

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Waste Management of West Virginia, Inc.,
LSC Services, Inc., Allied Waste Services of North
America, LLC, d/b/a Republic Services of West
Virginia, and Jefferson County Solid Waste
Authority,

Petitioners

vs.) No. 23-694

The Public Service Commission of West Virginia
and Apple Valley Waste Services, Inc. d/b/a Apple
Valley Waste,

Respondents.

BRIEF OF RESPONDENT
APPLE VALLEY WASTE SERVICES, INC.

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I. INTRODUCTION

Respondent Apple Valley Waste Services, Inc. (“Apple Valley”), an affiliate of AVW of West Virginia, Inc. (“AVW”), by counsel Bowles Rice LLP, hereby responds in opposition to Petitioners’ Brief.¹ AVW is an intrastate motor carrier that collects solid waste. Appendix Record (“App.”) at pp. 3, 72. By Commission Order entered on November 8, 2023, the Public Service Commission of West Virginia (the “PSC”) correctly determined—under the facts, West Virginia law, and PSC precedent—that AVW’s proposed solid waste consolidation operation at the former EntSORGA facility is not a public service and does not require a certificate of need. *Apple Valley Waste Services, Inc.*, Case No. 23-0813-SWF-PW-CN, Comm’n Or. (Nov. 8, 2023), App. at pp. 69-73.

No certificate of need is required, because the proposal does not qualify as a “commercial solid waste facility” under the pertinent statutes, W. Va. Code §§ 22-15-2 and 24-2-1c. There are at least two reasons why.

First, no “commerce” (*i.e.*, exchange or buying and selling of commodities) will occur in the consolidation operation. Second, and relatedly, AVW will not “accept” any solid waste for disposal from a separate party in the

¹ Petitioners are 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 the Jefferson County Solid Waste Authority (“JCSWA”).

operation; instead, AVW will consolidate waste already in its possession. AVW then will transport the waste to a commercial solid waste facility. There, the waste will be accepted for disposal by a separate party in exchange for its payment of a fee.

The internal consolidation operation at the former Entsorga facility will not be open to or serve the public. It will have no adverse impact on customer costs. Additionally, the operation will help defer AVW's need to request a rate increase from the PSC for solid waste collection services. In view of these and other salient facts, the proposal does not meet the definition of "commercial solid waste facility" in § 22-15-2, and the PSC correctly determined that the certificate of need requirement in § 24-2-1c does not apply. This Court should AFFIRM the Commission Order.

II. ASSIGNMENT OF ERROR

Did the PSC correctly determine that a certificated motor carrier's proposed solid waste consolidation operation does not qualify as a "commercial solid waste facility" that requires a certificate of need under W. Va. Code § 24-2-1c, where the operation:

- Will be limited to waste collected from the carrier's customers;
- Will be performed at no extra cost to those customers;

- Will occur prior to transportation to a commercial solid waste facility, where the waste will be accepted for disposal in exchange for the payment of a fee;
- Is already within the certificate authority granted to motor carriers who collect solid waste;
- Serves the public interest by, among other things, delaying a rate increase for solid waste collection services, lowering greenhouse gas emissions, and reducing road wear and tear; and
- Is supported by PSC precedent recognizing that a certificate of need is not required?

The answer is “Yes.” The PSC correctly determined that the proposal does not require a certificate of need under § 24-2-1c. This Court should AFFIRM the Commission Order under the “highly deferential” standard of review mandated by West Virginia jurisprudence.²

² See, e.g., *W. Va. Action Group v. Pub. Serv. Comm’n of W. Va.*, 233 W. Va. 327, 331-32, 758 S.E.2d 254, 258-59 (2014) (addressed in Standard of Review section of this Brief).

III. STATEMENT OF THE CASE

AVW, an intrastate motor carrier, holds a certificate from the PSC that authorizes it to provide solid waste (*e.g.*, garbage) collection services in Berkeley, Hampshire, Jefferson, and Mineral Counties, West Virginia. App. at pp. 3, 72.

Prior to May of 2022, AVW disposed a portion of the solid waste it collected at the certificated commercial solid waste facility in Berkeley County that was operated by lessee Entsorga West Virginia, LLC (“Entsorga”). *Id.* The facility—which is owned by the Berkeley County Solid Waste Authority (the “BCSWA”)—was plagued with financial and operational issues during Entsorga’s leasehold, and it closed temporarily in May of 2022. *Id.* at pp. 3-4, 71-72.

Entsorga subsequently abandoned the facility and the BCSWA terminated its lease with Entsorga. *Id.* at pp. 4, 72. Entsorga filed a bankruptcy petition and attempted to reorganize. *Id.* at p. 4. However, the U.S. Bankruptcy Court for the Northern District of West Virginia dismissed the petition based on Entsorga’s inability to credibly show it could operate, due to a lack of insurance. *Id.*

Entsorga’s abandonment of the facility created public health and safety issues. Fires broke out at the facility and burned from July 23-26, 2022.³ *Id.*

³The Appendix contains a scrivener’s error. Apple Valley’s “Petition for a Determination that No Certificate of Need is Required” states, incorrectly, that the fires occurred on July 23-26, 2023. App. at p. 4. The fires actually occurred on July 23-26, 2022.

Without receiving compensation, AVW assisted the West Virginia Department of Environmental Protection (“DEP”) and the BCSWA with extinguishing the fires. *Id.* at pp. 4, 69. AVW also removed roughly 75% of the garbage that was left in the facility at the time of abandonment and addressed a vermin problem. *Id.*

Unable to utilize the facility for waste disposal, AVW was forced to drive solid waste greater distances to alternative disposal sites. *Id.* at pp. 5, 72. This increased AVW’s cost of operations. *Id.* Specifically, AVW’s expenses in fuel, labor, and vehicle wear and tear escalated. *Id.* Additionally, some of the alternative disposal sites charged rates exceeding Entsorga’s rates. *Id.*

AVW was in a difficult position financially, as there is extensive competition from *interstate* carriers in AVW’s service area. *Id.* at p. 5. Requesting a rate increase would place AVW at risk of losing customers. *Id.*

On June 27, 2023, the BCSWA issued a request for proposal (“RFP”) inviting responses for leasing the former Entsorga facility on a short term, month-to-month basis. *Id.* The BCSWA selected a proposal submitted by Apple Valley, AVW’s affiliate. *App.* at pp. 5, 72. Apple Valley proposed that AVW would utilize the former Entsorga facility “as an *internal* transfer station⁴ to aggregate solid waste

⁴ The 2023 West Virginia Solid Waste Management Plan prepared by the West Virginia Solid Waste Management Board describes transfer stations as follows: “Transfer stations allow garbage from packers and smaller trucks to be transferred to larger trucks in areas where a long haul to the nearest landfill is necessary. On average, one large vehicle can haul 4 times the load of one standard size garbage

collected by AVW onto large roll off containers.” *Id.* at p. 5 (emphasis added). When completely full, AVW would transport the roll off containers to a solid waste facility for disposal. *Id.* The PSC appropriately characterizes this practice of aggregating waste for easier transportation to a commercial disposal facility as being a “consolidation operation.” *Id.* at p. 71.

Apple Valley estimates that utilizing the former Entsorga facility for the consolidation operation will reduce AVW’s expenses by approximately \$100,000 per month, deferring “AVW’s need to seek a rate increase.” *Id.* at p. 5. The BCSWA, moreover, will benefit financially from having a tenant. *Id.* at p. 7.

In connection with commencing the proposed solid waste consolidation operation, Apple Valley filed a Petition with the PSC on October 16, 2023, pursuant to W. Va. Code § 24-2-1c. App. at pp. 1-10. The Petition sought a determination from the PSC that the proposed consolidation operation does not require a certificate of need. *Id.* at pp. 6-7. Apple Valley explains in the Petition that AVW’s planned use of the facility will not render it a “commercial solid waste facility,” because AVW will not impose charges on any customer and all consolidation efforts will be handled by AVW’s employees. *Id.* The proposed consolidation operation will not be open to or serve the public. *Id.* at p. 7.

truck saving time, wear and tear on the trucks and fuel. Transfer stations are an essential part of the waste management system.” App. at p. 56.

Alternatively, Apple Valley's Petition requests an emergency certificate of need on an expedited timetable, to the extent the PSC deems a certificate to be necessary. *Id.* at p. 8. The Petition answers the questions listed on the PSC's standard form certificate of need application. *Id.* at pp. 8-9; *see also* Rules of Practice and Procedure ("PSC Procedural Rules"), W. Va. C.S.R. § 150-1-1, *et seq.*, at § 150-1-26, Form No. 15. Further, Apple Valley requests a waiver of the obligation to present a Tariff Rule 42 Exhibit⁵ or to propose and give notice of rates, as no members of the public will be affected by the emergency certificate of need application. App. at pp. 9-10.

PSC Staff filed a Response to Apple Valley's Petition on October 18, 2023. *Id.* at pp. 11-18. Waste Management and LCS filed a Motion to Intervene and Protest on October 20, 2023. *Id.* at pp. 20-27. Republic did likewise on October 23, 2023. *Id.* at pp. 28-33. On October 26, 2023, the JCSWA filed its Motion to Intervene and Protest. *Id.* at pp. 39-43.

On October 30, 2023, Apple Valley filed its Reply, with attachments. *Id.* at pp. 44-58. PSC Staff filed a Surreply on November 3, 2023. *Id.* at pp. 60-68.

⁵ A Tariff Rule 42 Exhibit provides extensive financial information regarding revenue, expenses, and investments and is used by the PSC to consider setting a rate. *See* Rules for the Construction and Filing of Tariffs ("PSC Tariff Rules"), W. Va. C.S.R. § 150-2-1, *et seq.*, at § 150-2-21 ("Tariff Form No. 42").

Thereafter, on November 8, 2023, the PSC entered a Commission Order granting Apple Valley's Petition and determining that no certificate of need is required under W. Va. Code § 24-2-1c. *Id.* at pp. 69-73. The PSC makes several pertinent Findings of Fact in the Commission Order based on publicly available information and the representations made in Apple Valley's Petition. *Id.* at p. 72. Among other things, the PSC's Findings of Fact reflect that:

- AVW's "inability to use the Entsorga facility as a place of disposal has increased its cost of operations by forcing it to drive greater distances to alternative disposal sites, which increases its operational expenses in fuel, labor, and vehicle wear and tear." *Id.* at p. 72, ¶ 4.
- AVW's solid waste consolidation operation will "aggregate [the] solid waste it collects onto roll off containers carried by larger trucks, which w[ill] then be transported to solid waste facilities." *Id.* at p. 72, ¶ 5.
- The "[c]onsolidation of loads as proposed by AVW should allow [it] to reduce its operating costs, which should ultimately help keep rates down for its solid waste customers." *Id.* at p. 72, ¶ 6.
- AVW "represents that its proposed practice will reduce AVW's expenses by approximately \$100,000 per month, which in turn will defer [its] need to seek a rate increase." *Id.* at p. 72, ¶ 7.

- “No entity other than AVW will use the facility to be located within the former Entsorga footprint.” *Id.* at p. 72, ¶ 8.

After making these Findings of Fact, the PSC expresses two Conclusions of Law in the Commission Order. *Id.* at pp. 72-73. First, the PSC concludes that the “[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.” *Id.* at pp. 72-73, ¶ 1. This Conclusion of Law echoes PSC precedent. *Fly-By-Nite Disposal Service, Inc.*, Case Nos. 02-1154-SWF-CN & 03-1163-MC-GI, Comm’n Or. p. 22 (Conclusion of Law 3, Feb. 25, 2008); *Morgan Sanitation & Recycling Corp.*, Case No. 98-1339, Comm’n Or. p. 3 (Conclusion of Law 1, Jan. 13, 2000).

Second, the PSC concludes that, “[u]nder the facts present in this case, 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.” App. at p. 73, ¶ 2.

Petitioners filed a Joint Motion to Stay the Commission Order in the PSC on December 6, 2023. *Id.* at pp. 77-84. Two days later, on December 8, 2023,

Petitioners filed this appeal. The PSC entered a Commission Order on January 5, 2024, denying Petitioners' Joint Motion to Stay. *Apple Valley Waste Services, Inc.*, Case No. 23-0813-SWF-PW-CN, Comm'n Or., 2024 WL 109485 (W. Va. P.S.C. Jan. 5, 2024).

IV. SUMMARY OF ARGUMENT

AVW's proposed solid waste consolidation operation does not meet the definition of "commercial solid waste facility" in W. Va. Code § 22-15-2. Therefore, the PSC did not exceed its statutory jurisdiction and powers in correctly concluding that no certificate of need is required under W. Va. Code § 24-2-1c.

There are two primary reasons why the consolidation operation is not a "commercial solid waste facility." First, no "commerce" (*i.e.*, exchange or buying and selling of commodities) will occur in the consolidation operation. All solid waste consolidation efforts will be handled internally, by AVW's employees. The consolidation operation will not be open to or serve the public. No charges will be imposed on AVW's solid waste customers in addition to current rates.

Second, the definition of a "commercial solid waste facility" under § 22-15-2 requires that the facility "accept" solid waste. AVW will not "accept" solid waste in the consolidation operation. Instead, the operation will consolidate solid waste already in the possession of AVW. The operation will occur prior to transporting the waste to a commercial solid waste facility for acceptance and

disposal. At that subsequent facility, the waste will be accepted in exchange for the payment of a fee, in “commerce.” The PSC correctly determined that the consolidation operation itself does not require a certificate of need, because there will be no commercial exchange of waste in the operation.

Importantly, the Commission Order achieves a result that benefits AVW’s customers and the public. PSC precedent recognizes that small waste consolidation operations are beneficial. Among other things, consolidation operations save motor carriers time and expenses in transporting waste; lessen greenhouse gas emissions; save road wear and tear; enhance services to rural residents; and help defer rate increase requests. In these circumstances, the Commission Order not only reaches the correct result legally, it reflects sound public policy.

V. STATEMENT OF ORAL ARGUMENT AND DECISION

This Court has entered a Scheduling Order setting Petitioners’ appeal for oral argument on March 12, 2024, in accordance with W. Va. Code § 24-5-1 and W. Va. R. App. P. 19. Scheduling Or., Case No. 23-694 (Dec. 19, 2023). Apple Valley looks forward to participating and believes the case is appropriate for memorandum decision, as time is of the essence. The minimum time for argument set forth in Rule 19 should be sufficient.

VI. STANDARD OF REVIEW

This Court is “highly deferential” to orders of the PSC, recognizing that its cases “involve complex issues” and “arcane concepts” that fall within its special expertise of supervising and regulating public utilities. *W. Va. Action Group v. Pub. Serv. Comm’n of W. Va.*, 233 W. Va. 327, 331-32, 758 S.E.2d 254, 258-59 (2014) (explaining Legislature intended PSC’s judgment to prevail on questions of expediency and best interests of litigants and public served).

Review of a PSC order is limited to determining “(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.” Syl. Pt. 1, *Mason Co. Pub. Serv. Dist. v. Pub. Serv. Comm’n of W. Va.*, 247 W. Va. 580, 885 S.E.2d 161 (2022).

An order based on the PSC’s finding 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.” Syl. Pt. 1, *Trulargo, LLC v. Pub. Serv. Comm’n of W. Va.*, 242 W. Va. 482, 836 S.E.2d 449 (2019). This Court will not substitute its judgment for that of the PSC on controverted evidence. Syl. Pt. 2, *Chesapeake and Potomac Tel. Co. of W. Va. v. Pub. Serv. Comm’n of W. Va.*, 171 W. Va. 494, 300 S.E.2d 607 (1982).

VII. ARGUMENT

A. THE PSC DID NOT EXCEED ITS POWERS AND JURISDICTION IN CORRECTLY DETERMINING THAT THE PROPOSED CONSOLIDATION OPERATION DOES NOT QUALIFY AS A “COMMERCIAL SOLID WASTE FACILITY” UNDER WEST VIRGINIA LAW.

A person must obtain a certificate of need from the PSC to construct, operate or expand a “commercial solid waste facility” in West Virginia. W. Va. Code § 24-2-1c. In this case, the PSC determined that AVW’s proposed solid waste consolidation operation does not require a certificate of need. App. at pp. 69-73. The PSC’s determination is correct, because the proposed operation does not meet the definition of “commercial solid waste facility” in W. Va. Code § 22-15-2.

A “*commercial* solid waste facility” is:

[A]ny 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.

W. Va. Code § 22-15-2 (emphasis added).

In § 22-15-2, the West Virginia Legislature distinguishes the defined phrase “commercial solid waste facility” from the separate defined phrase “solid

waste facility” by, among other things, use of the word “commercial.” The 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.” *Black’s Law Dictionary* 214 (Abridged 7th ed. 2000); *Merriam Webster’s Collegiate Dictionary* 231 (10th ed. 1995).

As § 22-15-2 states, a commercial solid waste facility “accepts solid waste” in commerce; that is, in exchange for something else. The “[a]cceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain.” *Williston on Contracts* § 6:1 (4th ed., July 2023 update). Here, there is only one party to the consolidation operation: AVW. AVW is not accepting any waste in the operation; the waste being consolidated already will be in AVW’s possession.

A *commercial* solid waste facility “accepts solid waste” in exchange for the payment of a tipping fee. This is illuminated when the “commercial solid waste facility” definition is compared and contrasted with the separate definition of “solid waste facility” in § 22-15-2. The “solid waste facility” definition does not depend on an exchange in commerce, and it does not expressly focus on the facility

“accepting” solid waste.⁶ The “*commercial* solid waste facility” definition *does* focus on the facility “accepting” waste—in the commercial context.

The “commercial solid waste facility” definition is the definition that matters in this appeal, despite Petitioners’ attempts to confuse the two definitions. *See, e.g.*, Petitioners’ Br. at pp. 8-9. AVW does not dispute that its proposed consolidation operation is akin to an internal “transfer station” that may qualify as a “solid waste facility” under W. Va. Code § 22-15-2. But AVW vehemently disputes that the proposed operation meets § 22-15-2’s separate definition of “*commercial* solid waste facility.”

The facts dictate whether a “solid waste facility” qualifies as a “commercial solid waste facility” that requires a certificate of need under W. Va. Code § 24-2-1c. A solid waste facility that does not accept solid waste in a

⁶ The West Virginia Code defines “Solid waste facility” 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 § 22-15-20 of this code. Such facility shall be deemed to be situated, for purposes of this article, in the county where the majority of the spatial area of such facility is located: *Provided*, That a salvage yard, licensed and regulated pursuant to the terms of § 17-23-1 *et seq.* of this code, is not a solid waste facility and an advanced recycling facility is not a solid waste facility.”

commercial exchange does not qualify as a “commercial solid waste facility” under § 24-2-1c.

Here, the PSC correctly determined that the proposed solid waste consolidation operation does not qualify as a “commercial solid waste facility.” There are at least two reasons why. First, no commerce (“exchange or buying and selling of commodities”) will occur in the consolidation operation. The operation will entail AVW’s employees aggregating solid waste loads already in their possession. This operation will be performed internally, as AVW’s employees will not have any interaction with other parties.

Significantly, the solid waste will not be exchanged for anything else of value in the operation. Waste consolidation will be limited to garbage collected from AVW’s customers, and it will be performed at no cost to those customers other than AVW’s existing rates. Further, the operation will not be open to or serve the public. The test as to whether an enterprise is a public utility that must be regulated by the PSC is whether the enterprise is holding itself out to serve the public. *United Fuel Gas Co. v. Battle*, 153 W.Va. 222, 167 S.E.2d 890 (1969), *cert. denied* 396 U.S. 116, 90 S.Ct. 398, 24 L.Ed 309 (1969). AVW will not be serving the public in consolidating waste internally.

Accordingly, the consolidation operation cannot, in and of itself, be characterized as being “commercial” in nature. Without a commercial exchange of

goods or commodities, a consolidation operation does not qualify as a “commercial solid waste facility.” The proposed solid waste consolidation operation is what the PSC characterized it to be: A consolidation operation. App. at p. 71.

Second, and relatedly, AVW will not “accept solid waste” at the former Entsorga facility in the operation. The “commercial solid waste facility” definition in W. Va. Code § 22-15-2 requires the *acceptance* of waste by the facility. Here, AVW will *consolidate* waste that it previously has collected for easier transport to a commercial facility, where the waste will be “accepted” for disposal. To the extent that a commercial transaction will occur, it will occur downstream from the consolidation operation at a commercial solid waste facility owned by a third party. AVW’s internal consolidation of waste is akin to one passing \$20 from one’s left hand to one’s right hand. There is no exchange “in commerce” between two distinct persons or entities in the operation.

Because no commerce will occur in the consolidation operation, and AVW will be consolidating solid waste already in its possession rather than “accepting” waste as part of a commercial exchange, the PSC was correct that, under the facts, the consolidation operation does not meet the definition of “commercial solid waste facility.” W. Va. Code § 22-15-2. Accordingly, no certificate of need is required under § 24-2-1c.

And even more fundamentally, this Court must be mindful that the Legislature created the PSC so that the users of public services would not be subject to excessive rates or unreasonable terms of service. W. Va. Code §§ 24-1-1(a)(1), -1(a)(4), 24-2-3; *see also State ex rel. Water Dev. Auth. v. Northern Wayne Co. Pub. Serv. Dist.*, 195 W. Va. 135, 140-41, 464 S.E.2d 777, 782-83 (1995). AVW's proposed consolidation operation will have no impact on customer rates or terms of service, and AVW is not proposing to and will not serve the public at the former Entsorga facility. The consolidation operation will be a wholly internal operation, targeted to help AVW reduce its operating expenses.

The PSC acted appropriately in concluding that no certificate of need is required in the forgoing circumstances. The PSC did not exceed its statutory jurisdiction and powers. *Mason Co. Pub. Serv. Dist.*, 885 S.E.2d at Syl. Pt. 1.

B. THE PSC'S FINDINGS OF FACT ARE UNDISPUTED AND SHOULD NOT BE DISTURBED.

The PSC's Commission Order makes eight separate Findings of Fact. App. p. 72. Finding of Fact 1 relates to Apple Valley's and AVW's business affiliation, AVW's status as a certificated motor carrier, and AVW's service territory. *Id.* Finding of Fact 2 states that AVW previously disposed a portion of the solid waste it collected at the former Entsorga facility. *Id.* Finding of Fact 3 observes that the Entsorga facility closed in May of 2022 and was subsequently abandoned. *Id.* These three Findings of Fact are based on publicly available

background information. They were not disputed by Petitioners and cannot reasonably be disputed by Petitioners now.

The remaining Findings of Fact stem from representations made by Apple Valley in its initial PSC Petition for a determination that no certificate of need is required. App. pp. 1-10. Finding of Fact 4, for example, relates to the financial hardships AVW is experiencing due to the closure of the former Entsorga facility. *Id.* at p. 72, ¶ 4 (“[AVW] represents that its inability to use the Entsorga facility as a place of disposal has increased its costs of operations by forcing it to drive greater distances to alternative disposal sites, which increases its operational expenses in fuel, labor, and vehicle wear and tear.”). Finding of Fact 5 describes for the record the solid waste consolidation operation that Apple Valley has proposed. *Id.*, ¶ 5 (stating AWW proposes “aggregat[ing the] solid waste it collects onto roll off containers carried by larger trucks, which would then be transported to solid waste facilities.”).

Findings of Fact 6 and 7 describe the benefits that will flow from the proposed consolidation operation, including reducing AWW’s operating costs, keeping rates down for customers, and deferring AWW’s need to seek a rate increase. App. p. 72, ¶¶ 6, 7. Finally, Finding of Fact 8 is based on Apple Valley’s representation that, “[n]o entity other than [AVW] will use the facility to be located within the former Entsorga footprint.” *Id.*, ¶ 8. In making these Findings of Fact,

the PSC cites exactly where Apple Valley’s representations appear in the record. And in the context of this case, representations are appropriate, because this controversy arises out of a *proposal*.

Petitioners have not and cannot point to any evidence that undermines the PSC’s Findings of Fact. They are undisputed and describe and contextualize a *proposal*. Because the PSC’s Findings of Fact are uncontested, they are subject to “high deference” and may not be disturbed by this Court. *Trulargo, LLC*, 836 S.E.2d at Syl. Pt. 1.

C. THE SUBSTANTIVE RESULT OF THE COMMISSION ORDER IS PROPER AND BENEFITS THE PUBLIC.

The PSC’s determination that no certificate of need is required for the consolidation operation is appropriate for several reasons.

First, as the Commission Order notes, AVW will not be operating any *facility*. App. at p. 71. Rather, AVW will be using a portion of the former EntSORGA facility to transfer waste collected from customers “from small trucks to larger trucks.” *Id.* Moving solid waste between trucks does not transform the property where that occurs into a “commercial solid waste facility,” particularly where there is no exchange in commerce relating to the acceptance of solid waste for disposal. W. Va. Code § 22-15-2 (defining “commercial solid waste facility”).

Second, as the Commission Order also explains, AVW—as a certificated motor carrier of solid waste—already possesses the authority to

consolidate the waste it collects. App. at pp. 71-73. The West Virginia Code vests the PSC with the general “power and authority to supervise and regulate all common carriers by motor vehicle.” W. Va. Code § 24A-2-3. This includes regulating the rates, services, and operating schedules of motor carriers who collect solid waste, “so as to meet the reasonable needs of the community.” *Id.* The ability to consolidate waste internally is, as the PSC observes, within the inherent authority of a certificated motor carrier of solid waste. *This means that AVW did not even need to ask the PSC for permission to proceed with the consolidation operation and only did so out of an abundance of caution and respect for its regulator.* The PSC does not believe a certificate of need is required under the facts; this Court must afford “high deference” to the PSC on this issue. *W. Va. Action Group*, 758 S.E.2d at 258-59.

Third, 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. The PSC has concluded as a matter of law that small consolidation operations are beneficial because they:

- Save motor carriers time in transporting collected waste to a disposal facility;
- Allow appropriate service to be provided to West Virginia residents who live in rural areas;
- Save wear and tear on highways;

- Lessen greenhouse gas emissions and conserve gasoline as fewer vehicles are needed to deposit solid waste at landfills;
- Save landfill operators' resources as fewer vehicles must be processed; and
- Protect customer interests by delaying rate increases for solid waste collection services.

Fly-By-Nite Disposal Service, Inc., Case Nos. 02-1154-SWF-CN & 03-1163-MC-GI, Comm'n Or. p. 22 (Conclusion of Law 3, Feb. 25, 2008); *see also Morgan Sanitation & Recycling Corp.*, Case No. 98-1339, Comm'n Or. p. 3 (Conclusion of Law 1, Jan. 13, 2000) (observing consolidation of small loads into semitrailer before hauling solid waste to disposal site was internal business decision by which motor carrier was able to reduce operating costs and keep rates low for customers; concluding consolidation operation not a commercial solid waste facility requiring certificate of need).

Petitioners challenge the precedential value of *Fly-By-Nite* and *Morgan*, contending that these authorities do not support Respondents. Petitioners' Br. at pp. 15-16. This contention is based on the PSC determining, ultimately, that the consolidation operations in those cases qualify as commercial solid waste facilities and issuing certificates of need to them. *Fly-By-Nite*, Comm'n Or. p. 24 (Conclusion of Law 18); *Morgan Sanitation & Recycling Corp.*, Case No. 98-1339-SWF-CN (REOPENED), Comm'n Or. (Conclusion of Law 1, May 24, 2001).

Petitioners' argument is a red herring. Close analysis of the February 25, 2008, Commission Order in *Fly-By-Nite* and the May 24, 2001, Commission Order in *Morgan* following reopening reveal that the PSC did not believe that the consolidation operations in those cases qualify as "commercial solid waste facilities." The PSC issued certificates of need to the motor carriers in *Fly-By-Nite* and *Morgan* for reasons of expediency and comity to DEP, as it had intervened in the cases and was refusing to permit the consolidation operations without the PSC first issuing certificates of need. The PSC issued certificates of need only to get the motor carriers out of DEP procedural limbo, not because the PSC believed they were required.

Morgan is most instructive on this issue. There, two out of the three PSC Commissioners openly expressed that the consolidation operation at issue did NOT require a certificate of need. As Commissioner Martha Walker's concurring opinion explains, in pertinent part:

Although I join Chairman Otis D. Casto in concluding that a CON should be granted in this case, I am not convinced that Morgan Sanitation & Recycling Corporation, in fact, needs a certificate. The Commission concluded on January 13, 2000, and correctly I believe, that a certificate was not needed for MSRC's private facility. MSRC simply consolidates waste from its smaller collection trucks into a larger truck, and when that larger truck is filled, hauls the solid waste to a distant landfill. MSRC does not accept waste from any other source. There is no fee charged when the waste from the smaller trucks is consolidated into a larger load for transportation. MSRC

began operating its transfer station simply so it could make fewer trips to the landfill, thus saving time and money and avoiding a rate increase to its solid waste collection customers. This seems to me to be a responsible way for a solid waste hauler to operate.

Morgan Sanitation & Recycling Corp., Case No. 98-1339-SWF-CN (REOPENED) at Concurring Op. of Comm. Martha Y. Walker (May 24, 2001); *see also* Dissenting Op. of Comm. Charlotte Lane (“I continue to believe that it is not necessary for a trash hauler that possess[es] authority from the PSC to obtain a certificate of need to operate facilities solely intended to facilitate the economic disposal of waste at West Virginia landfills.”).

The instant appeal does not involve the DEP and it has not taken any position against the PSC here. The sole issue is whether AVW’s proposed consolidation operation is a “commercial solid waste facility.” As Commissioners Walker and Lane opined more than twenty years ago, and as the PSC recently reiterated here, small solid waste consolidation operations that are not open to but benefit the public should not and do not require a certificate of need.

Fourth, the consolidation operation will help AVW reduce monthly expenses. As the PSC’s Findings of Fact reflect, AVW’s “inability to use the Entsorga facility as a place of disposal has increased its cost of operations by forcing it to drive greater distances to alternative disposal sites, which increases its operational expenses in fuel, labor, and vehicle wear and tear.” App. at p. 72, ¶ 4.

The proposed consolidation operation is estimated to reduce AVW's expenses "by approximately \$100,000 per month, which in turn will defer [its] need to seek a rate increase." *Id.* at p. 72, ¶ 7. As the PSC observes in the Commission Order:

It is not in the State's interest to require motor carriers who choose to consolidate smaller loads, collected only from their customers, to expend the considerable resources necessary to process a certificate of need application for an operation that, in the interest of reducing costs, is simply transferring solid waste loads from smaller trucks to larger trucks for ultimate delivery to disposal sites. The Commission believes that it is in the public interest to encourage such operations by motor carriers who collect solid waste.

App. at p. 71-72.

Fifth, the BCSWA will receive lease revenue from the consolidation operation. App. at p. 4. Perhaps more importantly, the former Entsorga facility will not be an abandoned property, posing fire and vermin risks. *Id.* at pp. 4,69. AVW and Apple Valley will be there, attending to a consolidation operation that will benefit solid waste customers and the public at large.

Sixth, this Court must give due consideration to the motivations of the Petitioners in challenging the PSC's determination that no certificate of need is required. *See generally* App. at pp. 48-51. The Petitioners transport solid waste or operate commercial solid waste facilities in some of the same counties that AVW serves. They are benefitting financially from the closure of the former Entsorga facility. Petitioners want to keep the former Entsorga facility closed to stifle

competition from AVW, which now must drive greater distances at increased costs to deposit solid waste. In determining that a certificate of need is not required, the PSC likely considered the impact that the former Entsorga's facility's closure has had on AVW and how the closure has benefitted its competitors. Using the facility for a consolidation operation benefits AVW's customers and the public, and affords the BCSWA with lease revenue. Petitioners are benefitting from Entsorga's bad fortune to the detriment of AVW's bottom line. Equity favors the PSC's determination that no certificate of need is required; AVW would be utilizing the Entsorga facility but for its closure. The consolidation operation helps AVW manage increased costs.

In these circumstances, the Commission Order reaches the proper result substantively and should not be second-guessed by this Court.

VIII. CONCLUSION

WHEREFORE, in view of the foregoing, this Court should AFFIRM the Commission Order of November 8, 2023. The PSC correctly determined that no certificate of need is required under W. Va. Code § 24-2-1c because the proposed solid waste consolidation operation does not qualify as a "commercial solid waste facility" under the facts and the definition in W. Va. Code § 22-15-2.

Respectfully submitted by,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Waste Management of West Virginia, Inc.,
LSC Services, Inc., Allied Waste Services of North
America, LLC, d/b/a Republic Services of West
Virginia, and Jefferson County Solid Waste
Authority,

Petitioners

vs.) No. 23-694

The Public Service Commission of West Virginia
and Apple Valley Waste Services, Inc., d/b/a Apple
Valley Waste,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2024, I caused the
foregoing **Brief of Respondent Apple Valley Waste Services, Inc.** to be served
electronically on the following utilizing File & ServeXpress:

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