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

IN THE MATTER OF THE CLASS D
APPLICATION OF L&L SITE SERVICES, INC.
FOR ALL POINTS AND PLACES IN MISSOULA
COUNTY, MONTANA

Docket No. T-18.6.PCN

**L&L'S ANSWER TO
REPUBLIC'S MOTION FOR
RECONSIDERATION OF
ORDER NO. 7594**

Applicant L&L Site Services, Inc. ("L&L") answers Republic Services of Montana's ("Republic") Motion for Reconsideration of Procedural Order No. 7594 as follows:

INTRODUCTION

In contested proceedings, like L&L's application here which Republic voluntarily protests, the Montana Public Service Commission ("PSC" or "Commission") serves a dual role as investigator and adjudicator. The PSC's adjudicative role, pursuant to Mont. Code Ann. §69-12-323, is to render a decision on an application within 180 days of its filing. While proceedings before the PSC may be conducted in the form of an adversarial proceeding, such proceedings are investigative on the part of the PSC. Admin. R. Mont. 38.2.302.

The PSC's dual role here is a duty imposed by statute and the PSC has acted within its power and authority as conferred by the Montana Legislature. Perhaps more importantly, the United States Supreme Court "*has never held a system of combined functions to be a violation of due process, and it has upheld several systems.*" *Ethicon Endo-Surgery, Inc. v. Covidien, LP*, 812 F. 3d 1023, 1029 (Fed. Cir. 2016) cited in Richard J. Pierce, Jr., *Administrative Law Treatise*, § 9.9 (5th ed. 2010) (emphasis added).

ARGUMENT

I. The PSC is within its authority to propound data requests on the parties, examine witnesses, and introduce evidence in this matter.

The PSC has the power, authority, and duty to supervise and regulate every motor carrier in the state of Montana. Mont. Code Ann. § 69-12-201(1)(a). The PSC's duty includes regulation of "the properties, facilities, operations, accounts, service, practices, and affairs of all motor carriers." Mont. Code Ann. § 69-12-201(1)(c). More specifically, the PSC has the power, authority, and duty to require motor carriers to submit "reports, tariffs, schedules, or other data..." Mont. Code Ann. § 69-12-201(1)(d). The PSC may, at any time, require that a Class D carrier submit additional supporting evidence. Admin. R. Mont. 38.3.1206.

The duty, power, and authority of the PSC is not confined to powers expressly granted by statute. *Guillot v. State Highway Comm'n.*, 102 Mont. 149, 153-154, 56 P.2d 1072, 1074 (1936). By implication, the PSC has powers that are reasonably implied as necessary to carry out its statutory role. *Id.* Only those powers which are necessary for the effective exercise and discharge of the powers and duties expressly conferred to the PSC will be implied. *Id.*

In all contested cases, the PSC must apply the Montana Rules of Evidence. Admin. R. Mont. 38.2.4201(1). In applying the rules, all references to "court" shall be considered to refer to the PSC. Admin. R. Mont. 38.2.3301. The Montana Rules of Evidence expressly provide the

court, or in this case, the PSC, with the right to call and interrogate witnesses. Mont. R. Evid. 614(a) and (b).

Republic seeks to impose limits on the PSC's power, authority, and duties that simply do not exist. Even if, as Republic argues, Admin. R. Mont. 38.3.1206 allows the PSC to require a motor carrier to submit additional evidence only in relation to annual reports or the circumstances described in Admin. R. Mont. 38.3.1204, the administrative rule does not impose limitations on the PSC's statutory power to require motor carriers to submit other data. A statute cannot be changed by administrative regulations. *Coalition v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771. Moreover, 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.

Based on Montana law, the applicable administrative regulations and the Montana Rules of Evidence, the PSC is within its power, authority, and duty to propound data requests, examine witnesses and introduce evidence at the hearing on L&L's application.

II. The PSC's dual role as investigator and adjudicator in this matter does not violate Republic's due process rights.

The clear intent of the Montana Legislature in forming the PSC was that the PSC would conduct its own independent investigation and determination of the facts and circumstances before rendering a decision. *Cascade County Consumers Assn. v. Pub. Serv. Commn.*, 144 Mont. 169, 394 P.2d 856, 869 (1964). In an administrative proceeding in Montana, due process requires that the methods employed by an agency "shall not be unreasonable, arbitrary, or capricious and that the means selected shall have real and substantial relation to the object sought to be attained." *Id.* 394 P.2d at 866. Where a party has reasonable notice of a pending action and is afforded an opportunity to present evidence of their objections, fundamental due process requirements are met. *Id.*

The combination of investigative and adjudicative functions does not, without more, constitute a due process violation. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). The United States Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), held that the constitutional sufficiency of administrative procedures is determined by three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the administrative procedures; and (3) the government's interest. *Id.* at 335.

The Arizona Supreme Court case Republic cites in support of its claimed due process violation, *Horne v. Polk*, 394 P.3d 651 (Ariz. 2017), involved a situation where a single appointed special attorney general investigated, prosecuted, and adjudicated alleged campaign finance violations. *Id.* at 653-654. The special attorney general ordered Horne to refund campaign contributions totaling nearly \$397,000.00 and further ordered that should Horne fail to comply, a civil penalty of up to three times the amount of the violation could be imposed. *Id.* The Arizona Supreme Court applied the constitutional sufficiency test the United States Supreme Court laid out in *Mathews* and held that the combination of accusatory, advocacy, and adjudicative roles in a single agency official violates due process. *Horne*, 394 P.3d at 658.


Here, Republic improperly characterizes the PSC's investigative role as that of advocate for L&L. The PSC's interest and statutory duty in this matter is to investigate the facts and circumstances surrounding L&L's application and to issue a final decision. Unlike the special attorney general in *Horne*, the PSC is not engaged in an advocacy or accusatory role in this case. The PSC is not investigating any alleged violations Republic may have committed and Republic will not be subject to fines or any limitations on its existing certificate as a result of these proceedings. In fact, Republic entered these proceedings voluntarily by submitting a protest to L&L's application. Republic faces no risk of an erroneous deprivation of its existing certificate

in Missoula. The only risk to Republic's interests present in this matter is the potential entry of a waste-hauling competitor in the Missoula County market. As such, Republic's fundamental due process rights are met in the underlying proceedings and no due process violation exists.

CONCLUSION

The PSC's Order No. 7594 was issued within the PSC's duty, power, and authority and should not be modified.


DATED this 27th day of April, 2018.


Alison Garab

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2018, a true and correct copy of the foregoing document was served upon the following parties in the manner set forth below:

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Zachary Rogala Jeremiah Langston Montana Public Service Commission P.O. Box 202601 Helena MT 59620 zachary.rogala@mt.gov ; jlangston@mt.gov	<input checked="" type="checkbox"/> U.S. First-Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Email: <input type="checkbox"/> Hand Delivery: <input type="checkbox"/> Other:


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