley is not a solid waste facility operator.

Moreover, Apple Valley represented to the PSC that it was the successful respondent in a request for proposal issued by the BCSWA to use the Entsorga facility on a short-term, month-to-month basis, and that, under the terms of the lease agreement with the BCSWA, AVW would use the Entsorga facility as a transfer station. *See* Appx. at 5, 70. Inasmuch as the lease agreement was not of record before the PSC, it is unclear who possesses or exercises operational, managerial, or financial control over the proposed Apple Valley facility. Put differently, the BCSWA, Apple Valley, and/or AVW may each be a solid waste facility operator. As such, there is inadequate evidence to support the PSC's finding that Apple Valley is not a solid waste facility operator.

C. A Certificate of Need is Required for the Proposed Apple Valley Facility.

Under West Virginia law, “[a]ny person applying for a permit to construct, operate or expand a commercial solid waste facility as defined in [W. Va. Code § 22-15-2], or any person seeking a major permit modification for a commercial solid waste facility from the [DEP] first shall obtain a certificate of need from the [PSC].” W. Va. Code § 24-2-1c. As set forth above, the proposed Apple Valley facility is a commercial solid waste facility. Apple Valley is a solid waste facility operator. Apple Valley must, therefore, apply for a permit from the DEP. But first, Apple Valley must obtain a certificate of need from the PSC.

In the Petition, Apple Valley argues that a certificate of need is not required because the proposed Apple Valley facility “does not meet the definition of a ‘commercial solid waste facility’ as no commerce will occur.” Appx. at 6. In support of this argument, Apple Valley relies on the definition of “commerce” from the Sixth Edition of Black’s Law Dictionary, which defines “commerce,” in part, as “intercourse by way of trade and traffic between different peoples.”⁷ *Commerce, Black’s Law Dictionary* (6th ed. 1990).

Apple Valley, however, ignores the fact that “commercial solid waste facility” is defined by statute. Apple Valley further ignores the fact trade or traffic will occur between different peoples as AVW will dispose of solid waste generated or created by its customers at a facility operated by Apple Valley and owned by the BCSWA. The BCSWA will also “receive monthly rent payments” from Apple Valley. Appx. at 7. This is trade or traffic between different peoples.

In response, PSC Staff argued that a certificate of need should be required for the proposed Apple Valley facility because the PSC has jurisdiction over the facility and has exercised its

⁷ The Eleventh Edition of Black’s Law Dictionary defines “commerce” as “[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries.” *Commerce, Black’s Law Dictionary* (11th ed. 2019). Apple Valley’s proposed use of the facility would also involve the exchanges of goods and services.

jurisdiction in similar circumstances. *See* Appx. at 14-15 (*citing S&K Sanitation, Inc.*, Case No. 08-0507-SWF-CN, 2008 W. Va. PUC LEXIS 2470 (Sept. 9, 2008)). In *S&K Sanitation*, a motor carrier applied for a certificate of need to operate a transfer station. 2008 W. Va. PUC LEXIS 2470, at *1. As is here, the transfer station would not be open to the public. *Id.*

The motor carrier proposed using “a transfer trailer, which allows collection vehicles to back directly into and unload inside of the trailer.”⁸ Appx. at 53. The DEP had previously advised another motor carrier that, under the definition of a transfer station at the time,⁹ “this method of collection and transportation of solid waste does not constitute a solid waste transfer station if the waste is transported at least every 5 days.” Appx. at 53. PSC Staff noted, however, that the DEP’s position does not exempt the facility from regulation by the PSC. *See Initial and Final Joint Staff Memorandum*, Case No. 08-0507-SWF-CN (May 9, 2008), <https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=239438&NotType=WebDocket>.

PSC Staff recommended that the PSC grant a certificate of need provided proper publication was made and no protests were received. *Id.* The ALJ, relying on PSC Staff’s recommendation, granted the motor carrier a certificate of need. 2008 W. Va. PUC LEXIS 2470, at *4-*5. Following exceptions filed by the motor carrier unrelated to the granting of the certificate of need, the PSC adopted the ALJ’s recommended decision. *See S&K Sanitation, Inc.*, Case No. 08-0507-SWF-CN, 2008 W. Va. PUC LEXIS 2936 (Nov. 7, 2008).

⁸ *See Commercial Solid Waste Facilities Application for Certificate of Need*, Case No. 08-0507-SWF-CN (Mar. 7, 2008), <https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=236758&NotType=WebDocket>.

⁹ “Transfer station” was previously defined as “a combination of permanent structures, machinery, or devices at a place or facility where solid waste is taken from collection vehicles, often compacted, and prepared for shipment in other transportation units for movement to another solid waste management facility. Provided that, when solid waste is collected in a container including rolloffs, green boxes or bins which are temporarily positioned (not more than five days) at a specific location for transport by a transportation unit, such shall not be considered a transfer station. Leachate must be properly managed under either described activity.” W. Va. C.S.R. § 47-38-2.129 (1996); *see* Appx. at 53.

In reply, Apple Valley argues *S&K Sanitation* has no precedential value because the “motor carrier filed the application without assistance of counsel, and the issue of whether the [PSC] has jurisdiction to grant a certificate of need to a non-commercial transfer station was not contested or addressed.” Appx. at 46. Apple Valley further argues that

[t]he obligation of an entity to obtain a certificate of need from the [PSC] for a solid waste facility is tied to the same entity needing a permit from the [DEP] for a solid waste facility. This statute says that one has to get a certificate of need from the PSC before getting a permit from the DEP for a solid waste facility. The DEP previously advised a PSC certificated solid waste motor carrier that a manner of operation that is substantively identical to what Apple Valley is now proposing would not constitute a transfer station and would not require a solid waste facility permit from DEP.

Appx. at 46-47 (citations omitted). Apple Valley also argues that the

DEP never issued a solid waste facility permit to S&K Sanitation, Inc. The West Virginia Solid Waste Management Board’s Solid Waste Management Plan identifies all transfer stations in the State; no transfer station owned by S&K Sanitation, Inc. is listed. Since DEP does not view a solid waste facility permit as required, it follows that there is no obligation under W. Va. Code § 24-2-1c for an entity to obtain a certificate of need from the [PSC].

Appx. at 47.

These arguments are flawed in multiple respects. First, whether a case has precedential value is not determined by whether the parties are represented by counsel or whether an issue is contested. In *S&K Sanitation*, the PSC exercised its jurisdiction over the motor carrier despite the fact that the DEP determined that the facility was not a transfer station. Implicit in this exercise of jurisdiction is the PSC’s determination that the facility was a transfer station and, therefore, required a certificate of need.

Second, the DEP’s determination that the facility did not constitute a transfer station was premised on the definition of a transfer station at that time. It follows that the DEP would not issue

a solid waste facility permit based on this determination. Further, that definition has since changed. Now, for the exception to apply, the person that disposes of the solid waste must be the generator of the solid waste. Again, neither BCSWA, Apple Valley, nor AVW will generate or create the solid waste disposed of at the proposed Apple Valley facility.

Third, Apple Valley directly contradicts the representations it made to the PSC in the Petition. Indeed, Apple Valley represented to the PSC that it “will submit a permit application to the DEP by October 17, 2023.” Appx. at 9; *see* Appx. at 7 (acknowledging that the proposed Apple Valley facility must receive “appropriate authorizations” from the PSC and DEP).

Finally, the Solid Waste Management Plan has no bearing on whether or not a facility is a commercial solid waste facility, solid waste facility, or transfer station as defined by the relevant statutes and rules. Accordingly, the PSC erred in finding that a certificate of need is not required for the proposed Apple Valley facility.

D. A Certificate of Need is Required Regardless of Whether the Proposed Apple Valley Facility is Open to the Public.

Apple Valley argues that “[t]he jurisdiction of the [PSC] is limited to utilities providing public services.” Appx. at 6. Apple Valley further argues that it “will not hold itself out as serving the public” and “will not permit or promote use of the Entsorga facility by members of the public.” Appx. at 7. Apple Valley also argues that the adequacy of the existing solid waste facilities serving the region is irrelevant because Apple Valley is not proposing to serve the public. *See* Appx. at 48. Finally, Apple Valley argues that “the [PSC] previously found a need and granted a certificate of need to [Entsorga] for a solid waste facility in Berkeley County.” Appx. at 48.

These arguments are also flawed in several respects. First, West Virginia Code § 24-2-1c gives the PSC jurisdiction over certificates of need for commercial solid waste facilities regardless of whether the facility is open to the public.

Second, Apple Valley ignores the relevant factors that the PSC must consider in determining whether to grant or deny a certificate of need. *See* W. Va. Code § 24-2-1c(c)-(d). Specifically, “[t]he current capacity and life-span of other solid waste facilities that are likely to compete with the applicant’s facility,” W. Va. Code § 24-2-1c(c)(2), and whether “[t]he proposal, taken as a whole, is inconsistent with the public convenience and necessity,” W. Va. Code § 24-2-1c(d)(6).

Third, Apple Valley ignores the fact that the certificate of need granted to EntSORGA was to operate a mechanical-biological treatment solid waste facility. *See* Appx. at 3. Apple Valley, however, represented to the PSC that it would not operate this type of facility. *See* Appx. at 8. Instead, Apple Valley represented that it “will operate a conventional, internal transfer station.” Appx. at 8. Moreover, Apple Valley’s position is inconsistent with the PSC’s *Rules of Practice and Procedure*, which provide that

[a]n owner and/or operator of a commercial solid waste facility must obtain a certificate of need before commencing any additional or new commercial solid waste facility activities not explicitly authorized by an existing certificate of need, regardless of whether such additional or new activities would require a major permit modification from the [DEP], when such activities would have a significant impact upon rates, upon the applicant, upon the applicant’s competitors, or upon the public. Such additional or new commercial solid waste activities include, but are not limited to, the following -- composting activities, recycling activities, and *transfer station activities* -- regardless of the location of such activities relative to the currently permitted commercial solid waste activity.

W. Va. C.S.R. § 150-1-10.3.6 (emphasis added). Accordingly, the PSC erred in finding that a certificate of need is not required for the proposed Apple Valley facility.

III. The PSC Erred in Finding that Consolidation of Load Operations Limited to Waste Collected Solely from a Carrier's Customers, Performed at No Cost to Customers other than the Carrier's Existing Rates, and Occurring Prior to Transportation to a Disposal Facility, are Functions Included Within the Certificate Authority Granted to a Motor Carrier Who Collects Solid Waste.

The PSC found that “[c]onsolidation of load operations limited to waste collected solely from a carrier’s customers, performed at no cost to customers other than the carrier’s existing rates, and occurring prior to transportation to a disposal facility, are functions included within the certificate authority granted to the motor carriers who collect solid waste.” Appx. at 72-73. In support of this finding, the PSC relies on *Morgan Sanitation & Recycling Corporation*, Case No. 98-1339-SWF-CN, 2001 W. Va. PUC LEXIS 1857 (May 24, 2001) and *Fly-By-Nite Disposal Service, Inc.*, Case Nos. 02-1154-SWF-CN, 03-1163-MC-GI, 2008 W. Va. PUC LEXIS 400 (Feb. 25, 2008).

In *Morgan Sanitation*, a motor carrier applied for a certificate of need from the PSC to operate a transfer station. 2001 W. Va. PUC LEXIS 1857, at *1, *34. The motor carrier collected solid waste from its customers using small trucks. *Id.* at *2, *34. The motor carrier would consolidate the solid waste in semi-trailers and then haul the consolidated solid waste to a solid waste facility for disposal. *Id.* In *Fly-By-Nite*, the PSC faced a similar situation. 2008 W. Va. PUC LEXIS 400, at *1, *6, *41, *47. Instead of using a semi-trailer, the motor carrier would consolidate the solid waste in mobile compactors and then haul the consolidated solid waste to a solid waste facility for disposal. 2008 W. Va. PUC LEXIS 400, at *3-*5, *43-*45. As is here, the transfer stations were not open to the public. 2001 W. Va. PUC LEXIS 1857, at *3; 2008 W. Va. PUC LEXIS 400, at *7.

In *Morgan Sanitation* and *Fly-By-Nite*, the PSC found that the transfer stations were commercial solid waste facilities. 2001 W. Va. PUC LEXIS 1857, at *24; 2008 W. Va. PUC

LEXIS 400, at *29. The PSC further found that the solid waste was not generated by the motor carriers. 2001 W. Va. PUC LEXIS 1857, at *25; 2008 W. Va. PUC LEXIS 400, at *30. The PSC then analyzed the relevant factors in considering whether to grant or deny a certificate of need for a commercial solid waste facility, concluded that the motor carriers met the statutory requirements, and granted a certificate of need. 2001 W. Va. PUC LEXIS 1857, at *26-*30; 2008 W. Va. PUC LEXIS 400, at *30-*37.

The PSC's findings in this case directly contradict the PSC's findings in *Morgan Sanitation* and *Fly-By-Nite*. Here, instead of using a mobile compactor or semi-trailer, Apple Valley plans to consolidate solid waste in roll-off containers and then haul the consolidated solid waste to a solid waste facility for disposal. Yet, the PSC determined that no certificate of need is required in this case.

The PSC distinguishes these cases noting that

[t]he sole reason for the [PSC] to determine that a certificate of need should be granted was a tension between the [PSC's] conclusion that a certificate of need was not required and DEP's position that it could not grant a permit for the operations of those Motor Carriers' consolidation stations unless they received a certificate of need from the [PSC]. There is no such issue or tension, apparent or alleged, with regard to the use of the Entsorga facility.

Appx. at 71.

There is no evidence in the record that PSC consulted with the DEP regarding its position with respect to the proposed Apple Valley facility. Nor is there any evidence in the record that Apple Valley contacted the DEP or received any determination that the proposed Apple Valley facility does not need a permit from the DEP. Nor is there any reason to believe that the DEP would change its position when the only difference in this case is the type of container used to consolidate the solid waste. In both cases, the DEP intervened because it disagreed with the PSC's

findings that such facilities do not constitute commercial solid waste facilities. *See* 2001 W. Va. PUC LEXIS 1857; 2008 W. Va. PUC LEXIS 400.

IV. The PSC Erred in Finding that Consolidation of Loads Operations of AVW does not Constitute a Solid Waste Disposal Facility Requiring a Separate Certificate Beyond the Authority to Operate as a Trash Hauler Already Authorized for AVW in its Motor Carrier Certificates.

The PSC found that “consolidation of loads operations of [AVW] does not constitute a solid waste disposal facility requiring a separate certificate beyond the authority to operate as a trash hauler already authorized for [AVW] in its motor carrier certificates.” Appx. at 73. However, there is no evidence to support the PSC’s finding.

The PSC based its finding entirely on the unsupported representations of Apple Valley. Ordinarily, the PSC would refer the matter to an ALJ for a written recommended decision setting forth findings of fact and conclusions of law, which findings of fact must be supported by specific reference to evidence in the record.¹⁰ W. Va. Code § 24-1-9(a). PSC Staff would investigate and issue a recommendation. The parties would be allowed to respond to PSC Staff’s recommendation, serve discovery, brief issues, and otherwise participate in the proceeding. A hearing would be held and evidence would be taken. The ALJ would issue a recommended decision and the parties would be allowed to file exceptions. Unlike in *Morgan Sanitation*, *Fly-By-Nite*, and *S&K Sanitation*, none of this occurred in this case. Given Petitioners’ protest and PSC Staff’s objection, the PSC should have allowed the parties to present evidence in support of their respective positions. Instead, the PSC denied Petitioners due process by hastily issuing an order that simply relied on the unsupported assertions of Apple Valley.

¹⁰ Even if the PSC retains a case, as it did with the Petition, it is still required to “set forth separately findings of fact and conclusions of law, which findings of fact shall make specific reference to the evidence in the record which supports such findings.” W. Va. Code § 24-1-7.

It is also worth noting the PSC completely ignored the fact there is an obvious affiliate arrangement between Apple Valley and AVW that required prior PSC consent and approval. *See* Appx. at 71. Indeed, any arrangement “for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest” requires prior consent and approval of the PSC. W. Va. Code § 24-2-12(f); W. Va. C.S.R. § 150-1-10.9. By its own admission, Apple Valley will be handling the solid waste collected by its affiliate, AVW. Such an arrangement between affiliates requires prior PSC consent and approval. The PSC simply ignores the fact that AVW has not obtained consent and approval to unload solid waste at a facility operated by its affiliate, Apple Valley.

CONCLUSION

For the reasons set forth above, and any other reasons appearing to the Court, Petitioners respectfully request that the Court (1) stay the Commission Order pending this appeal if the PSC refuses to grant a stay or if the relief afforded is not acceptable, (2) reverse the Commission Order granting Apple Valley’s Petition for a Determination that No Certificate of Need is Required, (3) direct the PSC to determine that the proposed facility is a commercial solid waste facility, thereby requiring a certificate of need, and (4) grant such further relief as the Court deems necessary and appropriate.

CERTIFICATE OF SERVICE

I, Clayton T. Harkins, hereby certify that the foregoing **Petitioners' Brief** was electronically filed with the Court on December 8, 2023, via File & ServeXpress, and served, via U.S. Mail and/or E-Mail, upon the following:

Samuel F. Hanna
Hanna Law Office
P.O. Box 2311
Charleston, WV 25328-2311
*Counsel for Allied Waste Services of North America, LLC d/b/a
Republic Services of West Virginia*

Todd M. Swanson
Kevin W. Hivick, Jr.
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Counsel for Jefferson County Solid Waste Authority

James V. Kelsh
Bowles Rice LLP
P.O. Box 1386
Charleston, WV 25325-1386
Counsel for Apple Valley Waste Services, Inc.

Karen Buckley
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

/s/ Clayton T. Harkins

Clayton T. Harkins (WVSB # 13409)