

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**No. DA 21-0249**

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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

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On Appeal from the Montana First Judicial District Court, Lewis & Clark County  
Cause No. DDV 2018-318, Honorable Ed McLean

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**APPELLANT NORTHWESTERN ENERGY'S**  
**OPENING BRIEF ON APPEAL**

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## **STATEMENT OF THE ISSUE**

Whether the district court erroneously dismissed this case as moot when the Commission continues to defy judicial orders through its contested case procedures, and all three of the exceptions to the mootness doctrine apply?

## **STATEMENT OF THE CASE**

This case comes to this Court, for the second time, for resolution of the Montana Public Service Commission's ("Commission") unlawful contested case procedures. *See Allied Waste Services of North America, LLC v. Department of Public Service Regulation ("Allied Waste")*, 2019 MT 199, ¶ 17, 397 Mont. 85, 447 P.3d 463. In *Allied Waste*, this Court upheld the district court's writ of prohibition precluding the Commission from issuing discovery in its contested cases. While this Court declined to address the question of whether the Commission's participation as a party in contested cases, while simultaneously serving in a quasi-judicial role, violates the Montana Administrative Procedure Act ("MAPA") and constitutional requirements for due process, the Court remanded the matter and warned the Commission that it is "not exempt from the constitutional restraints of due process requirements' and **must ensure that all litigants receive 'a fair and open hearing[.]'**" *Id.* at ¶ 17 (emphasis added; internal citation omitted). The Commission failed to heed that warning. Consequently, this case presents itself to this Court once again.

The present appeal arises from the district court's most recent temporary restraining order ("TRO") preventing the Commission from violating Evergreen Disposal Inc.'s ("Evergreen") due process rights. The district court granted Evergreen a TRO staying the Commission's underlying proceeding involving Big Foot Dumpsters and Containers, LLC's ("Big Foot") application for a Class D garbage hauler certificate in Flathead County. Big Foot moved to withdraw its underlying application before the Commission in attempt to moot the district court proceeding prior to its decision on Evergreen's preliminary injunction. Big Foot then moved the district court to dismiss the proceeding on that basis. Evergreen originally consented to the matter being dismissed, with the understanding that Big Foot would not seek a certificate from the Commission. Evergreen subsequently discovered Big Foot publicly announced its intention to continue its pursuit of a certificate from the Commission to haul garbage in Flathead County, which would require the same underlying proceeding that Big Foot had just withdrawn. As a result, Evergreen contested the motion to dismiss due to the inevitable recurrence of this dispute and the Commission's steadfast defiance of this Court's and the district court's prior orders requiring the Commission to afford due process to all litigants.

Despite Evergreen's opposition to the dismissal, the district court dismissed this matter as moot relying exclusively on Big Foot's withdrawal of its underlying

application without any discussion of its public announcement made only four days later. The district court declined to retain the case under the exceptions to the mootness doctrine based on its belief that the Commission’s contested case procedures are of limited interest to the broader public, that it would be impossible for the issue to recur in a manner which would evade review, and no issue remains to guide public officers in the performance of their duties.<sup>1</sup>

NorthWestern appeals the district court’s dismissal because Evergreen’s requested relief to mandate the Commission to follow the prior judicial orders is not moot, and all three exceptions to the mootness doctrine apply based on the inevitable recurrence of this dispute.

### **STATEMENT OF THE FACTS**

Earlier in this very case, the district court unequivocally held that the Commission as the tribunal may not participate as a party because such conduct “violates Petitioners’ right to a hearing before an impartial body.”<sup>2</sup> On appeal of that order to this Court, the Commission did not challenge the prohibition barring it from issuing discovery while also serving as the tribunal. *Allied Waste*, at ¶ 14. As a result, the constitutionality of the Commission’s procedures evaded this Court’s

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<sup>1</sup> Doc. 139 – Order on Motion to Dismiss – Dismissal Granted. Fees and Costs Denied (April 21, 2021).

<sup>2</sup> Doc. 16 – Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue (May 4, 2018); Doc. 31 – Order on Petition for Preliminary Injunction and Writ of Mandate (July 9, 2018).

review. *Id.* at n. 6. However, this Court explicitly held the Commission is “‘not exempt from the constitutional restraints of due process requirements’ and **must ensure that all litigants receive ‘a fair and open hearing.’”** *Id.*, at ¶ 17 (emphasis added).

In another challenge to the Commission’s contested case procedures, Judge Seeley of the First Judicial District, likewise, held

The quasi-judicial powers and duties of the Commission holding a contested case hearing as prescribed in law and administrative rule, differ from its other general statutory powers and duties....The PSC, as the tribunal, should not engage in the discovery process as a party or advocate in a contested matter before the tribunal.

Appendix, Attachment 1 - *In the Matter of the Class D Application of L&L Site Services, Inc.*, Cause No. CDV-2018-455, Order (“*L&L Order*”), pp. 3-4 (May 17, 2018). In yet another case, Judge McMahon of the First Judicial District similarly questioned, “How is it any due process where the adjudicator gets to send discovery?” Appendix, Attachment 2 - *In the Matter of the Complaint of AmeriMont, Inc.*, Cause No. BDV 2018-692 (“*AmeriMont Oral Argument*”) (November 13, 2018).

On remand, despite this Court’s and the district court’s directives, the Commission, as the tribunal, remained undeterred in participating in this matter as a party. Doc. 1 - Cause No. BDV 2019-1792 - Emergency Petition for Immediate Review of Agency Action, Temporary Restraining Order and Preliminary



Injunction, Writ of Supervisory Control, Writ of Mandate, and Writ of Prohibition (“Petition”), ¶¶ 14-18 (Dec. 30, 2019).<sup>3</sup> The Commission defied the courts’ directions asserting that it “retain[s] the power to investigate issues and examine witnesses during the evidentiary hearing” and to introduce evidence into the record. *Id.* at ¶¶ 14-18, Exhibit 10 (Procedural Order 7701, ¶ 13 (Oct. 29, 2019)). Evergreen moved the Commission for reconsideration of the new procedural order pointing out that the Commission’s proposed “investigation” during the hearing would allow the Commission, as the tribunal, to also participate in the contested case as a party, which would undermine the courts’ directives against such conduct and, likewise, violate its due process rights. *Id.* at ¶ 19.

On December 23, 2019, the Commission denied Evergreen’s motion for reconsideration. *Petition*, at ¶ 20. In its order denying reconsideration, the Commission acknowledged that its data requests functioned the same as cross-examination and that, since the Commission could not issue data requests, it would elicit the same information through live investigation and cross-examination. *Id.*, Exhibit 12 (Order No. 7701b, ¶ 14 (Dec. 23, 2019)). The Commission further stated Evergreen deserved a trial by ambush due to its successful vindication of its

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<sup>3</sup> See Doc. 49 – Order of Consolidation – Cause BDV 2019-1792 Consolidated into Cause DDV 2018-318.

constitutional rights restricting the Commission's, as the tribunal, ability to participate in discovery. *Id.* at ¶ 21, Exhibit 12 at ¶ 17.

Ironically, Evergreen has put itself in a self-ambushing situation. It, along with other Protestants was successful in preventing the Commission from engaging in discovery in this docket. The Commission's use of data requests tends to put the parties on notice of what concerns or questions the Commission has. Now, because the Commission is not able to engage in discovery, the Commission is forced to wait until the hearing to ask questions or address its concerns. Evergreen is now protesting **the alleged ambush it asked for**. . . . The Commission's use of data requests made ambush less likely because it put the parties on notice of questions or concerns the Commission had.

*Id.*, Exhibit 12 at ¶ 17 (emphasis added). While the Commission acknowledged that neither it nor its staff are a party, it maintained that it and its staff may participate as a party "to make sure, through introduction of data responses or other evidence, or through cross-examination, **that the record**, to the extent possible, **contains all the facts necessary to support decisions on the issues.**" *Id.*, Exhibit 12 at ¶ 20 (emphasis added). The Commission further maintained that its staff may participate as a party and still provide it ex parte advice on how to decide the case. *Id.*, Exhibit 12 at ¶¶ 21-25.

Consequently, on December 30, 2019, Evergreen filed its Petition for immediate relief from the Commission's procedural order. *See* Petition, at ¶¶ 38-50. The Petition illustrated the constitutional due process violations present in the Commission's current practices, which the underlying procedural order

exemplified. *Id.* The Petition demonstrated that during contested case hearings, the Commission's staff sit as quasi-judicial officers and

[u]nlike other administrative agencies, the Commission's staff is not designated as a party separate from the tribunal and the staff do not follow *ex parte* rules for parties. Rather, similar to a judicial law clerk, the Commission's staff advises the Commission on technical and legal issues, drafts summaries of the hearing, advises the Commission as to how to decide the case based on those summaries, and drafts the eventual order in the matter.

*Id.* at ¶¶ 28-29. Under the procedural order, the Commission and its staff do not respond to discovery or provide testimony, and are not subject to cross-examination as are all other parties in contested case hearings. *Id.* at ¶¶ 30-33. Yet, under the procedural order, the Commission and its staff may conduct their own investigation within the contested case proceeding, introduce evidence into the record to support its decision, and cross-examine witnesses. *Id.* Following the hearing, the Commission with the advice of its staff then issues a decision on the substantive merits based on the evidence presented at the hearing. *Id.* at ¶ 35. Due to that procedure and based on the courts' precedent, Evergreen sought to restrain the Commission from violating its due process rights by simultaneously participating in contested cases as a party and serving as the tribunal. *Id.* at ¶¶ 38-50. Evergreen also sought "[a] writ of mandate ordering the [Commission] to comply with prior court orders[.]" *Id.* at ¶ 64d.

On January 3, 2020, the district court granted Evergreen a TRO staying the Commission's proceedings in the underlying docket.<sup>4</sup> On January 9, 2020, Big Foot voluntarily moved the Commission to withdraw its underlying application and, on January 15, 2020, moved this Court to dismiss the Petition alleging its motion to withdraw its application rendered the present action moot.<sup>5</sup> Despite moving to withdraw the application, Big Foot's principal, Stephen Stancher, appeared before the Montana Legislature's Energy Interim Committee on January 13, 2020, and publicly asserted his intent to haul garbage in Flathead County, which would require the same type of Commission approval currently in dispute. Montana Energy and Telecommunications Committee Meeting Minutes-Video, 14:58:00 (Jan. 13, 2020).<sup>6</sup>

### **STANDARD OF REVIEW**

Mootness presents a question of law that this Court reviews de novo for correctness. *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 6, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_.

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<sup>4</sup> Doc. 50 – Temporary Restraining Order (Jan. 3, 2020).

<sup>5</sup> Doc. 68 - Big Foot Motion to Dismiss (Jan. 15, 2020); Doc. 69 – Big Foot Brief in Support of Motion to Dismiss (Jan. 15, 2020).

<sup>6</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20200113/-1/37384#agenda>.

## **SUMMARY OF THE ARGUMENT**

The district court incorrectly concluded that this matter is moot. This case is not moot because the district court may still grant effective relief by issuing a writ of mandate ordering the Commission to comply with prior judicial orders as specifically requested by Evergreen. The district court incorrectly concluded that none of the exceptions to the mootness doctrine apply. All three exceptions to the mootness doctrine apply based on Big Foot's pronounced intent to refile the application that initiated this process coupled with the Commission's continued defiance of judicial orders.

## **ARGUMENT**

This case is not moot because the district court maintains the authority to declare the Commission's contested case procedures unconstitutional and Big Foot's conduct did not and cannot deprive the court of its authority. Mootness only occurs when the court cannot grant any form of effective relief due to an event or happening that absolves the dispute and terminates the actual controversy at issue. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864; *Wilkie*, at ¶ 8. Even when an actual controversy no longer exists, the exceptions to the mootness doctrine allow courts to rule on non-extant controversies in order to provide guidance concerning the legality of expected future conduct. *Id.* at ¶ 38; *Wilkie*, at ¶ 9.

The district court can still grant effective relief in this case by issuing a writ of mandate ordering the Commission to follow the courts' prior orders in all of its contested cases as requested by Evergreen. Alternatively, even if moot, Big Foot's public statement together with the Commission's adherence to its invalid contested case procedures demonstrates the high likelihood that this issue will recur.

Therefore, the case is not moot and the exceptions to the mootness doctrine apply regardless. As a result, the Court must reverse the district court's order and remand it for consideration of Evergreen's preliminary injunction and writ of mandate on the merits.

**I. The district court erred in finding this matter moot because it may still grant effective relief by requiring the Commission to follow judicial orders.**

Big Foot's withdrawal of its application did not resolve the entire controversy in this case. A live controversy exists because the Commission continues to disregard litigants' due process rights in direct contravention of judicial orders. Mootness only occurs when the issue ceases such that a live controversy no longer exists and the court cannot grant any form of effective relief. *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150. If the Court can grant some form of effective relief, the matter is not moot. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶¶ 37, 43, 49, 364 Mont. 390, 276 P.3d 867.

Regardless of Big Foot’s withdrawal of its application before the Commission, the Commission maintains its position that it does not have to follow the courts’ directives to provide due process to all litigants. In this very case, the district court already unequivocally held that the Commission as the tribunal may not participate as a party because such conduct “violates Petitioners’ right to a hearing before an impartial body.” Doc. 16 - Temporary Restraining Order and Order to Show Cause; Doc. 31 - Order on Petition for Preliminary Injunction. The Commission evaded this Court’s review of that issue by failing to challenge that part of the district court’s order on appeal. *Allied Waste*, at ¶ 14. Nevertheless, this Court explicitly held the Commission is ““not exempt from the constitutional restraints of due process requirements’ and **must ensure that all litigants receive ‘a fair and open hearing.’”** *Id.*, at ¶ 17 (emphasis added).

Judge Seeley also proscribed the Commission’s conduct holding the Commission “as the tribunal, should not engage in the discovery process as a party or advocate in a contested matter before the tribunal.” Attachment 1 - *L&L Order* at p. 4. This Court, likewise, held the Commission, while serving in a “quasi-judicial function,” is limited to “making determinations in controversies” and lacks sua sponte authority to simultaneously participate as a party by raising uncontested issues. *MTSUN, LLC v. Mont. Dept. Pub. Serv. Reg.*, 2020 MT 238, ¶ 73, 401 Mont. 324, 472 P.3d 1154; Mont. Code Ann. § 2-15-102(10).

Despite the district court and this Court's directives, the Commission remained undeterred in participating as a party in this matter forcing Evergreen to seek emergency review and a writ of mandate compelling the Commission to follow the courts' orders in all of its contested cases. On remand, instead of adhering to the district court's writ of prohibition precluding the Commission from participating in discovery, the Commission admittedly reframed its discovery practices as cross-examination and advised it, as the tribunal, would seek the same information from Evergreen during the hearing. *See* Petition, Exhibit 12 at ¶ 17. Likewise, instead of providing due process to *all litigants* as this Court ordered, the Commission attempts to collaterally attack the order alleging it does not have to provide due process to all litigants. *See* Doc. 101 - Commission's Initial Brief, pp. 3-17 (April 13, 2020); Doc. 109 – Commission's Response Brief and Request for Oral Argument, pp. 2-7 (May 13, 2020). Since Evergreen requested judicial relief to require the Commission to follow the courts' orders in all of its contested cases, the case is not moot and the district court still has the power to grant that relief to proscribe the Commission from attempting to evade clear directions from the judiciary. Therefore, the Court must reverse the district court's order and remand for consideration of the preliminary injunction and writ of mandate on the merits.



**II. The district court erred by not retaining the case under the exceptions to the mootness doctrine because this issue likely will recur.**

The Montana Supreme Court has recognized three exceptions to the mootness doctrine: (1) public interest; (2) capable of repetition, yet evading review; and (3) voluntary cessation. *Havre Daily News*, at ¶¶ 32-34. All three exceptions allowed the district court to rule on the constitutionality of the Commission's procedures, even if a live controversy no longer exists, in order to provide guidance concerning the legality of its expected future conduct. *Id.* at ¶ 38; *Wilkie*, at ¶ 9.

Big Foot's public announcement that it intends on reinitiating the same proceeding that gave rise to this action coupled with the Commission's steadfast adherence to its unconstitutional contested case procedures demonstrate that this issue will recur. It is not a matter of whether, but a matter of when. The exceptions to the mootness doctrine were designed precisely for this type of situation. All three exceptions authorized the district court to retain jurisdiction over this matter regardless of Big Foot's voluntary withdrawal of its application before the Commission.

**A. The public interest exception authorized the district court to issue a ruling on the constitutionality of the Commission's procedures to guide its future conduct.**

The public interest exception to the mootness doctrine empowers courts to examine issues that involve broad public concerns to avoid future litigation on a

point of law. *Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867; *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. When faced with constitutional questions that would otherwise avoid review due to changed circumstances, the Court may still consider the merits of the dispute. *Lohmeier v. State*, 2008 MT 307, ¶ 13, 346 Mont. 23, 192 P.3d 1137. The public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties. *Ramon*, at ¶ 21; *Walker*, at ¶ 41.

This Court recently held that the public interest exception applies in situations where conflicts exist between the branches of government. *McLaughlin v. Montana State Legislature*, OP 21-0173, Order Denying Motion to Dismiss, pp. 2-3 (June 29, 2021). In *McLaughlin*, the Court dealt with a conflict over the powers of the judicial and legislative branches. The Court held that conflicts between the branches of government involve issues of great public interest, are likely to recur, and need a ruling to guide public officers in the performance of their duties. As a result, the Court retained jurisdiction over the issue despite the legislature's withdrawal of subpoenas for sensitive judicial information which created the conflict. *Id.*

The present matter is synonymous to *McLaughlin* in that it involves a conflict between the judiciary and an executive branch agency, i.e. whether the

Commission must follow judicial orders and provide due process to all litigants. The district court erroneously concluded that the public interest exception did not apply because the issue is of limited interest to the broader public. To reach that conclusion, the district court incorrectly viewed the issue solely in the context of the single contested case before it. The issue actually involves the due process rights of all litigants before the Commission and is of great public importance. MAPA's contested case procedures apply to all contested cases before the Commission, including public utility and motor carrier cases. Mont. Code Ann. §§ 2-4-102, 69-3-303; *McGree Corp. v. Montana Public Service Commission*, 2019 MT 75, ¶¶ 34-35, 395 Mont. 229, 438 P.3d 326. This case further involves Montanan's fundamental constitutional right to due process. Mont. Const., Art. II § 17; Mont. Code Ann. § 2-4-101(2)(b). Therefore, the matter presents an issue of great public importance.

The conflict over the Commission's contested case procedures is also likely to recur as the Commission continues to flout judicial orders requiring it to provide due process and prohibiting it from participating in its cases as a party. Additionally, Big Foot's public declaration that it intends on pursuing an application before the Commission within a week of its voluntary withdrawal further demonstrates the likelihood of recurrence even for this individual contested case.

Resolving the constitutional matter will guide the Commission in its future contested cases and preserve the due process rights of all the parties that appear before it. A ruling on the merits will not only prevent the Commission from continuing to violate parties' due process rights in this particular contested case, but in all of the Commission's other contested cases as well. Prohibiting the Commission, as the tribunal, from participating in its cases as a party will resolve the ongoing disputes over discovery, cross-examination, introduction of evidence, and investigation during its contested cases and, thus, will preserve judicial economy by eliminating future disputes over those issues.

Two judges from the First Judicial District have already expressly ordered the Commission to refrain from participating as a party in its contested cases and a third questioned the constitutionality of that conduct. *See* Doc. 16 - Temporary Restraining Order and Order to Show Cause; Doc. 31 - Order on Petition for Preliminary Injunction; Attachment 1 - *L&L Order*; Attachment 2 – *AmeriMont Oral Argument*. This Court further proscribed such conduct by ordering the Commission to provide due process to “all litigants” and to stay within the confines of its “quasi-judicial” role in contested cases. *Allied Waste*, at ¶ 17; *MTSUN*, at ¶ 73. Yet, the Commission continues to ignore those orders by interpreting them narrowly and re-branding the name of its conduct. A writ of mandate or injunctive order prohibiting the Commission from participating as a

party will prevent the Commission from re-characterizing its procedures to undermine the courts' precedent, and prevent the likelihood of it repeating its unconstitutional practices under different terminology or at different stages of its proceedings. Therefore, even if moot, the public interest exception empowered the district court to resolve the conflict between the Commission and the judiciary.

**B. The voluntary cessation and capable of repetition, yet evading review exceptions also apply because Big Foot's withdrawal cannot create mootness when it fully intends on reinstituting the same process that initiated this case.**

The district court also should have retained jurisdiction over this matter because Big Foot's voluntary withdrawal did not strip the district court of jurisdiction. The capable of repetition, yet evading review and voluntary cessation exceptions allow courts to rule on matters that become moot due to changed circumstances based on the likelihood of recurrence. *Havre Daily News*, at ¶¶ 32-39; *Wilkie*, at ¶ 9. Under the capable of repetition, yet evading review exception, the party opposing mootness must demonstrate that there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* at ¶ 34.

In contrast, under the voluntary cessation exception, the party asserting mootness based on its own voluntary conduct bears the “heavy burden of persuad[ing]’ the court that the challenged conduct cannot reasonably be expected to start up again.” *Id.*; *Wilkie*, at ¶ 9. The voluntary cessation exception prevents

parties from manipulating the litigation process by creating mootness. *Id.*; *Wilkie*, at ¶ 10. Thus, a case may only become moot by a party’s voluntary conduct when it is “‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’” *Wilkie*, at ¶ 10 (quoting *Havre Daily News*, at ¶ 38).

The district court failed to consider either the voluntary cessation or capable of repetition, yet evading review exceptions, which were raised by both NorthWestern and Evergreen.<sup>7</sup> Further, the district court failed to evaluate the effect of Big Foot’s public announcement that it intends on resurrecting the same process that gave rise to this case, which occurred less than a week after moving to withdraw its underlying application. This is especially troubling given the district court relied exclusively on Big Foot’s withdrawal of its application before the Commission in dismissing this case as moot. The result essentially allowed Big Foot to circumvent a ruling from the district court by creating mootness through its own voluntary conduct.

The voluntary cessation doctrine applies to prevent such manipulation of the court system, especially when Big Foot’s principal publicly stated, less than a week after moving to withdraw its application, that it intends to pursue the same application that created this dilemma. In *Wilkie*, this Court recently reaffirmed the

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<sup>7</sup> See Doc. 103 – NorthWestern’s Supplemental Brief, pp. 6-10 (April 13, 2020); Doc. 111 – Evergreen Disposal, Inc.’s Response Supplemental Briefs, pp. 2-4 (May 13, 2020); Doc. 113- NorthWestern’s Supplemental Response Brief, pp. 4-6 (May 13, 2020).

voluntary cessation exception to the mootness doctrine under analogous circumstances. *Id.* at ¶¶ 7-20. There, the petitioner sought a tortfeasor's insurance policy from his insurer. *Id.* at ¶ 2. After the insurer refused to provide the policy, the petitioner sought a declaratory judgment that the insurer has a duty to provide third-party claimants a copy of its insureds' policies when liability is reasonably clear. *Id.* at ¶ 3. Subsequently, the insured tortfeasor provided the petitioner the insurance policy at issue. *Id.* at ¶ 4. The insurer then moved the district court to dismiss the action as moot and claimed the district court could not grant the petitioner any further relief since he now had the policy. *Id.*

The petitioner asserted exceptions to the mootness doctrine and claimed the insurer's common and normal practice is to refuse to provide its insureds' policies to third-party claimants, which he supported with declarations from personal injury attorneys identifying similar historical conduct. *Id.* at ¶ 15. The insurer did not provide any evidence or other showing to demonstrate the challenged conduct would not recur. *Id.* Nevertheless, the district court agreed with the insurer and dismissed the action. *Id.* at ¶ 5. This Court reversed the district court because the insurer failed to meet its burden to demonstrate "the challenged conduct will not or cannot recur." *Id.* at ¶¶ 15, 17. Additionally, the Court noted the insured tortfeasor voluntarily resolved the immediate issue not the insurer, which further indicated the insurer's challenged conduct would likely recur. Therefore, the Court

determined the district court erred by failing to apply the voluntary cessation exception and remanded for a decision on the merits. *Id.* at ¶ 19.

As in *Wilkie*, Evergreen sought relief from an unlawful and common practice of a third party, i.e. the Commission's unlawful contested case procedures. Similar to the insured tortfeasor in *Wilkie*, Big Foot's voluntary conduct created the potential for mootness in this case. Synonymous to the insurer in *Wilkie*, the Commission has not demonstrated that its challenged conduct will not or cannot recur. The Commission admittedly remains committed to its unlawful contested case procedures claiming that certain litigants, including Evergreen, do not deserve due process. *See* Doc. 101 - Commission's Initial Brief, pp. 3-17 (April 13, 2020); Doc. 109 – Commission's Response Brief and Request for Oral Argument, pp. 2-7 (May 13, 2020).

Under the voluntary cessation exception, the Commission was required to carry the heavy burden of persuading the district court that it would not continue using its unlawful practices. The Commission made no such showing; rather, as in *Wilkie*, the district court found the matter moot based on Big Foot's voluntary conduct and not the Commission's. Additionally, the present case reflects an even more compelling application of the voluntary cessation doctrine due to Big Foot's public announcement within a week of its motion to withdraw its application and the Commission's commitment to its unlawful practices. Pursuant to *Wilkie*, this



Court must reverse the district court because it erroneously failed to apply the voluntary cessation exception.

For the same reasons, Evergreen satisfied its burden under the capable of repetition, yet evading review exception. Big Foot's public declaration that it intends to reinitiate the same proceeding that gave rise to this case and the Commission's adherence to its unlawful procedures create a reasonable expectation that Evergreen will be subject to the same action again. The district court erroneously failed to consider the application of this exception as well. As a result, the Court must reverse the district court and remand this matter for a decision on the merits.

### **CONCLUSION**

The district court erroneously dismissed this case as moot because it can still grant Evergreen's requested relief by issuing a writ of mandate requiring the Commission to follow the judiciary's orders. Additionally, the district court erroneously concluded the public interest exception does not apply and failed to consider the other exceptions as well as the effect of Big Foot's public declaration. Therefore, this Court should reverse the district court's order and remand the case for consideration of the merits of Evergreen's requested preliminary injunction and writ of mandate.

Respectfully submitted this 14<sup>th</sup> day of October, 2021.

/s/ Clark Hensley

Clark Hensley  
Attorney for NorthWestern Energy

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response is printed in proportionately-spaced Times New Roman typeface of 14 points; that it is double spaced; and the word count calculated by Microsoft Word is 4,934 words, excluding the caption, table of contents, table of citations, certificate of compliance, and certificate of service.

/s/ Clark Hensley

Clark Hensley  
Attorney for NorthWestern Energy

## **APPENDIX**

Attachment 1 – *In the Matter of the Class D Application of L&L Site Services, Inc.*, Cause No. CDV-2018-455, Order (May 17, 2018).....Tab 1

Attachment 2 – *In the Matter of the Complaint of AmeriMont, Inc.*, Cause No. BDV 2018-692, Oral Argument Excerpt (November 13, 2018).....Tab 2

## **CERTIFICATE OF SERVICE**

I, Clark Robert Hensley, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-14-2021:

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