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ATTORNEYS FOR ALLIED WASTE
SERVICES OF NORTH AMERICA, LLC,
D/B/A REPUBLIC SERVICES OF MONTANA

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

IN THE MATTER OF L&L Site Services,)	
Inc.'s Application for a Certificate of Public)	REGULATORY DIVISION
Convenience and Necessity between all points)	
and places in Missoula County.)	DOCKET NO. T-18.6.PCN
)	

**REPUBLIC SERVICES OF MONTANA'S
MOTION FOR RECONSIDERATION OF PROCEDURAL ORDER NO. 7594**

Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana ("Republic"), by and through their counsel, Holland & Hart LLP, and pursuant to Admin. R. Mont. 38.2.4806 (2018), respectfully submits this motion for reconsideration ("Motion") of the Montana Public Service Commission's (the "Commission") April 11, 2018 Procedural Order No. 7594 (the "Order").

With this Motion, Republic objects to the Order because it improperly contemplates an advocacy role for the Commission.

1. INTRODUCTION

On March 1, 2018, L & L Site Services, Inc. (“L&L”) filed an Application for Certificate of Public Convenience and Necessity (“Application”) with the Commission. In the Application, L&L seeks authority for a Class D License allowing it to operate between all points and places within Missoula County, Montana, to a lawful disposal site. Republic timely filed a protest to the Application on April 2, 2018. The Commission then issued the Order on April 11, 2018, setting the time and place of a hearing on the Application and setting forth the procedure governing the discovery, any pre-hearing proceedings, and the upcoming May 21, 2018 hearing.

In the Order, the Commission stated that it has broad authority to collect information from motor carriers based upon Mont. Code Ann. § 69-12-201, which states: “The commission has the power and authority and it is its duty to . . . require the filing of annual and other reports, tariffs, schedules, or other data by motor carriers.” The Commission further stated that its broad regulatory authority over motor carriers is to be incorporated into the Commission’s general administrative procedure set forth in Mont. Code Ann. § 69-12-204. The Commission cited Mont. Code Ann. § 69-2-102, which is entitled “Role of Commission When Consumer Counsel Protests,” to support its contention that it may investigate, interrogate witnesses, and introduce evidence in a hearing.

2. ARGUMENT

The Order is defective and should be modified because the purported authority of the Commission set forth in the Order to act as both advocate and adjudicator is problematic and flies in the face of the requirements of due process.

The Order improperly contemplates the Commission and Commission staff acting as both advocate and adjudicator. *See* Order, pp. 2-3 (“Failure of the parties to provide sufficient responses may result in the Commission providing this information itself.”; “The Commission and its staff has the authority to investigate and interrogate ‘in any hearing to clarify the case or present an issue.’”; “[T]he Commission will propound data requests upon parties and may examine witnesses and introduce evidence at hearing . . .”) (quotations omitted). Though an agency may combine investigative, adversarial, and adjudicative functions, the same person cannot serve in dual roles. *See, e.g.*, Charles H. Koch, Jr., and Richard Murphy, *Separation of functions*, 2 Admin. L. & Prac. § 6:11 (3d ed. 2018); *Horne v. Polk*, 394 P.3d 651 (Ariz. 2017) (stating “due process does not allow the same person to serve as an accuser, advocate, and final decisionmaker in an agency adjudication”).

In the Order, the Commission overstates its authority to act as an advocate. The Commission quotes Mont. Code Ann. § 69-2-102 for the proposition that the Commission or its staff may investigate and interrogate in *any* hearing to clarify the case or present an issue. However, Mont. Code Ann. § 69-2-102 does not apply here. Mont. Code Ann. § 69-2-102 sets out the “[r]ole of commission when consumer counsel protests.” The Consumer Counsel has not protested in this case. The phrase “any hearing” cannot be read to apply to *any* hearing before the Commission when the first sentence makes clear that Mont. Code Ann. § 69-2-102 applies to “any case involving an application by a regulated entity to the commission for authority to increase its rate that is actively contested by consumer counsel.” The first sentence in addition to the language describing the statute limits the scope of the language that follows because “[w]ords and phrases used in the statutes of Montana are construed according to context.” Mont. Code Ann. § 1-2-106. This case does not relate to an application to increase rates, nor is the case

actively contested by Consumer Counsel. To the extent the Commission has the authority under Mont. Code Ann. § 69-2-102, in ratemaking matters in which the Consumer Counsel has protested, to introduce evidence on an issue that was not adequately addressed by any party, the Commission must first request that counsel of record address the issue. Only if counsel fails to introduce sufficient or adequate evidence may the Commission step in. Moreover, even though Commission staff may receive discovery under Admin. R. Mont. 38.2.601(1)(n) and 38.2.3301, there is no authority to allow the Commission, acting in its adjudicative function, to propound discovery. Given the Commission's conflation of the Commission and its staff, Republic risks having the same person serve in dual roles, which violates Republic's due process rights.

Mont. Code Ann. § 69-12-201 allows the Commission to collect "other data" from motor carriers, but again, the Commission overstates the import of the authority. Admin. R. Mont. 38.3.1206 allows the Commission to require a class D carrier, such as Republic, to submit additional supporting evidence but only in relation to the submission of annual reports under Admin. R. Mont. 38.3.1205 or in relation to the process by which a carrier submits a signed and verified statement describing in detail those circumstances which lead the carrier to believe that it should be allowed to retain its Class D certificate even though it cannot meet several conditions due to seasonal operation or other circumstances. Neither instance is relevant here. The statutory and regulatory authorities cited by the Commission in its Order do not support its broad reading of its authority.

In addition to exceeding its authority under Mont. Code Ann. §§ 69-2-102 and 69-12-201 as set forth above, the Commission failed to cite any regulation or statute giving it the authority to require the parties to make available for cross-examination "each person that authored a data request" unless the Commission approves an agreement among the parties to waive cross-

examination. Order, p. 5. Given the lack of authority for the Commission's requirement, this onerous requirement should be deleted from the Order.

3. CONCLUSION

For the reasons set forth above, the Commission should reconsider and modify the Order to delete the references to the Commission's alleged authority act as an advocate in the place of L&L. The Commission does not have such authority.

Dated this 23rd day of April, 2018.

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CERTIFICATE OF SERVICE

I certify that on this, the 23rd day of April, 2018, **REPUBLIC SERVICES OF MONTANA'S MOTION FOR RECONSIDERATION OF PROCEDURAL ORDER NO. 7594** was e-filed with the Commission and served via U.S. mail and e-mail, unless otherwise noted, to the following:

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s/ Adele C. Lee _____