

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

IN THE MATTER OF L&L Site Services) DOCKET NO. T-18.6.PCN
Class D Garbage between all points and)
places within Missoula County to a lawful) Order No. 7594a
disposal site.)

ORDER ON RECONSIDERATION

PROCEDURAL HISTORY

1. On March 1, 2018, L & L Site Services, Inc. (“L&L”) filed an Application for Certificate of Public Convenience and Necessity (“Application”) with the Montana Public Service Commission (“Commission”). The Application seeks authority for a Class D License, to allow L&L to operate between all points and places within Missoula County, Montana, to a lawful disposal site. Republic Services of Montana (“Republic”) subsequently protested the Application.

2. On April 11, 2018, the Commission issued Procedural Order 7594 (“Order”) which established, among other things, that parties may seek reconsideration of the Order within ten days of the service date of the Order. Order ¶ 4.

3. On April 23, 2018, the Commission received Republic’s Motion for Reconsideration of the Order (“Motion”). The Motion seeks reconsideration of the various provisions in the Order which provide the Commission with authority to investigate L&L’s Application. On April 27, 2018, the Commission received L&L’s Answer to Republic’s Motion (“Answer”).

4. During a regularly scheduled work session on May 1, 2018, the Commission denied Republic’s Motion, as discussed below.

DISCUSSION

5. Republic requests the Commission to modify the Order to remove various investigatory powers provided to the Commission which allow it to engage in pre-hearing discovery. Mot. at 2, citing to Order ¶ 7. Republic argues that the Commission lacks authority to

have both investigatory and adjudicatory powers. Republic argues that a dual-purpose Commission infringes upon Republic's due process rights, as the eventual decision maker on L&L's Application should not be permitted to also investigate the merits of the Application. Mot. at 2. Republic generally argues—citing to an administrative treatise and non-binding authority from another jurisdiction—that “though an agency may combine investigative, adversarial, and adjudicative functions, the same person cannot serve in dual roles.” *Id.*, citing to 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).

6. Republic provides three arguments in support of its position. First, Republic argues that the Order overstates the Commission's authority to act as an advocate. *Id.* at 3 (referring to Order ¶ 7, citing to Mont. Code Ann. § 69-2-102). Republic argues this statute is only applicable when the Consumer Counsel has protested an application. As the Consumer Counsel has not protested, then the Commission lacks investigatory powers. *Id.* at 3. Additionally, Republic argues that even if the Consumer Counsel has not protested, the statute does not provide the Commission with investigatory powers in motor carrier applications, when the statute refers to rate case proceedings. *Id.* Finally, Republic argues that the Commission's investigatory powers are only triggered upon exhaustion of applicant and protester investigations: only when counsel fail to introduce sufficient or adequate evidence may the Commission “step in.” *Id.* at 4.

7. Second, Republic argues that the Order also overstates the types of information which the Commission can investigate. *Id.* (referring to Order ¶ 7, citing to Mont. Code Ann. § 69-12-201). Republic argues that this statute only provides the Commission with the power to investigate more limited, specific categories of information, including those generally related to the submission of annual reports. *Id.* As L&L's Application does not relate to these more narrow categories of information, Republic argues the Commission lacks investigatory powers.

8. Third, Republic argues that the Commission does not cite to any specific authority that allows it to require parties to be available for cross-examination. *Id.* Without this authority, Republic requests that it similarly be removed from the Order. *Id.* at 5.

9. In response, L&L argues that the Commission has the authority to serve in the dual role as an investigator and adjudicator. Answer at 1. L&L argues that the Commission's authority is imposed by statute, and that the United States Supreme Court “has never held a

system of combined functions to be a violation of due process” *Id.* at 2, citing to *Ethicon Endo-Surgery, Inc. v. Covidien, LP*, 812 F.3d 1023, 1029 (Fed. Circ. 2016), cited in Richard J. Pierce, Jr., *Administrative Law Treatise*, § 9.9 (5th ed. 2010).

10. L&L provides two arguments in support of its position. First, L&L argues that the Commission has the direct and implied authority to investigate issues in this Application. *Id.* citing to Mont. Code Ann. § 69-12-201(1), Mont. Admin. R. 38.3.1206, Mont. R. Evid. 614(a), (b). L&L argues that contrary to Republic’s interpretation, “the plain language of Admin. R. Mont. 38.3.1206 explicitly allows the PSC to request additional information from a motor carrier at any time.” *Id.* at 3.

11. Second, L&L argues that the Commission’s dual investigatory and adjudicatory role does not violate Republic’s due process rights. *Id.* L&L argues that the Legislature clearly provided the Commission with the authority to conduct independent investigation of factual and legal issues before reaching a decision. *Id.*, citing to *Cascade County Consumers Assn. v. Pub. Serv. Commn.*, 144 Mont. 169, 394 P.2d 856, 869 (1964). L&L argues that the *Horn* case cited by Republic is distinguishable from the facts presented in L&L’s Application. *Id.* at 4. In *Horn*, the Arizona Supreme Court found that a special attorney general violated the due process rights of a respondent by maintaining a combination of accusatory, advocacy, and adjudicative roles. *See Horne*, 394 P.3d at 658 (applying the due process test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Specifically, L&L argues that the Commission’s role in this Application is not as an advocate for L&L, but rather as an advocate for the public interest. This fact, in addition to Republic voluntarily participating in this application, and that Republic is not subject to any administrative fines nor limitations on its existing motor carrier authority, strongly weigh against a finding that the Commission’s role violates Republic’s due process rights under *Mathews*. *Id.*

12. The Commission finds that Republic’s arguments lack merit, and denies Republic’s Motion to Reconsider Order No. 7594 for several reasons. Additionally, the Commission finds L&L’s arguments persuasive in supporting the Commission’s exercise of authority in issuing discovery upon the parties.

13. First, Republic’s attempts to contextualize Mont. Code Ann. § 69-2-102 as a provision that does not apply to motor carrier regulation fails to understand the structure of this statute. This statute has three sentences. Republic adequately described the first which outlines

the Commission's role when the Consumer Counsel intervenes. However Republic failed to address the second clause, which states: "This section does not prohibit the commission or its staff from investigating and interrogating in any hearing to clarify the case or present an issue." *See* Mont. Code Ann. § 69-2-102. This power exists even when the Montana Consumer Counsel—the rate payer advocate—has intervened in a proceeding. The structure of this language indicates that this power still exists when the Montana Consumer Counsel has not intervened in a proceeding and arguably is even stronger and more apt when the rate payer advocate is not present as is the case in the current proceeding: "In any case involving an application by a regulated entity to the commission for authority to increase its rates that is actively contested by the consumer counsel, the commission *shall leave representation of the interests of consumers* to the consumer counsel when the consumer counsel timely petitions to become a party to the case." *Id.* (emphasis added). Accordingly, the first sentence describes when the Commission's ability to represent the consumer toggles on and off depending on whether the Montana Consumer Counsel has intervened, and the second two sentences describe the Commission's powers in every contested case proceeding before it regardless of the actions of the Montana Consumer Counsel.

14. Second, Republic's argument that Mont. Code Ann. § 69-12-201 limits the Commission's investigatory power to only information related to annual reports fails to give full effect to the language contained in this statute. Mot. at 4. This statute similarly has multiple clauses. Republic adequately described one which limits the Commission's investigatory power to "require the filing of annual and other reports, tariffs, schedules" However Republic failed to adequately address the concluding category of information in this subsection, which states the Commission has the power to require the filing of "other data[.]" *See* Mont. Code Ann. § 69-12-201(1)(d). Conflating "other data" with the information the Commission may request through "annual and other reports," as suggested by Republic, would rob these clauses of their independent significance and do violence to the language of Mont. Code Ann. § 69-12-201(1)(d). *See id.* § 1-2-101 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will *give effect to all.*") (emphasis added).

15. Third, Republic's argument that Mont. Admin. R. 38.3.1206(1) also limits the

Commission's investigatory power to only information related to annual reports fails to give full effect to the language contained in this rule. Mot. at 4. This regulation states that: "[a]t any time, the commission may in its discretion require any class D carrier to submit additional supporting evidence beyond that received in accordance with ARM 38.3.1204 or ARM 38.3.1205." This language contemplates the Commission gathering information outside of the annual reporting process. Otherwise, ARM 38.3.1204 or ARM 38.3.1205 would suffice—hence, the use of the word "beyond." Additionally, the use of the word phrases "additional supporting evidence" and "at any time" indicates that the Commission's information collecting is not limited to an annual perfunctory filing by the motor carrier. *See also In re L&L Site Services, Inc.*, Docket T-15.23.PCN, Order 7477 ¶¶ 73–74 (Mar. 22, 2016) (overruling Republic's objections to the Commission taking administrative notice of their 2014 Annual Report), *aff'd McGree Corp. v. Mont. Pub. Serv. Comm'n*, Cause No. DV-16-155 (Mont. 2nd Jud. Dist. Ct. Dec. 28 2017). The second subsection of this rule refers to the consequences of failing to provide this data at any time. Mont. Admin. R. 38.3.1206 ("Upon refusal to submit additional evidence or receipt of additional evidence from the carrier or from any other source, the commission may in its discretion" take several actions). Accordingly, this production of information is not limited to use in a show cause hearing, *contra* Mot. at 4, but instead might result in a show cause hearing for failure to adhere to the Commission's requests for additional information.

16. Fourth, The Commission finds that Republic's general argument that the Commission should reconsider its Order to remove the power to compel attendance of witnesses ignores relevant authorities. Mot. at 4–5. Mont. Code Ann. § 69-12-204 provides that the Commission has the power to compel "the attendance and testimony of witnesses and the production of records, data, and information." Additionally, Mont. Code Ann. § 2-4-104 provides the Commission with subpoena power to compel witnesses if necessary.

17. Fifth, the Commission finds that Republic's due process concerns are insufficient to preclude the Commission from issuing discovery. Republic presents a false dichotomy that the Commission must occupy either a pure advocacy or advisory role. Mont. Code Ann. § 69-12-202 (motor carrier regulation is "declared to be a public purpose."); *State ex rel. Roberts v. Pub. Serv. Comm'n*, 242 Mont. 242, 250, 790 P.2d 489, 494 (1990) ("PSC hearing ensures that the [motor] carrier is capable of performing the contract and that a new [motor] carrier is in the public's best interests."); *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 29, 364 Mont. 128, 141,

272 P.3d 71, 82 (“The PSC is not a ‘court.’”); *McGree Corp.*, ** 12, 20 (“It is not inappropriate, therefore, for the PSC to ask clarifying questions that may assist it in reaching its final determination or ascertaining what may best serve the public interest,” and “[t]he PSC and the Court favors decisions being made on substantive grounds rather than because of technical, procedural reasons.”); *see, e.g., Qwest Corp. v. Mont. Dep’t of Pub. Serv. Regulation*, 2007 MT 350, ¶ 35, 340 Mont. 309, 317, 174 P.3d 496, 502 (finding the Commission may “collect the information it needs” regardless of whether it may adjudicate a future rate case initiated on its own motion); *NorthWestern Corp. v. Mont. Dep’t of Pub. Serv. Regulation*, 2016 MT 239, ¶¶ 42–43, 385 Mont. 33, 380 P.3d 787 (holding substantial evidence supports a finding based on Commission questions at hearing and reasoning in the final order even when a party has not sponsored that particular finding); *In re Mont. Power Co.*, 180 Mont. 385, 400, 590 P.2d 1140, 1149 (1979) (although the Commission did not have the authority to require Montana Power Company to hire an independent accounting firm, “the Commission is clearly empowered to request and obtain from Montana Power accounting information on the original costs of disputed properties, but it is up to Montana Power to decide how to go about collecting this information.”).

18. The Commission has concurrent investigative and adjudicatory powers. These powers allow a more robust record upon which the Commission can make a more correct decision, which necessarily helps avoid arbitrary or capricious decisions. These powers assist in putting parties on notice of issues that the Commission views as important to a respective docket. *See, e.g. NorthWestern Corp. v. Mont. Pub. Serv. Comm’n*, Cause No. Adv-2015-459,* 9 (Mont. 1st Jud. Dist Ct. (Mar. 3, 2016) (“NWE had sufficient notice of the issues in this case The PSC first raised this issue in data requests on April 2, 2014 NWE also had sufficient opportunity to address this issue in its responses to data requests and at the November 6, 2014 hearing.”) (internal citations omitted).

19. Furthermore, to the extent that the Commission occupies two roles, this is the result of the statutory scheme enacted by the Montana legislature. The Montana legislature has provided the Commission broad investigatory authority—both inside and outside proceedings concerning PCN applications—in matters concerning motor carrier regulation. Mont. Code Ann. §§ 69-12-201 to -204, -407. The Commission is also required to adjudicate Class D public convenience and necessity applications. *Id.* § 69-12-314, -321 to -323. Despite assigning these

dual roles, the Montana legislature has not required the Commission (or provided the Commission the necessary resources) to have a permanent separation of staff that would facilitate the procedure imagined by Republic. Instead, the legislature has granted the Commission broad authority to dictate its own process. *Id.* § 69-12-201 (“The commission may, by general order *or otherwise*, prescribe rules in conformity with this chapter and applicable to any and all motor carriers.”) (emphasis added).

20. In order to alleviate Republic’s concerns that one staff attorney could both issue discovery and rule on discovery as a hearings examiner, the Commission modifies this portion of the Procedural Order to eliminate any reference to staff attorneys acting as hearings examiners. Procedural Order 7594 ¶ 18 (Apr. 11, 2018). With this modification, all discovery disputes and motions for protective orders will be brought to the Commission in a work session.

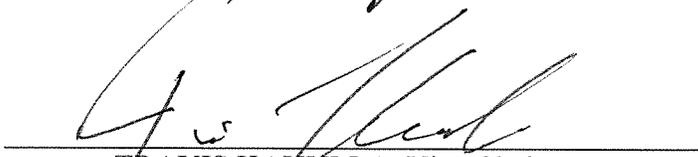
ORDER

21. Republic’s Motion for Reconsideration of Order No. 7594 is denied.
22. Paragraph 18 of Procedural Order 7594 is modified to remove any reference to staff attorneys acting as hearings examiners.

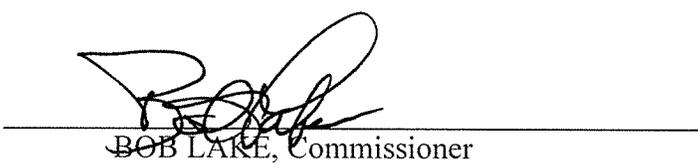
DONE AND DATED this 1st day of May, 2018, by a vote of 5–0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

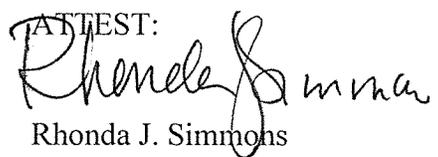

BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner


TONY O'DONNELL, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary
(Seal)



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Order on Reconsideration issued in Docket T-18.6.PCN in the matter of L&L Site Services, Missoula, Montana has today been sent to all parties listed.

MAILING DATE: May 8, 2018

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