

IN THE SUPREME COURT OF THE STATE OF MONTANA  
DA 21-0249

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IN THE MATTER OF  
Big Foot's Application for a Class D License

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On Appeal from Montana First Judicial District Court,  
Lewis & Clark and Broadwater Counties, Cause No. DDV 2018-318  
Honorable Ed McLean, Presiding

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**MONTANA PUBLIC SERVICE COMMISSION  
OPPOSED MOTION TO DISMISS**

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## ARGUMENT

### I. This appeal should be dismissed as moot.

The Montana Public Service Commission respectfully requests this Court dismiss this proceeding as moot. Evergreen and NorthWestern oppose this motion. Mont. R. App. P. 16(1).

In early 2018, Big Foot filed an application for a Class D License to haul garbage in Flathead County. Prior to a final Commission decision, the case proceeded to judicial review and appeal. *Allied Waste Servs of N. Am., LLC v. Mont. Dep't of Pub. Serv. Reg.*, 2019 MT 199, 397 Mont. 85, 447 P.3d 563. Among other things, this Court remanded to the Commission for further proceedings. *Id.* ¶ 22.

The Commission reinitiated the proceeding in late 2019 by issuing Procedural Order 7701, which determined that *Allied Waste* prohibited the Commission from engaging in discovery, and noted that the Commission retained the power to examine witnesses during the upcoming evidentiary hearing.

Evergreen sought reconsideration of this decision, which the Commission denied, and on December 30, 2021, Evergreen filed a second emergency petition for immediate judicial review. The District

Court issued a temporary restraining order and stayed further Commission proceedings pending a show cause hearing.

After three years, one judicial review and one appeal, and about to be dragged into a second judicial review (for a proceeding which is statutorily required to conclude in 180 days), Big Foot threw in the towel. It filed a motion to withdraw its application before the Commission, and a motion to dismiss Evergreen’s lawsuit as moot before the District Court.

Each party to this lawsuit—including Evergreen and NorthWestern—agreed the case was moot when Big Foot moved to withdraw its Application. Order on Motion to Dismiss, at 1, 2, and 5 (Attachment 1). The Commission could not act on Big Foot’s motion because of the TRO.

All the same, Evergreen “changed its position at the show cause hearing and argued that an exception to mootness applied . . . despite no change in the circumstances.” *Id.* at 7. Unpersuaded and noting that the case “has become a procedural morass,” the District Court concluded the case was moot. *Id.* at 9; *Id.* at 7 (“Petitioners cannot maintain an action based on alleged procedural deficiencies with an underlying

application before the Commission once that application no longer exists.”). The Court also found that the public interest exception to mootness did not apply because the issues “are of limited interest to the broader public” and “impossible” to evade review, and “once Big Foot’s application is withdrawn, there will be no longer be any issue remaining to ‘guide public officers in the performance of their duties.’” *Id.* at 8. The Court dissolved the TRO to permit Big Foot to withdraw its Application before the Commission. *Id.* at 12.

A district court’s final judgment on a motion for injunction is not stayed pending appeal (beyond an initial 14-day stay as a matter of law). Mont. R. Civ. P. 62(a)(1). Neither is an agency decision stayed pending appeal. Mont. Code Ann. § 2-4-711. To preserve the status quo Evergreen was required to seek a stay, either under Mont. R. Civ. P. 62(c), or Mont. Code Ann. § 2-4-711(1).

Evergreen did neither.

On June 22, 2021, the Commission granted Big Foot’s Motion to withdraw its Application, and closed the contested case proceeding.

Attachment 2.

If moot before, Evergreen’s appeal is now uber-moot.

Courts can only decide justiciable controversies. *City of Deer Lodge v. Fox*, 2017 MT 129, ¶ 8, 387 Mont. 478, 395 P.3d 506. A question “that was not moot when posed to a district court may be mooted on appeal by changed circumstances that prevent this Court from fashioning effective relief.” *Id.* If “a question presents a risk of becoming moot while pending appeal, it is incumbent upon the appellant to move to stay the judgment.” *Id.*

Importantly Evergreen “may not claim an exception to the mootness doctrine where the case has become moot through that party’s own failure to seek a stay of the judgment.” *Billings High School v. Billings Gazette*, 2006 MT 329, ¶ 18, 335 Mont. 94, 149 P.3d 565. The exception to mootness “was designed to apply to situations where the type of injury involved inherently precludes judicial review, not to situations where the failure of parties to take actions has precluded review as a practical matter.” *Id.*

Evergreen’s failure to request a stay or enjoin the District Court’s decision; Evergreen’s requested as-applied, case-specific relief; and Big Foot withdrawing its Application render this appeal even more

academic. Dismissal is appropriate under *Billings High School* and *City of Deer Lodge*.

The public interest exception to mootness was ready-made for *McLaughlin v. MT Legislature*-caliber cases. It is not meant for appeals of hypothetical agency contested case proceedings like this. Especially when the appeal concerns a routine Commission practice, as presiding officer, of examining witnesses during an evidentiary hearing—a practice well supported by multiple independent and adequate statutory authorities (*e.g.*, Mont. R. Evid. 614; Mont. Code Ann. §§ 69-2-102, 69-12-204, 69-12-206(2)).

Evergreen’s appeal should be dismissed.

## **II. Alternatively NorthWestern Energy should be dismissed from this appeal.**

If this Court instead reaches the merits, it should nonetheless dismiss NorthWestern.

While NorthWestern was an intervenor before the district court, it is not an aggrieved party and lacks standing to jointly appeal. Mont. R. App. P. 6(3); *Lewis & Clark County v. Hampton*, 2014 MT 207, ¶¶ 31–32, 376 Mont. 137, 333 P.3d 205. For case-or-controversy standing, the “question is whether the complaining party is the proper party before

the court.” *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. NorthWestern must “clearly allege past, present, or threatened injury to a property or civil right.” *Id.* That injury must be “concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally.” *Id.*

It is unclear, beyond a nebulous interest in the outcome of the case, how NorthWestern is injured or harmed when a district court dismisses a lawsuit as moot which arose from a garbage licensing case under Montana’s Motor Carrier Act. *See TransUnion LLC v. Ramirez*, 594 U.S. \_\_ (2021) (“To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: ‘What’s it to you?’”) (slip op., at 7).

Even if NorthWestern was aggrieved, this appeal is beyond the scope of its intervention which only sought “to prevent the possibility of inconsistent arguments or judgments and to preserve its arguments on appeal” in a collateral declaratory ruling proceeding currently before the First Judicial District Court. Motion to Intervene, at 2 (Attachment 3). Because the District Court decision did not address any of the issues

which relate to NorthWestern's collateral proceeding, this appeal is beyond the scope of NorthWestern's grounds for intervention.

### **CONCLUSION**

The Commission respectfully requests this Court dismiss this appeal, or in the alternative dismiss NorthWestern from the proceeding.

RESPECTFULLY SUBMITTED this 1st day of July, 2021.

/s/ Zachary Taylor Rogala  
Staff Attorney  
Montana Public Service Commission

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 11 and 16 of the Montana Rules of Appellate Procedure, I certify that this Motion to Dismiss is double-spaced; is printed in proportionately spaced 14 point Century Schoolbook font; and has 1,162 words excluding the Caption, Certificate of Compliance, and Appendix.

/s/ Zachary Taylor Rogala  
Montana Public Service Commission

## APPENDIX

1. *In re Big Foot's Class D Application*, DDV-2018-318, Order on Motion to Dismiss (Mont. 1st Dist. Apr. 20 2021).
2. *In re Big Foot's Class D Application*, Dkt. 2019.10.077, Notice of Commission Action (Mont. PSC June 23, 2021).
3. *In re Big Foot's Class D Application*, DDV-2018-318, NorthWestern Energy's Motion to Intervene (Mont. 1st Dist. Jan 9, 2020).

FILED

APR 20 2021

ANGIE SPARKS, Clerk of District Court  
By **K KRESGE**, Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

IN THE MATTER OF the Class D  
Application of Big Foot Dumpsters &  
Containers, LLC's Application for  
Class D Garbage Service between all  
points and places within Flathead  
County

Cause No. DDV-2018-318

**ORDER ON  
MOTION TO DISMISS**

Before the Court is a motion to dismiss this case on the grounds that Intervenor Big Foot Dumpsters and Containers, LLC, (Big Foot), represented by Francesca diStefano, has filed a pending motion to withdraw in the underlying proceeding, Big Foot's Class D license application to haul garbage within Flathead County before the Montana Public Service Commission ("Commission"). On January 22, 2020, Big Foot filed a motion seeking fees and costs related to a temporary restraining order currently in effect.

The Commission supports Big Foot's motion to dismiss and motion for fees and costs. Petitioner Evergreen Disposal, Inc. (Evergreen), represented by Doney Crowley P.C., opposes both motions. NorthWestern Energy (NorthWestern), represented by Clark R. Hensley, has responded that the

1 Court should dismiss this matter as moot. Following a February 12, 2020  
2 hearing, the Court ordered supplemental briefing on certain topics addressed by  
3 the parties, including mootness. Following the supplemental briefing, Big Foot  
4 filed a motion to dissolve the temporary restraining order.

5 The parties have fully briefed these motions. Big Foot filed a  
6 notice of submittal on its motion for fees and costs on March 9, 2020 and filed a  
7 notice of submittal on its motion to dissolve the temporary restraining order on  
8 July 7, 2020. The motions are ready for decision. Due to the Court's  
9 determination that Big Foot's withdrawal has rendered the case moot, the Court  
10 does not reach any remaining issues not discussed herein.

#### 11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 This case involves Big Foot's application for a Class D motor  
13 carrier certificate of public convenience or necessity to haul garbage in Flathead  
14 County, Docket 2019.10.077 (previously Docket T-18.2.PCN). Big Foot filed its  
15 application before the Commission on January 8, 2018. Evergreen, Montana  
16 Waste Systems, Inc., d/b/a North Valley Refuse, and Allied Waste Services of  
17 North America, LLC, d/b/a Republic Services of Montana (collectively  
18 "Petitioners") filed protests against Big Foot's application before the  
19 Commission. Petitioners provide garbage services in Flathead County and  
20 initially opposed Big Foot's application on the basis that there was no need for  
21 the additional garbage hauling services provided by Big Foot.

22 After the initial protest was filed, the Commission issued  
23 procedural orders 7590 and 7590a setting forth procedures for discovery on  
24 Bigfoot's application. The Commission's order provided that Commission staff  
25 attorneys would resolve discovery disputes. On March 19, 2018, despite that the

1 hearings before the Commission on applications are adversarial proceedings, the  
2 Commission mailed their own data requests to the parties.

3           On April 9, 2018, Petitioners commenced this action, Cause No.  
4 DDV-2018-318, by filing a Petition for Immediate Review of Agency Action,  
5 Temporary Restraining Order, and Preliminary Injunction, Writ of Supervisory  
6 Control, Writ of Mandate, and Writ of Prohibition. Petitioners sought relief from  
7 the Commission's data requests and for related due process violations. Petitioners  
8 also alleged that Commission staff attorneys had improper *ex parte*  
9 communications with Big Foot's attorney. Big Foot filed an unopposed motion  
10 to intervene.

11           This Court issued a temporary restraining order barring the  
12 Commission from further action. On July 9, 2018, the Court granted a  
13 preliminary injunction and writ of prohibition barring the Commission from  
14 submitting direct discovery requests to parties. The order stated that Petitioners  
15 were not required to respond to any discovery requests submitted by the  
16 Commission in this matter. The Court also granted the writ of mandate  
17 appointing an independent hearing examiner to conduct the contested case  
18 hearing. The Commission filed a motion for a new trial seeking relief from the  
19 Court's writ of mandate appointing the hearing examiner. Before the Court ruled  
20 on the Commission's motion, Big Foot appealed to the Montana Supreme Court,  
21 divesting this Court of jurisdiction.<sup>1</sup>

22           On August 20, 2019, the Montana Supreme Court issued its ruling  
23 on appeal. *Allied Waste Serv. of N. Am., LLC v. Mont. Dep't of Pub. Serv. Reg.*,

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24  
25 <sup>1</sup> The Court nevertheless issued an order on December 6, 2018, to clarify that the Commission's motion was deemed denied as of October 5, 2018, and that it had not addressed that motion before that date due to the lack of a timely notice of submittal. The Court held that any further issues were moot by virtue of the appeal.

1 2019 MT 199, 397 Mont. 85, 477 P.3d 463. The Supreme Court summarily  
2 affirmed the writ of prohibition but reversed the writ of mandate regarding the  
3 hearings examiner and remanded back to the Commission for further  
4 proceedings.

5           The Commission issued a new procedural order on  
6 October 29, 2019. Evergreen filed a motion for reconsideration of that order, and  
7 the Commission denied that motion on December 23, 2019. The Commission  
8 scheduled a three-day evidentiary hearing in Kalispell from January 8-10, 2020.  
9 On December 30, 2019, Evergreen filed a second emergency petition for  
10 immediate review of actions of the PSC, asserting similar due process violations  
11 as before based on the Commission claiming the authority to investigate and  
12 interrogate witnesses. This proceeding, *In the Matter of the Class D Application*  
13 *of Big Foot Dumpsters, LLC*, Cause No. DDV-2019-1792, was consolidated into  
14 this case. The Court entered a new temporary restraining order on  
15 January 3, 2020, which once again stayed the proceedings on Big Foot's  
16 application. The Commission suspended the evidentiary hearing due to the  
17 temporary restraining order.

18           On January 9, 2020, Big Foot filed a Notice and Motion to  
19 Withdraw its application for a Class D license before the Commission in Docket  
20 2019.10.077. That same day, NorthWestern filed a motion to intervene and a  
21 Petition for Declaratory Judgment seeking a declaration regarding the  
22 Commission's contested case proceedings. This Court granted NorthWestern's  
23 motion to intervene on January 27, 2020.

24           On January 14, 2020, Big Foot filed its Notice of Filing in this  
25 action, informing the Court of the withdrawal of its Class D license application in

1 the underlying proceeding. Big Foot filed a motion to dismiss on the basis that  
2 all issues in the action were mooted by the withdrawal. Since the Commission  
3 cannot act on the withdrawal due to the temporary restraining order, Big Foot  
4 seeks an order of this Court releasing the Commission to allow withdrawal and  
5 terminate both this case and the underlying proceeding.

6           Evergreen initially agreed that this case is rendered moot by Big  
7 Foot's withdrawal and must be dismissed. Evergreen's response brief states:

8           Evergreen agrees that, if the [Commission] accepts Big Foot's  
9 withdrawal of its application, Evergreen's Petition to this Court is  
10 mooted, as there would be no actual underlying "case or  
11 controversy" for the Court to determine.... That said, the  
12 [Commission] has not acted, and cannot act, on Big Foot's Notice  
13 and Motion of Withdrawal until the temporary restraining order is  
14 lifted. Therefore, the Court should modify the temporary restraining  
15 order only to allow the PSC to grant Big Foot's Motion of  
16 Withdrawal, and once the [Commission] does so, this Court may  
dismiss this action. While Evergreen would have preferred to prevail  
on the merits of its Petition, now that Big Foot is no longer seeking a  
Class D Certificate, there is no longer a live controversy and the case  
is now moot.

17 Evergreen Resp. to Mot. to Dismiss, 2 (Jan. 27, 2020).

18           The Court heard arguments as to whether a preliminary injunction  
19 should issue on February 12, 2020. Evergreen changed its position at oral  
20 argument to oppose Big Foot's motion to dismiss. During the hearing and in a  
21 written order on February 27, 2020, the Court ordered supplemental briefing on  
22 certain topics addressed by the parties at that hearing, including whether Big  
23 Foot's withdrawal renders this matter moot and whether an exception to  
24 mootness should apply. The Court clarified that the temporary restraining order  
25 remained in place until further ruling of the Court after receipt of this briefing.

1 On December 17, 2020, the Commission moved to consolidate cause number  
2 CDV-2020-27 (Broad Reach) with this case. This motion was summarily denied  
3 without prejudice for failure to abide by Montana Uniform District Court Rule  
4 2(a) on December 15, 2020, with leave to refile. The Commission refiled its  
5 motion to consolidate and supporting brief on December 17, 2020.

### 6 APPLICABLE LEGAL STANDARDS

7 The judicial power of Montana courts is limited to justiciable  
8 controversies that may be resolved by the courts. *Sudan Drilling, Inc. v. Anacker*,  
9 2014 MT 72, ¶ 8, 374 Mont. 272, 274, 320 P.3d 977, 979. Mootness is a  
10 threshold legal issue which must be resolved before addressing the underlying  
11 dispute. *Shamrock Motors, Inc. v. Ford*, 1999 MT 21, P17, 293 Mont. 188, ¶ 17,  
12 974 P.2d 1150. “If a court determines that it lacks jurisdiction, then it may take  
13 no further action in the case other than to dismiss it.” *Plan Helena, Inc. v. Helena*  
14 *Reg’l Airport Auth. Bd.*, 2010 MT 26, ¶ 11, 355 Mont. 142, 142, 226 P.3d 567,  
15 570.

16 Whether or not a party is entitled to recover attorney fees is strictly  
17 a question of law. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 11,  
18 333 Mont. 331, 336, 142 P.3d 864, 868.

### 19 DISCUSSION

20 To resolve Big Foot’s motions, the Court must address the  
21 following issues:

- 22 1. Does Big Foot’s withdrawal moot this case, requiring  
23 dismissal?
- 24 2. Is Big Foot entitled to fees and costs related to the temporary  
25 restraining order?

1     **A.     Big Foot’s Motion to Dismiss for Mootness**

2             Mootness is one of several central concepts of justiciability.

3             [I]f the issue presented at the outset of the action has ceased to exist  
4             or is no longer ‘live,’ or if the court is unable due to an intervening  
5             event or change in circumstances to grant effective relief or to  
6             restore the parties to their original position, then the issue before the  
7             court is moot.

8             *Sudan Drilling, Inc.*, ¶ 8 (quoting *Greater Missoula Area Fedn. of Early*  
9             *Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201,  
10            219 P.3d 881. Courts lack jurisdiction to decide moot issues insofar as an actual  
11            ‘case or controversy’ no longer exists. *Id.* A question is moot when the court  
12            cannot grant effective relief. *Grabow v. Montana High Sch. Ass’n*, 2000 MT  
13            159, ¶ 14, 300 Mont. 227, 230, 3 P.3d 650, 652.

14            The *Montanans Against Assisted Suicide* case is instructive.  
15            *Montanans Against Assisted Suicide v. Bd. of Med. Examiners*, 2015 MT 112,  
16            ¶ 13, 379 Mont. 11, 15, 347 P.3d 1244, 1248. In that case, the parties were  
17            litigating over the validity of a “position statement” adopted by a non-profit  
18            board. The Montana Supreme Court affirmed the district court’s decision to  
19            dismiss the case as moot, because once the position statement was rescinded, “no  
20            judgment of the District Court could grant effective relief, and there [was] no  
21            longer a ‘live’ request for relief.” *Id.* Here, similarly, Petitioners cannot maintain  
22            an action based on alleged procedural deficiencies with an underlying application  
23            before the Commission once that application no longer exists.

24            Montana courts recognize several exceptions to the mootness  
25            doctrine, including the public interest exception. This Court retains the power to  
              examine constitutional issues that involve broad public concerns to avoid future

1 litigation on a point of law. *Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254,  
2 266, 460 P.3d 867, 874. The “public interest exception applies where: (1) the  
3 case presents an issue of public importance; (2) the issue is likely to recur; and  
4 (3) an answer to the issue will guide public officers in the performance of their  
5 duties.” *Id.*

6 First, while the Commission’s discovery procedures in Class D  
7 license applications to haul garbage are certainly of importance to the parties to  
8 this case, such issues are of limited interest to the broader public. Second, it is  
9 impossible for these issues to recur in a manner which would evade review.  
10 Petitioners are not challenging the Commission’s discovery procedures in the  
11 abstract: they are challenging specific actions taken in a contested case. With  
12 Big Foot’s application withdrawn, Petitioners can no longer claim to be harmed  
13 by the Commission’s actions. Moreover, it would not be appropriate for this  
14 Court to speculate as to how the Commission might violate the rights of  
15 petitioners in some future proceeding. Third, once Big Foot’s application is  
16 withdrawn, there will no longer be any issue remaining in which to “guide public  
17 officers in the performance of their duties.”

18 Prior to the show cause hearing, all parties agreed that Big Foot’s  
19 withdrawal rendered this case moot. Evergreen initially agreed that if the  
20 application is withdrawn, its petition is mooted for lack of an actual underlying  
21 case or controversy. Evergreen changed its position at the show cause hearing  
22 and argued that an exception to mootness applied. Evergreen’s change in  
23 position—despite no change in the circumstances—fails to offer any convincing  
24 reason why the mootness doctrine should not apply here.

25 ////

1           This case has become a procedural morass. The parties have  
2 referred to other parallel proceedings on similar issues regarding the  
3 Commission’s discovery practices, including an action for declaratory judgment  
4 currently being litigated. There is no compelling reason to settle these issues  
5 here in an advisory opinion, or to continue this case at all in light of Big Foot’s  
6 decision to withdraw. The one common factor underpinning all pending issues in  
7 this case is the Class D application by Big Foot. With that application  
8 withdrawn, all of the other issues to be decided between the Commission and  
9 petitioners will be rendered moot.

10           Evergreen has requested that, if the motion to dismiss is granted,  
11 that it be granted without prejudice to allow Evergreen to refile its petition if  
12 necessary. This is unnecessary: if Big Foot files a new application, Evergreen  
13 certainly has the right to protect its rights and challenge any wrongful actions  
14 taken by the Commission with regard to that new petition. Because there is no  
15 longer a live case or controversy with regard to Big Foot’s pending application,  
16 however, dismissal with prejudice is appropriate.

17           If a court determines it lacks jurisdiction, then it may take no  
18 further action in the case other than to dismiss it. *Thompson v. Crow Tribe of*  
19 *Indians*, 1998 MT 161, ¶ 12, 289 Mont. 358, 962 P.2d 577. The Court agrees that  
20 once Big Foot’s application is withdrawn, it is required to dismiss the case with  
21 prejudice. *Serena Vista, LLC v. State Dep’t of Nat. Res. & Conservation*, 2008  
22 MT 65, ¶ 17, 342 Mont. 73, 179 P.3d 510 (holding that cases resolved on  
23 grounds of mootness should be dismissed with prejudice).

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25       ////

1 **B. Big Foot’s Motion for fees and costs**

2 Big Foot seeks compensation for the temporary restraining order  
3 on the basis that it was improperly granted. The temporary restraining order was  
4 not illegal and does not entitle Big Foot to damages.

5 Big Foot’s application was initially enjoined pending resolution of  
6 disputes over Big Foot’s improper *ex parte* communications with the  
7 Commission and the Commission’s decision to issue *sua sponte* discovery  
8 requests to Petitioners. While the Montana Supreme Court did not rule directly  
9 on the injunction, it affirmed the decision as to the writ of prohibition with regard  
10 to Big Foot’s improper conduct, stating “that the [Commission] is not exempt  
11 from the constitutional restraints of due process requirements and must ensure  
12 that all litigants receive a fair and open hearing as guaranteed by the Fourteenth  
13 Amendment.” *Allied Waste Services of North America*, ¶ 17. On remand, despite  
14 that the Commission no longer sought responses to its own written discovery  
15 requests, the Commission retained the authority to investigate and interrogate  
16 witnesses at the evidentiary hearing in the underlying matter. This decision  
17 implicated the same dispute regarding due process rights that necessitated the  
18 first temporary restraining order. The second temporary restraining order, like  
19 the one before it, was necessary to stay the underlying proceedings pending a  
20 decision on the alleged due process violations.

21 Moreover, the grant of a stay during judicial review of an agency  
22 action under the Montana Administrative Procedures Act is not required to  
23 follow the same formalities as other preliminary injunctions. Mont. Code Ann.  
24 § 2-4-702(3), provides:

25 //

1 Unless otherwise provided by statute, the filing of the petition  
2 shall not stay enforcement of the agency's decision. The agency may  
3 grant *or the reviewing court may order a stay upon terms which it*  
4 *considers proper*, following notice to the affected parties and an  
opportunity for hearing. [emphasis added.]

5 Big Foot does not argue that MAPA does not apply, but  
6 nevertheless asserts that since Evergreen specifically sought a temporary  
7 restraining order under sections 27-19-201 and 27-19-314, the less restrictive  
8 terms of MAPA can be ignored. Big Foot's semantic argument does not avoid  
9 the fact that MAPA authorizes this Court to order a temporary stay pending  
10 adjudication of the underlying dispute over Petitioners' constitutional rights.  
11 Also, only the party enjoined may seek compensation. Mont. Code Ann.  
12 § 27-19-406 ("...upon application of the party enjoined thereby..."). The  
13 January 3, 2020 temporary restraining order expressly stayed proceedings before  
14 the Commission and barred any action by the Commission—not Big Foot.

15 In addition to damages for the temporary restraining order, Big  
16 Foot seeks damages incurred for "trial preparation" in the underlying case. These  
17 alleged damages were not caused by the restraining order, and ostensibly would  
18 have been incurred even if the restraining order had been denied. Big Foot has  
19 not provided any reason to deviate from the general rule that each party pays  
20 their own attorney's fees for the underlying administrative proceeding.

21 Finally, this Court has the discretion to waive damages related to  
22 an injunction or restraining order in the interests of justice. Mont. Code Ann.  
23 § 27-19-306(1)(b)(ii). Big Foot chose to intervene in this action between the  
24 Commission and Petitioners. Requiring Petitioners to pay for an intervenor's  
25 attorney fees and costs while seeking to vindicate their due process rights would

1 be unfair, and the Court also declines to grant an award of fees or costs for Big  
2 Foot's fees incurred by its decision to seek a Class D license in the interests of  
3 justice.

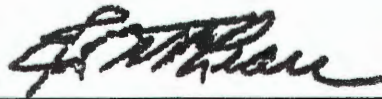
4 **ORDER**

5 1. Big Foot's Motion to dissolve the Temporary Restraining  
6 Order in effect in this case is **GRANTED** for the limited purpose of allowing Big  
7 Foot to withdraw from the underlying proceeding.

8 2. Big Foot's motion to dismiss is **GRANTED**.

9 3. Big Foot's motion for fees and costs is **DENIED**.

10 DATED this 20th day of April 2021.

11 

12  
13 EDWARD P. McLEAN  
14 District Court Judge

15 cc: Zachary Rogala, (via email to: zachary.rogala@mt.gov)  
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22 William Mercer, (via email to: WWMercer@hollandhart.com /  
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22 EPM/tm/DDV-2018-318 Allied Waste Services v. MDPSR, et al. (Big Foot Dumpsters) - Order on Motion to Dismiss.doc

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

IN THE MATTER OF the Class D ) REGULATORY DIVISION  
Application of Big Foot Dumpsters & )  
Containers, LLC Application for Class D ) DOCKET NO. 2019.10.077  
Garbage Service between all points and )  
places within Flathead County )

**NOTICE OF COMMISSION ACTION**

**PROCEDURAL HISTORY**

1. On January 8, 2018, Big Foot Dumpsters & Containers, LLC (“Big Foot”) filed an Application for a Class D Certificate of Public Convenience and Necessity with the Montana Public Service Commission (“Commission”), for transportation of garbage between all points and places within Flathead County.

2. Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana (“Republic”), Evergreen Disposal Inc. (“Evergreen”), and Montana Waste Systems, Inc., d/b/a North Valley Refuse (“North Valley”) protested Big Foot’s application.

3. Prior to resolution of Big Foot’s Application on the merits, this case was subject to judicial review and subsequent appeal. *Allied Waste Servs of N. Am., LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 2019 MT 199, 397 Mont. 85, 447 P.3d 463. The Montana Supreme Court remanded the matter to the Commission for further proceedings. *Id.* ¶ 22.

4. The Commission reinitiated the docket in late 2019 by issuing Procedural Order 7701. Evergreen sought reconsideration of the decision, requesting the Commission to refrain from examining witnesses during the evidentiary hearing for the docket. The Commission denied the motion, and on December 30, 2019, Evergreen filed a second emergency petition for immediate judicial review. The Court issued a temporary restraining order and stayed further Commission proceedings in the docket.

5. On January 9, 2020, Big Foot filed a motion to withdraw its application before the Commission. Because the temporary restraining order was in place, the Commission could not act on Big Foot’s motion. Instead Big Foot filed a motion to dismiss Evergreen’s petition,

arguing that its lawsuit was moot. On January 22, 2020, Big Foot also filed a motion for fees and costs arguing that the temporary restraining order was improperly granted.

6. The District Court heard arguments regarding whether a preliminary injunction should issue on February 12, 2020. At argument, Evergreen argued that the Court should reach the merits because an exception to mootness could apply. The Court entertained the argument and ordered supplemental briefing and heard arguments from the parties on several topics to inform its decision.

7. On April 20, 2021, the Court granted Big Foot's Motion to Dismiss, dissolved the restraining order and directed the Commission to permit Big Foot to withdraw its petition, and denied Big Foot's Motion for Fees.

8. On June 22, 2021, the Commission granted Big Foot's Motion as discussed below.

### **DISCUSSION**

9. The Commission has jurisdiction to act on Big Foot's Motion.

10. The typical two-week period preventing the Commission from acting after a District Court decision has passed. Mont. R. Civ. P. 62(a). Similarly, the District Court's decision does not prevent further Commission action. The District Court granted a Temporary Restraining Order, and also stayed proceedings "pending judicial review" in this matter. TRO, at 1. In its final decision, the Court dissolved the TRO "for the limited purpose of allowing Big Foot to withdraw from the underlying proceeding." Order at 12. By implication this extends to the stay, which reasonably terminated based on the Court dissolving the TRO, and dismissing the case on the merits.

11. Additionally no party has requested a stay or injunction pending appeal, which if granted could prevent further Commission action, and a district court's final judgment on a motion for injunction is not stayed as an operation of law when parties appeal (Mont. R. Civ. P. 62(a)(1)), nor is an agency decision stayed pending appeal (Mont. Code Ann. § 2-4-711).

12. Further, the Commission cannot take action in a docket subject to judicial review until after the relevant deadlines to appeal and cross-appeal have passed. *See Whitehall Wind, LLC v. Mont. PSC*, 2010 MT 2, ¶ 18, 355 Mont. 15, 223 P.3d 907 ("To force the PSC to recalculate the rate in accordance with the District Court's specific instructions before allowing it

to appeal would undermine the PSC's right to appeal under § 2-4-711, MCA."); *see also Mays v. Sam's Inc.*, 2019 MT 219, ¶ 9, 397 Mont. 248, 448 P.3d 1096.

13. Accordingly, the Commission was prevented from taking any action in the Big Foot docket until after June 21, 2021. As of June 22, 2021, the Commission retained jurisdiction to consider Big Foot's Motion.

14. The Commission concludes it should grant Big Foot's Motion.

15. In addressing this issue, because the Commission remains responsible for the supervision, control, and encouragement of the entire common motor carrier sector (including incumbent license holders and applicants) (Mont. Code Ann. §§ 69-12-201-, -202), the Commission should consider both Evergreen and Big Foot's interests.

16. The relevant analysis that guides the Commission's decision is whether a stay would be appropriate pending appeal. If yes, then the Commission will not act on the motion; if not, the Commission will.

17. An applicant for a stay (in this case Evergreen) must demonstrate good cause to stay the district court's decision. Mont. R. App. P. 22(2)(a)(i). There are four factors to consider when determining to stay a civil judgment: (1) whether Evergreen has made a strong showing that it is likely to succeed on the merits; (2) whether Evergreen will be irreparably injured absent a stay; (3) whether issuing the stay will substantially injure the other parties (including Big Foot) in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770 (1987).

18. First, it is unclear whether Evergreen can demonstrate a strong showing that it will succeed on the merits. We do not know what issues Evergreen will appeal, and accordingly lack any insight into whether it can demonstrate a strong showing of success. The Commission will focus on other elements of the test.

19. Second, Evergreen cannot be irreparably injured without a stay because dismissing Big Foot's application benefits Evergreen. If the Commission grants Big Foot's motion, there is no longer the ability to proceed to an evidentiary hearing which could result in the Commission examining witnesses potentially to Evergreen's detriment. Similarly, dismissing the application means there is no possibility of an additional carrier (Big Foot) being admitted to Evergreen's service territory. These are beneficial outcomes for Evergreen.

20. Evergreen would reasonably argue that it could be injured in future cases, because it presumably wants the Supreme Court to determine that an exception to mootness applies, such that the Court is required to consider Evergreen's remaining issues on the merits (either on remand to the district court, or *sua sponte* on appeal). However, this is speculative. First, as the district court concluded, this issue is moot because Big Foot has sought to withdraw its application. While Evergreen would argue that Big Foot has represented that it intends to file again for a license, and that indicates the problem could recur in the future, Evergreen will have the opportunity to raise the issue at that time. This speculative concern of future injury would reasonably be outweighed by the tangible benefit from withdrawing Big Foot's application.

21. Third, more importantly, Big Foot would be substantially injured if the Commission does not dismiss its application. Big Foot has sought a license to operate in Montana since 2018. Prior to even reaching an evidentiary hearing in this matter, it has already been forced to litigate two district court cases and one appeal. If the Commission did not dismiss Big Foot's application, it would have a much stronger obligation to appear in a second appeal. These costs are not insignificant, and even redundant if the Commission and Big Foot are successful on appeal: it would merely put Big Foot in the same position they could be if the Commission dismisses the application now (Big Foot would no longer be a party to a proceeding before the Commission). Big Foot is even more harmed if Evergreen is successful on appeal: Big Foot would be carried into further proceedings on remand before the District Court on issues which largely have no bearing on Big Foot (preliminary injunction supplemental briefing issues).

22. Fourth, there are competing public interest factors. Evergreen would likely argue, as it did before the district court, that there are strong public interest factors at play regarding the Commission's practice of asking questions of witnesses during evidentiary hearings. Evergreen would likely argue that this practice raises due process concerns, is a matter of important public interest, and which would support a stay of the Commission's ability to act. The Commission has represented in its litigation and in various contested dockets that it disagrees. The District Court in its Order also disagreed. Regardless this is a reasonable public interest factor.

23. Conversely, the public has a strong interest in only resolving actual issues. Courts can only decide cases or controversies. They do not reach decisions on academic issues. Here, if the Commission did not grant Big Foot's motion, there is no case or controversy—the

Commission would be sitting on Big Foot's motion for purposes of Evergreen's appeal, even where Big Foot arguably has the unilateral right to withdraw its application without Commission action. This is not an actual case or controversy. This is underscored by the fact that Evergreen's claims can be raised in subsequent motor carrier cases, or even in the Commission's other outstanding lawsuits involving similar issues (for example the *Broad Reach* case). These public interest factors should reasonably balance out Evergreen's concern.

24. Overall it is reasonable to assume that Evergreen would be unsuccessful in a motion for stay—it actually benefits from a Commission decision to dismiss Big Foot's application, its claims can be brought in future cases, and Big Foot would be further harmed by more litigation expenses and proceedings when it merely wants to withdraw its application. Accordingly, the Commission grant Big Foot's Motion to Withdraw.

### **ORDER**

25. Big Foot's Motion to Withdraw is GRANTED. The Commission no longer has jurisdiction over the parties and issues presented in this docket and closes this docket.

DONE AND DATED this 22nd day of June, 2021, by a vote of 5 to 0.

BY THE MONTANA PUBLIC SERVICE COMMISSION

JAMES BROWN, Chairman

BRAD JOHNSON, Vice Chairman

TONY O'DONNELL, Commissioner

RANDY PINOCCI, Commissioner

JENNIFER FIELDER, Commissioner

**CERTIFICATE OF SERVICE**

I certify that on the 23rd day of June, 2021, a true and accurate copy of the foregoing was served by email to the following:

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**RECEIVED**  
JAN 09 2020  
MONT. P.S. COMMISSION

**FILED**

JAN 09 2020

ANGIE SPARKS, Clerk of District Court  
By **JREIDGERS** Deputy Clerk

Attorneys for Petitioner NorthWestern Energy

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY**

IN THE MATTER OF the Class D  
Application of Big Foot Dumpsters &  
Containers, LLC Application for Class D  
Garbage Service between all points and  
places within Flathead County

Cause No. DDV 2018-318  
Judge: James P. Reynolds

**MOTION TO INTERVENE**

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NorthWestern Energy (“NorthWestern”), by and through its counsel, respectfully moves this Court for an order granting it authority to intervene in this matter. As a public utility subject to the Montana Public Service Commission’s (“Commission”) contested case procedures, NorthWestern has an interest in the outcome of this matter. On January 9, 2020, NorthWestern filed a Petition for Declaratory Judgment with this Court seeking a declaration that the Commission’s contested case procedures violate due process requirements similar to the arguments made by the Petitioner in this case. Due to the possibility of inconsistent arguments or judgments, the disposition of this matter may impair or impede NorthWestern’s ability to protect its interests in that case. Further, NorthWestern participated as an amicus in a previous appeal to the Montana Supreme Court in this matter regarding the constitutional issues; however, the Court declined to address its arguments because they were not raised in this Court. *Allied Waste Services of North America, LLC v. Department of Public Service Regulation*, 2019 MT 199, n. 6,

397 Mont. 85, 447 P.3d 463.

To prevent the possibility of inconsistent arguments or judgments and to preserve its arguments on appeal, NorthWestern respectfully requests the Court to grant its motion to intervene.

NorthWestern contacted the other parties in this docket regarding this motion. All of the parties, except Big Foot Dumpsters & Containers, LLC ("Big Foot"), were unopposed to the motion. At the time of filing, NorthWestern had not heard back from Big Foot regarding its position on the motion. This motion is supported by the accompanying brief.

DATED this 9th day of January 2020.

NORTHWESTERN ENERGY

  
Clark Hensley  
Attorney for NorthWestern Energy

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served via U.S. Mail this 9<sup>th</sup> day of January, 2020, upon the following:

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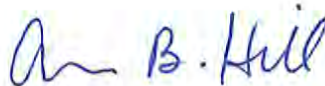
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Ann Hill  
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## CERTIFICATE OF SERVICE

I, Zachary Rogala, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 07-01-2021:

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Dated: 07-01-2021