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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' REPLY BRIEF

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VIRGINIA, INC. and LCS SERVICES, INC.**

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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 reply 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

Petitioners incorporate by reference the assignments of error set forth in Petitioners’ Brief.

STATEMENT OF THE CASE

Petitioners incorporate by reference the statement of the case set forth in Petitioners’ Brief.

SUMMARY OF ARGUMENT

Petitioners incorporate by reference the summary of argument set forth in Petitioners’ Brief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Scheduling Order entered on December 19, 2023, this matter is scheduled for oral argument on March 12, 2024. *See* Scheduling Order. Petitioners look forward to presenting oral argument before the Court.

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.”¹ 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.

Respondents argue that the proposed Apple Valley facility is not a commercial solid waste facility. Respondents offer two reasons why. First, Respondents assert that no “commerce” will occur at the facility. Second, Respondents assert that the facility will not “accept” solid waste. Statement of Reasons at 5, 8-16; Resp’t’s Br. at 10-11, 13-18. Neither argument holds water.

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 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.

¹ “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).

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.

Respondents argue that “commercial solid waste facility,” as used in W. Va. Code § 22-15-2, should be interpreted to incorporate the ordinary meaning of “commerce.” The PSC contends that consolidation operations are not “a commercial transaction because no money changes hands.” Statement of Reasons at 5. Similarly, Apple Valley asserts that “[t]he word ‘commercial’ signifies that a commercial solid waste facility engages in ‘commerce,’ *i.e.*, the ‘exchange of goods and services’ or ‘the exchange or buying and selling of commodities on a large scale involving transportation from place to place.’” Resp’t’s Br. at 14.

The Court, however, need not interpret the term “commercial solid waste facility.” In this case, the ordinary meaning of the term is irrelevant because the statute provides a definition. “When a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term’s ordinary meaning.” *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see Burgess v. United States*, 553 U.S. 124, 129 (2008) (“Statutory definitions control the meaning of statutory words . . . in the usual case.”); *Meese v. Keene*, 481 U.S. 465, 484 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (“As a rule, ‘[a] definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.”). The definition of commercial solid waste facility is clear and unambiguous. It does not require that money change hands or that the facility accept solid waste in exchange for something else. It only requires that the facility accept solid waste generated by sources other than the owner or operator of the facility. In this case, Apple Valley is accepting solid waste solely generated by residential and commercial customers of AVW of West

Virginia, Inc. d/b/a Apple Valley Waste (“AVW”), not by the Berkeley County Solid Waste Authority (“BCSWA”) or Apple Valley or any of its affiliates.²

Respondents further argue that the proposed Apple Valley facility will not “accept” solid waste. The PSC maintains that “[i]t is questionable whether the facility at issue could be regarded as ‘accepting’ any waste at all, given that the waste will first be consolidated, and then transported to an ultimate place of disposal.” Statement of Reasons at 8. Apple Valley claims that AVW is the only party to the consolidation operation and “AVW is not accepting any waste in the operation.” Resp’t’s Br. at 14.

There is no question that the proposed Apple Valley Facility will “accept” solid waste generated by sources other than the owner or operator of the facility. “Accept” means to take or receive something. *See Accept*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/accept> (last visited Feb. 9, 2024) (“to receive (something offered) willingly”); *Accept*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/accept> (last visited Feb. 9, 2024) (“to agree to take something”). Here, AVW will dispose of solid waste generated by its customers at a facility operated by Apple Valley and owned by the BCSWA. Put differently, Apple Valley and/or the BCSWA will take or receive solid waste generated by residential and commercial customers of AVW.

Moreover, the record reflects that there are multiple parties to the consolidation operation. Apple Valley represented to the PSC that (1) “the BCSWA now has possession and control of the [Entsorga] facility,” Appx. at 4; *see* Resp’t’s Br. at 4 (stating that the Entsorga facility is owned

² Setting aside Respondents preferred reading of the definition of a “commercial solid waste facility,” it is undisputed that AVW is a commercial business entity, getting paid by its customers to collect and dispose of their waste, and the facility in question is being used as one part of that overall transaction that starts with the sale of a service to customers, the collection of the customers’ waste, and the transportation and disposal of that waste. Common sense dictates that the proposed Apple Valley facility is a commercial solid waste facility squarely within the meaning of the statute.

by the BCSWA); (2) the BCSWA will “receive monthly rent payments,” presumably from Apple Valley, Appx. at 7; (3) Apple Valley “was the successful respondent in a request for proposal issued by the BCSWA to utilize the Entsorga site on a short term, month to month basis,” Appx. at 5; and (4) 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 *only be transported to solid waste facilities when full*,” Appx. at 5 (emphasis added); *see* Appx. at 8 (representing that the Entsorga facility would be used “by [Apple Valley] and AVW only” and that “[Apple Valley] will use this facility solely to transfer waste from individual collection vehicles to transport trailers.”); Appx. at 71-72. It is disingenuous for Apple Valley to now claim that AVW is the only party to the consolidation operation.

Because the proposed Apple Valley facility will accept solid waste generated by sources other than the owner or operator of the facility, it meets the definition of a commercial solid waste facility. *See* W. Va. Code § 22-15-2. 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.

Apple Valley asserts that “AVW will not be operating any *facility*. Rather, AVW will be using a portion of the former Entsorga facility to transfer waste collected from customers ‘from small truck to larger trucks.’” Resp’t’s Br. at 20 (citations omitted). As set forth in Petitioners’ brief, Apple Valley meets the definition of a solid waste facility operator. *See* Pet’rs’ Br. at 9. Further, Apple Valley’s assertion that it will transfer solid waste from small trucks to large trucks directly contradicts its representations to the PSC that it will transfer solid waste from small trucks to roll-off containers. This distinction is important for determining whether the consolidation operation

is a transfer station, which requires a certificate of need, or transloading, which does not require a certificate of need.

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

Apple Valley asserts that “AVW . . . already possesses the authority to consolidate the waste it collects” and the Court “must afford ‘high deference’ to the PSC on this issue” because “[t]he PSC does not believe a certificate of need is required under the facts.” Resp’t’s Br. at 20-21. Petitioners do not dispute that AVW has the authority to consolidate solid waste. The term for this is “transloading.” “Transloading” is defined as “the transfer of solid waste from one solid waste collection *motorized vehicle* to another, where that activity does not constitute either a ‘staging area’ or a ‘transfer station’ as defined in this rule.” W. Va. C.S.R. § 33-1-2.132 (emphasis added). Transloading “does not require a solid waste permit, provided that there is no discharge of leachate or other violations of W. Va. Code §§ 22-15-1 et seq., 22-12-1 et seq., 22-11-1 et seq., or any rules promulgated thereunder.” W. Va. C.S.R. § 33-1-2.132. Because transloading does not require a solid waste permit from the DEP, it also does not require a certificate of need from the PSC. *See* W. Va. Code § 24-2-1c. However, Apple Valley is not proposing to transfer solid waste from one motorize vehicle to another (*i.e.* transloading) – it is proposing to transfer solid waste from an affiliate’s motorized vehicle to a roll-off container (*i.e.* a transfer station). Indeed, Apple Valley fully admits that it intends to operate a transfer station. *See* Pet’rs’ Br. at 2-3, 7, 9, 14; Appx. at 5, 8, 71-72. Under West Virginia law, a transfer station requires a certificate of need.

Moreover, no deference is required to an administrative agency’s misapplication of the law. The interpretation of a statute or an administrative rule or regulation is subject to *de novo* review. Syl. Pt. 2, *Mason Cnty. Pub. Serv. Dist.*, 247 W. Va. 580, 885 S.E.2d 161.

D. The PSC’s Rules of Practice and Procedure Require a Certificate of Need for any Additional or New Commercial Solid Waste Activities not Explicitly Authorized by an Existing Certificate of Need.

The PSC argues that “[n]either of the Rules of Practice and Procedure or the Motor Carrier Rules say anything pertinent to the issue on appeal.” Statement of Reasons at 10. Petitioners agree that the PSC’s Motor Carrier Rules do not speak to the issue on appeal. However, the PSC’s Rules of Practice and Procedure do speak to this issue.

The PSC’s Rules of Practice and Procedure 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).

In 2013, the PSC granted Entsorga a certificate of need to construct and operate a mechanical-biological treatment solid waste facility.³ See Appx. at 3. Apple Valley 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. 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. Moreover, the PSC’s Rules of Practice and Procedure explicitly state that “additional or new commercial solid waste activities” include “transfer station activities.” W. Va. C.S.R. § 150-1-10.3.6. As such, the PSC should have considered whether the proposed Apple Valley facility

³ See *Entsorga West Virginia, LLC*, Case No. 12-0803-SWF-CN, 2013 W. Va. PUC LEXIS 499 (Mar. 11, 2013).

“would have a significant impact upon rates, upon the applicant, upon the applicant’s competitors, or upon the public.” W. Va. C.S.R. § 150-1-10.3.6. It failed to do so in this case.

E. The PSC’s Prior Decisions in *Morgan Sanitation*, *Fly-By-Nite*, and *S&K Sanitation* are Inconsistent and Conflict with the DEP’s Position Regarding the Regulation of Commercial Solid Waste Facilities.

The PSC argues that it has previously concluded that consolidation operations “are within the certificate authority granted to the motor carriers who collect solid waste[.]” Statement of Reasons at 10. Likewise, Apple Valley asserts that “PSC precedent recognizes that small consolidation operations are in the public interest and should be encouraged without the administrative hurdle of first having to obtain a certificate of need.” Resp’t’s Br. at 21.

Respondents selectively rely on, and distinguish this case from, *Morgan Sanitation* and *Fly-By-Nite* to support of their arguments, while simply dismissing *S&K Sanitation*. The PSC asserts that

[t]he sole reason for the [PSC’s] ultimate decisions [to grant certificates of need although it did not believe that certificates of need were required for consolidation operations] was a tension between the [PSC’s] conclusion that a certificate of need was not required and the DEP’s position . . . that it could not grant a permit for the consolidation stations unless a motor carrier first received a certificate of need to operate a commercial solid waste facility from the [PSC].”

Statement of Reasons at 15. Similarly, Apple Valley contends that the “PSC issued certificates of need to the motor carriers in *Fly-By-Nite* and *Morgan* for reasons of expediency and comity to DEP” Resp’t’s Br. at 23. With respect to *S&K Sanitation*, the PSC claims the case “is an outlier compared to [its] discussions and rationale in *Morgan Sanitation* and *Fly-By-Nite*,” Statement of Reasons at 15, and “is of little significance” because “[t]he application was uncontested and decided shortly after the DEP became involved in the *Fly-By-Nite* proceeding.

Thus, the [PSC] was aware of DEP's then position regarding transfer stations," Statement of Reasons at 15-16.

The underlying facts in *Morgan Sanitation*, *Fly-By-Nite*, and *S&K Sanitation* are more or less the same – the motor carrier would collect solid waste from its customers using a motorized vehicle, consolidate the solid waste in a container, and haul the consolidated solid waste to a solid waste facility for disposal. The important take away from these cases is the PSC's inconsistent application of the law to the facts. In *Morgan Sanitation* and *Fly-By-Nite*, the PSC initially determined the consolidation operations were not commercial solid waste facilities and no certificates of need were required. The PSC then changed its mind, found that they were, and granted certificates of need to the motor carriers. In *S&K Sanitation*, the PSC found that the consolidation operation was a commercial solid waste facility and granted a certificate of need. In this case, under the virtually the same facts, the PSC found that the consolidation operation is not a commercial solid waste facility and determined that no certificate of need is required.

Whether a consolidation operation is a commercial solid waste facility depends on the facts of the case – however, it does not depend on whether the application is contested or whether the DEP is involved in the case before the PSC. Further, the PSC should be well aware of the DEP's position at this point. There is nothing in the record to suggest that the DEP has changed its position.

III. There is Inadequate Evidence to Support the PSC's Findings.

The PSC argues that there was adequate evidence to support its ruling, the decision is in the public interest, and the substantive result was proper. Statement of Reasons at 16-18. Apple Valley argues the PSC's findings of fact are undisputed and should not be disturbed. Resp't's Br. at 18-20. Apply Valley further argues the substantive result of the PSC's order is proper and

benefits the public. Resp't's Br. at 20-26. There is simply no evidence to support the PSC's findings in this case.

Representations made by a party in an application, similar to allegations made in a complaint, are not evidence. And while the PSC is not bound by the technical rules of evidence, the Rules of Practice and Procedure outline the types of evidence that may be received by the PSC, including testimony under oath; prepared testimony; stipulations of fact; depositions; discovery requests, including interrogatories, requests for the production of documents and things, and requests for admissions; exhibits, including maps, prints, writings, statements, or documents; and staff reports. *See* W. Va. CSR § 150-1-13. None of this exists in the record.

Further, the PSC held no hearing in this case. As the Court has recognized, “[p]arties adversely affected by an order of the [PSC] are entitled to a hearing because absent a hearing and a record, meaningful appellate review of the [PSC’s] action as contemplated by [W. Va. Code § 24-5-1], would be impossible.” Syl. Pt. 2, *Virginia Elec. & Power Co. v. Public Serv. Comm’n*, 162 W. Va. 202, 248 S.E.2d 322 (1978). Petitioners maintain that the proposed Apple Valley facility will have a significant impact upon rates, upon Petitioners, and upon the public. *See* Pet’rs’ Mot. for Stay Pending Appeal at 3-4. At a minimum, the PSC should have held a hearing to allow the parties to present evidence in support of their respective positions. Instead, the PSC simply took Apple Valley at its word without providing Petitioners any meaningful due process.

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, (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 Apple Valley 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' Reply Brief** was electronically filed with the Court on February 12, 2024, via File & ServeXpress, and served, via U.S. Mail and/or E-Mail, upon the following:

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