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STATE OF MONTANA

Case Number: DA 21-0249

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

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

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

CAUSE NO. DDV 2018-318

HON. EDWARD P. MCLEAN, DISTRICT COURT JUDGE PRESIDING

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I. STATEMENT OF THE ISSUES

After Big Foot Dumpsters and Containers, LLC (“Big Foot”) sought to withdraw its Application for a Class D Certificate pending before the Montana Public Service Commission (“PSC”), the District Court dismissed the case as moot, over the objection of Appellants Evergreen Disposal, Inc. (“Evergreen”) and NorthWestern Energy. Evergreen raises the following issues in this appeal:

1. Whether the District Court should have applied the voluntary cessation exception to mootness in order to reach the substantive issues presented in Evergreen’s Petition, since both Big Foot and the PSC affirmed that the challenged conduct is reasonably expected to reoccur.
2. Whether the District Court should have applied the public interest exception to mootness, since Evergreen’s Petition alleged that the PSC’s procedural order denied Evergreen’s due process at the scheduled contested case hearing, and the PSC has stated that it will continue to issue the same procedural order in future hearings.

II. STATEMENT OF THE CASE

This constitutes the second appeal arising out of the PSC’s improper and unconstitutional insistence to act as both an investigator/advocate and decision maker in contested case hearings before the agency. In the first appeal, this Court

upheld the District Court’s decision that a writ of prohibition was appropriate to prevent the PSC from issuing discovery to the parties in a contested case hearing. *See, Allied Waste Services of North America, LLC v. Montana Dept. of Pub. Serv. Reg.*, 2019 MT 199, 397 Mont. 85, 447 P.3d 463. Here, the Court will address whether the District Court should have applied an exception to mootness in order to reach the question of whether the PSC has statutory or constitutional authority to act as both investigator/advocate and decision maker in a contested case hearing before the agency by cross-examining witnesses and introducing its own evidence, and also deciding the merits of the case before it.

This matter first arose in 2018, when Big Foot filed an application with the PSC seeking issuance a Class D Certificate of Public Convenience and Necessity (“Class D Certificate”). Evergreen, as well as Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana and Montana Waste Systems, Inc., d/b/a North Valley Refuse (collectively, “Protestants”) filed protests to Big Foot’s application, triggering a contested case hearing before the PSC.

After the PSC served discovery requests (termed “data requests” in PSC parlance) on the parties, Evergreen and the other Protestants filed a Petition for Judicial Review with the First Judicial District Court, Cause No. DDV 2018-318. The District Court, Judge Reynolds presiding, partially granted the Petition and

enjoined the PSC from issuing discovery, and ordered it to appoint a hearing examiner to conduct the hearing.

The PSC and Big Foot appealed the decision, and this Court affirmed in part and reversed in part and remanded to the PSC for further proceedings.¹ In affirming the District Court’s writ of prohibition, the Court concluded that the PSC “entertained unlawful *ex parte* communications with Big Foot’s counsel,” and reaffirmed “that the PSC is not exempt from the constitutional restraints of due process requirements and must ensure that all litigants receive a fair and open hearing as guaranteed by the Fourteenth Amendment.” *Allied Waste*, ¶ 18. However, the Court found there was not enough evidence, at that time, to require the PSC to appoint a hearing examiner to preside over the hearing and reversed the writ of prohibition issued by the District Court. *Id.* at ¶¶ 20-21. Given the outcome, the Court did not address the constitutionality of the PSC’s discovery procedures. *Id.* at ¶ 17, n. 6.

This appeal arises from the PSC’s actions to evade the Court’s order on remand. Upon remand, the PSC issued a new procedural order, which acknowledged the agency was enjoined from promulgating discovery. However, to circumvent this limitation, the order stated the PSC had the “authority to

¹ NorthWestern Energy filed an amicus brief in this appeal and it was later allowed to intervene as a party.

investigate and interrogate” witnesses and to introduce its own evidence at hearing. In compliance with the PSC’s administrative rules, Evergreen filed a motion for reconsideration of the procedural order, pointing out that it was contrary to both statutory authority and constitutional due process for the PSC to act as both investigator/advocate and decision maker at the contested case hearing, and thus the PSC’s procedural order should be amended to remove all references to any power of the PSC to examine witnesses or introduce evidence at hearing. The PSC denied this Motion on December 23, 2019.

Accordingly, on December 30, 2019, Evergreen filed a new Petition for Judicial Review with the First Judicial District Court, which was assigned Cause No. BDV-2019-1792, Judge McMahon presiding, seeking relief from the PSC’s unconstitutional and contrary to statute actions. Judge McMahon issued an order consolidating the case into DDV-2018-318 with Judge Reynolds. On January 3, 2020, Judge Reynolds issued a Temporary Restraining Order staying the proceedings before the PSC. On January 9, 2020, Big Foot filed a Notice and Motion to withdraw its Class D Application with the PSC. The following day, Big Foot filed a Motion to Dismiss Evergreen’s Petition with the District Court, asserting it was moot. On February 12, 2020, Judge Reynolds held a Show Cause Hearing on Evergreen’s request for a preliminary injunction.

At that hearing, Evergreen pointed out that it had learned, shortly before the hearing, that Big Foot's principal had testified before an interim legislative committee that Big Foot still intended to haul garbage in Flathead County. Additionally, the PSC's counsel acknowledged at that hearing that the PSC would issue substantially the same procedural order in any later case. Based on this information, Evergreen and NorthWestern Energy asked the Court to apply an exception to mootness to reach a final decision on the merits of Evergreen's Petition. In response to this argument, at the conclusion of that hearing, Judge Reynolds requested that the parties submit supplemental briefing on various topics including, *inter alia*, whether the case was moot, and whether an exception to mootness applied. At the PSC's request, Judge Reynolds heard additional oral arguments in August of 2020 on the topics addressed in the supplemental briefs.

Judge Reynolds retired in October of 2020 and retired District Court Judge Ed McLean was assigned by the Chief Justice to preside over the case. On April 20, 2021, Judge McLean issued an order finding the case was moot and dismissing Evergreen's Petition. Evergreen filed a timely appeal. In July 2021, the PSC filed a motion to dismiss Evergreen's appeal as "uber moot," which this Court denied.

A. Statement of Facts

Absent certain exceptions, no person or entity may haul garbage for hire in Montana without first obtaining a Class D Certificate of Public Convenience and Necessity issued by the PSC. If a person or entity applies for a Certificate, existing garbage haulers in the applied-for service area may protest the application, triggering a contested case hearing under the Montana Administrative Procedures Act (“MAPA”). Mont. Code Ann. § 2-4-102; *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dept. of Pub. Serv. Regulation*, 284 Mont. 245, 944 P.2d 210 (1997). The burden is on an applicant to prove that an application should be granted by a preponderance of the evidence. *In re Application of Barber Transportation Company*, Dkt. T-7375, Order No. 4934a, April 8, 1985, at ¶ 4; *In re Application of Hoyer*, Dkt. T-95.73.PCN, Order No. 6397a, April 30, 1996, at ¶ 35.

Big Foot did not initially follow this process, and started hauling operations without a Class D Certificate. After it was informed that doing so was illegal, Big Foot filed an application with the PSC for a Class D Certificate, which would allow it to provide garbage services to all of Flathead County (“First Petition”).

PSC Administrative Record (“AR”) 1.² Several incumbent service providers, including Evergreen, filed timely protests, triggering a contested case hearing under MAPA. AR 4-6. On March 6, 2018, the PSC issued a Procedural Order, which designated “staff attorneys Jennifer Hill-Hart and Jeremiah Langston [to] act as examiners for the limited purpose of disposing of discovery disputes . . .” AR 8 at ¶ 17.

On March 19, 2018, Evergreen, as well as the other parties to the litigation—and for the first time in a Class D contested case proceeding—unexpectedly received data requests from the PSC that were not signed, but came with a cover letter from Jennifer Hill-Hart. AR 8 and 20. Later that afternoon, Evergreen received data requests from Big Foot which, in part, mirrored the PSC’s requests. *See* AR 14-16.

In response to a public records request to the PSC, it was discovered that Ms. Hill-Hart — the PSC’s designated hearing examiner for discovery issues — had drafted the PSC’s data requests and provided Big Foot’s counsel with data requests she believed to be relevant. Dkt. #17 at 9-10. This answered Protestants’

² The PSC filed the AR with the District Court on August 31, 2018. Case Register Report, Dkt. # 37. The PSC did not supplement the AR with the documents filed after the case was remanded to the agency, so the AR is not complete.

questions regarding how the PSC and Big Foot issued nearly identical data requests.

The Protestants objected to the PSC's and Big Foot's data requests, but given Ms. Hill-Hart's conflicted role as adjudicator and advocate, there was no reasonable chance they would receive an impartial resolution of the objections. To compound the bias favoring Big Foot, Ms. Hill-Hart further provided Big Foot's attorney with advice on what to submit as part of a motion to compel discovery, and legal research to help Big Foot's position. Dkt. #17 at 9-10.

Concerned with the PSC's actions, Protestants filed a Petition for Immediate Judicial Review with the First Judicial District Court. Dkt. # 1. The District Court granted a TRO on May 4, 2018 and set a show cause hearing for May 16, 2018. Dkt. # 16. On July 9, 2018, the Court issued its Order on Petition for Preliminary Injunction and Writ of Mandate finding that the PSC's issuance of discovery (and acting as advocate and adjudicator), as well as the *ex parte* communications, were contrary to statute and administrative rules, and violated Protestants' constitutional due process rights to a fair hearing before a neutral adjudicator. Dkt. # 31. The Court fashioned a remedy for this constitutional violation by enjoining the PSC from asking discovery of Protestants and requiring that the PSC appoint a hearing examiner from Agency Legal Services. *Id.* at 10-13.

On December 4, 2018, the PSC and Big Foot filed a Notice of Appeal with this Court. Dkt. ## 39, 42-43. In its Opinion resolving the appeal, this Court reaffirmed “that the PSC is not exempt from the constitutional restraints of due process requirements and must ensure that all litigants receive a fair and open hearing as guaranteed by the Fourteenth Amendment,” which was ensured by the District Court’s writ of prohibition preventing the PSC from issuing discovery. *Allied Waste*, 2019 MT 199 ¶ 17. The Court, however, reversed the District Court’s appointment of an independent hearing examiner, and remanded Big Foot’s Application to the PSC for further proceedings. *Id.* at ¶ 20.

After remand to the PSC, the PSC issued a new procedural order on October 29, 2019. Dkt. # 1, Emergency Petition, Exhibit 10 (“Procedural Order”). Despite acknowledging it could not issue discovery (data requests) as a result of Judge Reynolds’ Order, as affirmed by this Court, the new Procedural Order, unlike the previous one, stated that the Commission and its staff had the “authority to investigate and interrogate” witnesses in order “to clarify the case or present an issue,” at the evidentiary hearing in the underlying matter, and to present its own evidence at hearing. *Id.* at ¶¶ 13, 20. As authority, the Order cited to Mont. Code Ann. § 69-3-103, as well as cases regarding the regulation of utilities. *Id.* at ¶¶ 9-11. However, Title 69 Chapter 3 covers the regulation of utilities—not motor

carriers regulated under Title 69 Chapter 12, and Chapter 12 does not contain a like provision.

Evergreen timely requested that the PSC reconsider its Procedural Order, pointing out that allowing “investigation” where discovery was precluded by a prior order of this Court was discovery by another choice of words, and pointing out that acting as both an adjudicator and advocate was violative of Evergreen’s right to due process of law. Emergency Petition, Exhibit 11.

On December 23, 2019, the PSC issued its Order denying Evergreen’s motion for reconsideration, finding “nothing in the Montana Supreme Court’s decision restrained the authority of the Commission and its Staff from investigating issues and examining witnesses during the evidentiary hearing.” Emergency Petition, Exhibit 12, ¶ 11. The Order on Reconsideration essentially stated that the PSC would punish Evergreen with a trial by ambush for prevailing in the first appeal and thereby precluding it from serving discovery. *Id.* at ¶ 17 (“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.” (Emphasis added)). While the PSC

acknowledged it and its staff were not a party to the proceeding, the PSC nonetheless stated that its staff would be allowed to participate as a party “to make sure, through the introduction of . . . evidence, or through cross-examination, that the record, to the extent possible, contains all the facts necessary to support decisions on the issues.” *Id.* at ¶ 20.

As a result of the Commission’s actions in contravention of statutory mandates and due process of law, on December 30, 2019, Evergreen filed a new Petition for Judicial Review with the First Judicial District Court, which was assigned Cause No. BDV-2019-1792, Judge McMahon presiding. Dkt. # 1, Emergency Petition. The following day, Judge McMahon issued an order consolidating the case into DDV 2018-318. Dkt. # 49. On January 3, 2020, Judge Reynolds granted Evergreen’s request for a Temporary Restraining Order, staying the proceedings before the PSC. Dkt. # 50. Apparently displeased with Judge Reynolds’ Order regarding the first Petition and the new TRO, on January 6, Big Foot filed a motion to substitute Judge Reynolds. Dkt. # 58. On January 8, Evergreen responded by pointing out why Big Foot’s Motion for Substitution was not timely and should be denied. Dkt. # 58. The Motion was subsequently denied and Judge Reynolds retained the case. Dkt. # 75.

Faced with what it apparently considered to be an unfriendly judge, Big Foot thereafter moved forward to withdraw its Class D Application. On January 9, 2020, it filed a Notice and Motion of Withdrawal with the PSC. Dkt. # 76, Exhibit A. The following day, Big Foot filed a Motion to Dismiss with the District Court asserting that the Petition was now moot. Dkt. ## 64, 65. On January 21, the PSC filed a brief supporting the Motion to Dismiss and opposing Evergreen's Petition. Dkt. # 71. Evergreen filed a response to the Motion to Dismiss stating that based on the information available at that time, it appeared the case was moot. Dkt. # 76.

Judge Reynolds did not immediately rule on the Motion to Dismiss but instead addressed the issue at the February 12, 2020, Show Cause Hearing ("February Hearing") regarding whether an injunction should issue. As counsel for Evergreen explained at the hearing, based on testimony given by Big Foot's principal at the Energy and Telecommunications Interim Committee ("ETIC") on January 13, 2020, "we learned after we filed our response that Bigfoot's principle [sic] stated that they fully do intend to file their application again." Feb. 2, 2020 Hearing Transcript at 34:11-14 ("February Transcript"), Appendix 2. Counsel for Big Foot confirmed that the owner of Big Foot had testified at the hearing regarding Big Foot's future plans, stating that while they had not drafted a new application yet,

[t]hat's not to say that it's not going to happen. Bigfoot has every right to refile. To withdraw and refile the application. . . . if they do, I have no doubt that Evergreen will insert itself into the petition again, and they can refile a petition for judicial review if, if, if. There's a lot of speculation of what could happen.

Id. 38:20-39:6.

Judge Reynolds noted that given the developed factual and legal record in this case, including the prior appeal, “we’re at stage eight on this case [presumably out of ten]. If you [Big Foot] withdraw and then [refile] we go back to stage one, we’re going to go through all these other stages again.” February Transcript at 69:24-70-4.

At the hearing, PSC’s counsel stated, “I also agree with Evergreen that this issue for motor carrier contested case proceedings is going to arise in the future.” February Transcript at 13:3-5 (emphasis added). He added that the PSC had recently received a similar Class D application and the PSC was “going to be issuing another procedural order on this that will substantially resemble what you have before you now and that protester in this case would likely bring the same type of motion Evergreen brought for you in this action.” *Id.* 13:6-12.

As a result of the statements from the PSC and Big Foot indicating that Big Foot was likely to file a new application and, when it did, the PSC would issue the same procedural order, and the recent discovery of the testimony from Big

Foot’s principal, at the February Hearing, Evergreen and NorthWestern Energy argued that an exception to mootness should apply, and the District Court should reach the merits of Evergreen’s petition instead of dismissing the case. February Transcript at 34:13 (“[Counsel for the PSC] is here telling you that the PSC will issue that same procedural order again At this juncture I do believe that this may be a case that is an exception to the mootness doctrine under the public interest exception.”).

Judge Reynolds recognized the possibility that the case was not moot: “So you think — I was wondering about that, if this was one of those situations where it’s moot but likely to reoccur. You know, that thing from way back in law school days, that this could arise again in a similar situation.” February Hearing at 5:9-13. And at the end of the hearing, he asked the parties to submit supplemental briefing on four topics, including whether the case should be dismissed as moot, or whether an exception applied. *Id.* at 70:21-25 (“It’s sort of that whole public interest argument that we’ve been talking about here today.”).

Following the hearing the parties filed supplemental briefs (Dkt. ## 102, 103, 104) and response briefs (Dkt. ## 109, 110, 111, 112).³ In their supplemental

³ On May 4, 2020, the district court issued an order allowing the Montana Solid Waste Contractor’s Association to participate as an amicus in the case and it filed a supplemental response brief as well. Dkt. # 108.

briefing, both Evergreen and NorthWestern Energy expanded on their arguments from the hearing regarding why the case was not moot. Evergreen provided additional information to the Court regarding the testimony of Big Foot's owner at the January 13, 2020 ETIC hearing, and his statement that Big Foot still intended to provide garbage hauling service in Flathead County. Dkt. # 104 at 9. Evergreen also provided the District Court with a copy of the PSC's March 25, 2020 Procedural Order for the new Class D application that counsel for the PSC mentioned at the February Hearing, wherein the PSC once again stated "Commission and staff can propound data requests upon parties and may examine witnesses and introduce evidence at hearing." Dkt. # 104, Exhibit 5 at 5 (Procedural Order No. 7720, PSC Dkt. No. 2020.01).

The PSC chose not to even address, or mention, mootness or exceptions thereto in its supplemental brief or its response brief (Dkt. ## 101, 109), despite the Court's direction to the parties to do so. February Transcript at 70:13-25 ("I'm going to request that you file supplemental briefs . . . on the question of whether Bigfoot's withdrawal of their application renders this moot . . . It's sort of that whole public interest argument that we've been talking about here today."). Counsel for the PSC acknowledged "We'd be briefing this mootness exception,"

id. at 73:2, but for whatever reason the words “moot” and “mootness” never appeared in the PSC’s supplemental briefing.

In its briefing the PSC asked for additional oral argument, which the court granted and set for August 13, 2020 (“August Hearing”). Dkt # 119. At the August Hearing the parties made their respective arguments for why the case was or was not moot. Counsel for Big Foot reiterated, “It has always been the case and would always be the case that Bigfoot could refile an additional application.” August 13, 2020 Hearing Transcript (“August Transcript”) at 17:19-22.

At the conclusion of the August Hearing, Judge Reynolds stated he would be retiring soon, and “I will get this out before I leave.” *Id.* at 90:25. Unfortunately, that did not occur, and after he retired at the end October of 2020, the Chief Justice reassigned the case to retired District Court Judge McLean. On April 20, 2021, Judge McLean issued an order finding the case was moot and dismissing Evergreen’s Petition. Dkt. # 139, Appendix 1. Evergreen filed this timely appeal. Dkt. # 143. In July 2021, the PSC filed a motion to dismiss this appeal as “uber moot,” PSC Opposed Motion to Dismiss, DA 21-0249 (July 1, 2021), which this Court denied.

B. Standard of review

The question of whether a matter is moot is a question of law that this Court

reviews de novo for correctness. *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 6, _ Mont. _, 494 P.3d 892.

III. SUMMARY OF ARGUMENT

The Court erred in dismissing Evergreen’s Petition as moot, as the Court should have applied both the voluntary cessation and the public interest doctrine here, as both the PSC and Big Foot explicitly stated their conduct would recur, and the question of the statutory and constitutional extent of the PSC’s power at a contested case hearing is a matter of wide public importance.

“Mootness is a threshold issue that must be resolved before [the Court] can address the underlying dispute.” *Walker v. State*, 2003 MT 134, ¶ 40, 316 Mont. 103, 68 P.3d 872. “[T]he fundamental question to be answered in any review of potential mootness is whether it is possible to grant some form of effective relief to the appellant.” *Montanans Against Assisted Suicide (MASS) v. Bd. of Med. Examiners*, 2015 MT 112, ¶ 11, 379 Mont. 11, 347 P.3d 1244. Here, effective relief can be granted to determine the breadth of the PSC’s constitutional authority in relation to contested case hearings, under both the voluntary cessation exception to mootness, as well as under the public interest exception. As described below, the District Court should have found either exception applies and, on that basis, should have issued a writ of mandate on the breadth of the PSC’s constitutional

and statutory authority to act as both party/advocate and decision maker in contested case hearings.

IV. ARGUMENT

A. The voluntary cessation doctrine prevents this case from being dismissed as moot.

When the conduct challenged in a lawsuit is voluntarily terminated by a defendant who then seeks to dismiss the case as moot, the voluntary cessation doctrine allows a court to proceed and decide the merits of the case notwithstanding the actions of the defendant. While the doctrine is listed as one of the exceptions to mootness, it is also part of the definition of mootness applied by this Court and the U.S. Supreme Court: ““A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”” *Havre Daily News v. City of Havre*, 2006 MT 215 ¶ 34, 333 Mont. 331, 142 P.3d 864 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000) (internal quotations and alterations omitted)).

Given that it is the actions of the defendant potentially making a case moot, the party asserting the case is moot carries a “heavy burden” of demonstrating the dispute is in fact moot because “the challenged conduct cannot reasonably be expected to start again.” *Havre Daily News* ¶ 34 (citing *Friends of the Earth, Inc.*,

528 U.S. at 189, 120 S. Ct. at 708); *see also*, *McLaughlin v. Montana State Legislature*, OP 21-0173, Order 5 (June 29, 2021) (“the Legislature has failed to bear its ‘heavy burden’ of persuading this Court that [the challenged conduct will not reoccur]. Thus, the ‘voluntary cessation’ exception to the mootness doctrine applies.”). In fact, this Court recently faulted the party asserting mootness for “at no point even acknowledged[ging] that it carries the burden of demonstrating the challenged conduct cannot reasonably be expected to start again.” *Wilkie*, ¶ 15 (quotations omitted). Placing the burden on the party claiming mootness to also prove the conduct will not reoccur is due to concerns that a defendant may utilize voluntary cessation to manipulate the litigation process. *Id.* Thus, absent evidence that the conduct cannot reasonably be expected to reoccur, a case is not moot under this doctrine.

The key factor cited by this Court in determining the applicability of this exception is whether the party claiming mootness provides affirmative assurances that the challenged conduct will not reoccur. In *Heringer* and *MAAS*, the parties took affirmative actions to disclaim the challenged conduct, and the Court therefore found the case was moot. *Heringer*, ¶¶ 23-24 (noting the developer had “swor[n] under oath in an affidavit” that the conduct would not reoccur); *MAAS*, ¶ 16 (“the Board has rescinded all of its position statements”). On the other hand, in

Wilkie and *McLaughlin* the parties failed to disclaim their prior actions, and the Court therefore found the cases were not moot. *Wilkie*, ¶ 15 (“Unlike in *Heringer*, where the defendant made various assurances that it would not repeat the challenged conduct, [the defendant] has markedly not stated that the challenged conduct will not or cannot recur.”); *McLaughlin* at 5 (“Notably, in its Motion to Dismiss, the Legislature has not committed itself to refraining from resuming the challenged conduct if its motion were granted.”).

Here, both the PSC and Big Foot stated that the conduct at the heart of Evergreen’s Petition is likely to reoccur, and neither party has disclaimed their conduct. For example, the PSC’s counsel argued at the February Hearing, “I also agree with Evergreen that this issue for motor carrier contested case proceedings *is going to arise in the future.*” February Transcript at 13:3-5 (emphasis added). He added that the PSC had recently receive a similar Class D application and the PSC was “going to be issuing another procedural order on this that will substantially resemble what you have before you now and that protester in this case would likely bring the same type of motion Evergreen brought for you in this action.” *Id.* 13:6-12. Counsel even stated, “this issue can come up again, we think,” and asked the Court to reach the merits of the case (in his client’s favor) in order “to send a signal to the regulated garbage hauling industry . . .” *Id.* 13:20-22.

Big Foot's attorney stated at the February Hearing that her client was interested in preserving the possibility to "file another application in the future." *Id.* 69:4-5. And at the August hearing, she added that even though her client was withdrawing its application, "It has always been the case and would always be the case that Bigfoot could refile an additional application." August Transcript at 17:19-22.

Not only did the PSC and Big Foot expressly leave the door open, Evergreen provided additional evidence to the Court that the challenged conduct would recur. For example, Evergreen pointed out that after Big Foot filed its motion to withdraw its application, the company's principal testified before a Legislative interim committee hearing that his company still intended to provide garbage service in Flathead County. Dkt. # 104 at 8-9. Evergreen also pointed out that (as predicted by the PSC's attorney at the February Hearing) the PSC issued substantially the same procedural order in a new contested case.⁴ *Id.* And during a PSC Work Session, the PSC's attorney stated that until a court ruled on the issues in this case, the PSC will continue in the practices challenged in Evergreen's petition. *Id.*

⁴ That case was resolved with a settlement between the applicant and the incumbent motor carrier before the issue could be litigated.

The District Court did not address the voluntary cessation doctrine in its Order, despite the fact that both Evergreen and NorthWestern Energy argued in their supplemental briefing and at the August 2020 hearing that the doctrine applied. Dkt. # 103 at 9-10, # 111 at 3-4, # 113 at 4-5; August Transcript at 44-45. Thus, the lower court failed to address an important and dispositive legal issue.

Clearly, the PSC and Big Foot have failed to carry their heavy burden of establishing that the conduct challenged in Evergreen’s Petition will not reoccur, thus the case should not have been dismissed as moot.

B. The public interest exception to the mootness doctrine also applies.

The “public interest exception” to the mootness doctrine applies to a “(1) question of public importance (2) that will likely recur and (3) whose answer will guide public officers in the performance of their duties.” *McLaughlin* at 2 (brackets omitted, quoting *Gateway Opencut Mining Action Group v. Bd. of County Comm’rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133. “[This Court] ha[s] consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance.” *Id.* (quoting *Ramon v. Short*, 2020 MT 69, ¶ 22, 399 Mont. 254, 460 P.3d 867). The exception also applies when a ruling would “provid[ing] ‘authoritative guidance on an unsettled issue’ in the absence of an existing

Montana Supreme Court ruling on the matter.” (Citing *Ramon*, ¶ 24).⁵ All three elements are satisfied.

1. Evergreen’s Petition and the PSC’s response to that Petition raise serious questions of public importance.

Evergreen’s Petition alleged that its fundamental right to due process would be violated if Evergreen was forced to comply with the procedures set forth in the PSC’s Procedural Order. Emergency Petition at 12. The PSC responded by arguing that Evergreen does not have “a constitutionally protected property interest”⁶ in the hearing and thus Evergreen’s due process rights could not be violated in any case.⁷ Dkt. # 101 at 9. Thus, the issue before the District Court clearly implicated questions of fundamental constitutional rights, including whether Evergreen has an interest protected under the due process clause to a fair hearing before a neutral adjudicator.

⁵ While the District Court could not provide authoritative guidance in the same way this Court’s decisions serve as binding precedent, an order would be binding on the PSC, and thus serve as authoritative guidance to the agency. Also a decision on the merits from the District Court is a necessary step to this court considering the merits of the case.

⁶ This is untrue, as courts have concluded that “[motor carrier] certificates . . . now do qualify as property interests for purposes of procedural due process.” *Wells Fargo Armored Serv. v. Georgia Pub. Serv. Comm’n*, 547 F.2d 938, 941 (5th Cir. 1977), citing *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971).

⁷ Taking the PSC’s arguments to their logical conclusion, the PSC believes that, since Evergreen has no due process rights, the PSC could hold a secret hearing at an undisclosed location on whether Big Foot’s Class D Application should issue, and Evergreen would have no basis to complain about the hearing process because it “doesn’t have a protected property interest.”

In its Motion to Dismiss this appeal, the PSC argued this is not a “*McLaughlin v. MT Legislature*-caliber case[.]” PSC Opposed Motion to Dismiss, DA 21-0249 (July 1, 2021). However, this case raises similar concerns regarding the separation of powers between the executive and the judiciary as the PSC continues to issue procedural orders stating that it may participate as a party in a contested case hearing despite several judges stating it may not do so.

In his first TRO in this case, Judge Reynolds ruled that the PSC decision to act as a party in a matter it is adjudicating “violates Petitioners’ right to a hearing before an impartial body.” Dkt. # 16 at 3. Yet on remand, the PSC issued a Procedural Order granting itself the right to participate as if it was a party by “investigat[ing]” and “interrogat[ing]” witnesses at the hearing and “introduce[ing] [its own] evidence into the record.” Procedural Order at 4. Clearly, the PSC did not heed Judge Reynolds’ prior order when it once again “place[d] [itself] as an adjudicative body into the role of a party.” Dkt. # 16 at 3.

In his order granting the First Petition, Judge Reynolds held that “In adversarial proceedings before an adjudicative body, it is inappropriate for the adjudicative body to insert itself into the dispute by submitting discovery” Dkt. #31. While the PSC has not always served discovery in recent contested cases, its procedural orders still assert that it has the right to do so and “[t]he Commission’s

decision not to exercise its discovery powers in this docket should not be interpreted as an admission or concession that the Commission is barred from issuing data requests in future dockets.” *See, e.g.* Procedural Order No. 7720, PSC Dkt. No. 2020.01, 4, ¶ 13 (March 25, 2020), Dkt. # 104, Exhibit 5.

Two other Judges in the First Judicial District have questioned or faulted the PSC’s practice of combining adjudicative and investigative functions in contested cases, yet the practice persists.⁸ Judge Manley in the Eighth Judicial District found that the PSC “improperly attempted to act as a quasi-legislative body by implementing new policy rather than acting as an impartial trier of fact.” *MTSUN, LLC v. Montana Dept. Pub. Serv. Regulation*, 2020 MT 238, ¶ 43, 401 Mont. 324, 472 P.3d 1154 (quoting Judge Manley’s Oder). In *MTSUN*, the Court “decline[d] to reach the issue of whether the PSC violated MTSUN’s due process rights by making decisions based on bias and policy preferences since” as it affirmed the district court’s decision on other grounds. *MTSUN*, ¶ 43, n. 26. This opened the door, however, for the PSC to argue that “*MTSUN* is not controlling” regarding due process requirements in future cases, and to describe the holding as “narrow”

⁸ *See* Northwestern Energy’s Supplemental Brief, Dkt. # 104, discussing Judge Seeley’s May 17, 2018 Order in *In the Matter of the Class D Application of L&L Site Services, Inc.*, Cause No. CDV-2018-455 (that “the PSC, as the tribunal, should not engage in the discovery process as a party or advocate in a contested matter before the tribunal), and Judge McMahon’s comments at oral argument in *In the Matter of the Complaint of AmeriMont, Inc.*, Cause No. BDV 2018-692 (Nov. 13, 2018) (“How is it any due process where the adjudicator gets to send discovery?”).

and thus “does not support the proposition that the Commission is categorically barred from investigating issues the Commission considers important.”

Respondent Brief Opposing Petitioners’ Motion for Summary Judgment at 18, *Broad Reach Power, LLC v. PSC*, Mont. First Judicial District Court Cause No. CDV-2020-27 (Nov. 24, 2020) (citation omitted), Dkt. # 129, Attachment 2.

Even though the several District Court Judges have held that the PSC’s procedures in contested case hearings are unconstitutional, the PSC refuses to respect these decisions and continues to issue procedural orders allowing it to participate as if it were a party and it continues to assert it has the right to serve discovery, as well as to act as an investigator “to see that any material neglected by the parties gets in the record so that it may be considered in reaching a decision.” *See e.g.* Procedural Order No. 7720, PSC Dkt. No. 2020.01.008 (March 25, 2020), Dkt. # 104, Exhibit 5.

While the PSC’s actions may not be as flagrant as the actions cited in the Court’s Order in *McLaughlin*, similar issues of separation of powers between the PSC (as part of the executive branch) and the judiciary, as well as respect for the rule of law are present in this case. If the case is not remanded for a decision on the merits, important questions regarding the fundamental rights of the parties before the PSC in contested cases will be left unanswered.

The District Court’s Order dismissed the importance of the issues stating “while the Commission’s discovery procedures in Class D license applications to haul garbage are certainly of importance to the parties to this case, such issues are of limited interest to the broader public.” Order at 8. This analysis, however, misstates the test, as the public interest exception looks to the nature of the issues before the court — “where questions implicate fundamental constitutional rights or where the legal power of a public official is in question,” *Ramon*, ¶ 22 — not to whether the resolution of the issues would be of interest to the general public. For example, in *Ramon*, the issue was whether an alien, who was arrested and posted bond, could be held in jail based on a federal civil immigration detainer. The Court did not cite the general public’s interest in the question as a reason to reach the merits of the dispute, rather it applied the exception because the “case presents a question of public importance.” *Id.* ¶ 26. Thus, the Court will apply the exception to reach the merits of a question that applies to less than 100 people a year,⁹ if the legal questions presented are sufficiently important. Likewise, in *McLaughlin*, the Court did not look to whether the public had expressed interest in the Legislature’s subpoenas, but whether the resolution of the issue would be in the public interest. *McLaughlin*, at 2. The District Court should have looked to the

⁹ According to the opinion in *Ramon*, 190 detainers were issued in years 2017 through 2019. *Ramon*, ¶ 25

nature of the claims raised by the parties and not its assumptions regarding the public's disinterest in the issues. Given that Evergreen's Petition raised serious constitutional questions, resolving the questions on the merits is in the public interest.

2. The questions raised in Evergreen's Petition are likely to reoccur.

The second element of the public interest exception is whether "the issue is likely to recur." *Ramon*, ¶ 21. The Court has said the element is satisfied when "the record demonstrate[es] that the [defendant] intends to continue [with the challenged conduct] at the heart of the present controversy," *McLaughlin*, at 3, or when the defendants "indicate that they plan to continue operating under the same terms leading to this very same issue recurring in the future . . ." *Ramon*, ¶ 25.

As described above, the PSC's attorney stated at the February Hearing, "this issue for motor carrier contested case proceedings *is going to arise in the future.*" February Transcript at 13:3-5 (emphasis added). Not only did the PSC predict this would happen, it occurred when the PSC issued a substantially similar procedural order in a new matter. Dkt. # 104 at Exhibit 6.

The District Court's Order said, "it would not be appropriate for this Court to speculate as to how the Commission might violate the rights of petitioners in some future proceeding." Order at 8. However, the Court did not need to

speculate, as the PSC’s attorney stated, “[the PSC] [is] going to be issuing another procedural order on this that will substantially resemble what you have before you now and that protester in this case would likely bring the same type of motion Evergreen brought for you in this action.” *Id.* 13:6-12. Thus, there was no need for the Court to speculate as to how the PSC would handle a future proceeding, because the agency told the court exactly what it would do — issue a procedural order with the same deficiencies noted in Evergreen’s Petition.

Further, the Court has said that when the defendants continue to “argue that their actions are lawful,” this too “necessitate[s] a judicial declaration as to its legality.” *Ramon*, ¶ 25. The PSC continues to argue its actions are proper and it continues to issue procedural orders with the challenged provisions. Thus, the second element is satisfied.

3. A ruling on the merits would guide the PSC in the performance of its duties.

It is clear that a decision on the merits would provide necessary guidance in the performance of the PSC’s duties. At the February Hearing, the PSC’s attorney argued that since “this issue can come up again, we think — we are asking this Court to send a signal to the regulated garbage hauling industry to say this is improper and it’s illegal . . .” February Transcript at 13:19-22. Even though the PSC is incorrect in its argument regarding the merits, it is clear that the PSC itself

is in need of “a signal” from the judiciary outlining the scope of its authority and role at a contested case hearing before the agency.

Given the ongoing disagreement between the PSC and the litigants before it regarding the limits of the PSC’s ability to question witnesses, introduce its own evidence, and to raise new issues without violating the rights of the parties appearing before the agency, there is a need for a judicial determination to provide guidance. There is no doubt “the problems will repeat themselves” and resolution in this case will “avoid future litigation.” *Walker*, 2003 MT 134, ¶¶ 41, 43. As Judge Reynolds noted, given the developed factual and legal record in this case, including the prior appeal, “we’re at stage eight on this case [presumably out of ten]. If you withdraw and then we go back to stage one, we’re going to go through all these other stages again.” February Transcript at 69:24-70-4. And he rhetorically asked “if I dismiss this and a week later you refile, they will come in a week and a day later and refile their petition because the Commission is still going to assert its right to conduct these investigations and interrogations. So you are going to be sucked right back into the whole process again. Why do we start at ground zero? Why not start where we are at this point?” *Id.* 39:11-18.

There is a need for a ruling on the merits as to the constitutional bounds of the PSC’s authority at contested motor carrier case hearings, and a ruling on the

merits in this case will provide the necessary guidance based on the establish legal and factual record instead of starting over at step one in a new case.

Because all three elements of the public interest exception are satisfied, the District Court should not have dismissed the case as moot. Thus, the Court should reverse the District Court and remand for a decision on the merits.

C. Even though Evergreen initially agreed the matter should be dismissed, subsequent events establish that the case is not moot.

In its Order, the District Court noted that Evergreen stated the case should be dismissed as moot when Big Foot withdrew its application, but then argued the case was not moot based on the voluntary cessation doctrine and the public interest exception. The District Court, however, is incorrect that this occurred “despite no change in the circumstances.” Order at 8. First, Big Foot filed its Motion to Dismiss on January 9, 2020, based on the Notice of Withdrawal it filed with the PSC. While Evergreen filed a response brief on January 27, stating that the case was moot (Dkt. # 76) at that time, Evergreen was not aware that Big Foot’s principal had testified at a Legislative interim committee hearing on January 13, stating that Big Foot still intended to provide garbage hauling service in Flathead County. Dkt. # 104 at 9. The fact that Big Foot still intended to proceed with its plans to obtain a Class D Certificate (by either reapplying or withdrawing its

Notice of Withdrawal after the TRO was lifted but before the PSC could act on the Notice) was a change in circumstances that Evergreen raised at the February Hearing. February Transcript 34:11-19 (“we learned after we filed our response that Bigfoot’s principle [sic] stated that they fully do intend to file their application again . . .”). Evergreen also noted the changed circumstances in its supplemental briefing. Dkt. # 104 at 9; Dkt. # 111 at 2-3. The District Court, however, did not mention that after Big Foot withdrew its application, the owner of the company represented that Big Foot still intended to provide solid waste collection service in Flathead County.

Second, in its January 21 Response Brief in support of Big Foot’s Motion to Dismiss, the PSC did not indicate what it would include in future procedural orders. But at the February Hearing — after Evergreen filed its response to the Motion to Dismiss — the PSC stated it will continue to rely upon the procedures challenged in Evergreen’s petition and that the questions would reoccur; another changed circumstance the District Court should have considered. The PSC even stated that a new application had been filed after Evergreen filed its Response Brief and it intended to issue a procedural order with the same defects noted in Evergreen’s Petition. February Transcript at 13:6-12 (“We had a protested garbage application filed yesterday, I think maybe today. So we are going to be issuing

another procedural order on this that will substantially resemble what you have before you now and that protester in this case would likely bring the same type of motion Evergreen brought for you in this action.”). The PSC’s statement that the same issues will reoccur came after Evergreen initially said the case should be dismissed, and is one of the changed or new circumstances cited by Evergreen and NorthWestern Energy at the February Hearing, which was not acknowledged in the final order. February Transcript at 34:13 (“[Counsel for the PSC] is here telling you that the PSC will issue that same procedural order again At this juncture I do believe that this may be a case that is an exception to the mootness doctrine under the public interest exception.”).

Judge Reynolds apparently recognized that Evergreen’s and NorthWestern Energy’s decision to argue that the case was not moot during the February Hearing was based on the fact that Big Foot’s principal said they were still intent on obtaining a Class D Certificate, and the PSC’s arguments at the February Hearing. February Transcript, 5: 9-13 (“So you think — I was wondering about that, if this was one of those situations where it’s moot but likely to reoccur. You know, that thing from way back in law school days, that this could arise again in a similar situation.”). Based on these new circumstances, Judge Reynolds asked the parties to submit supplemental briefing regarding whether the case was moot. *Id.* at

70:21-25 (“It’s sort of that whole public interest argument that we’ve been talking about here today.”). Judge McLean, however, did not acknowledge these new circumstances in his Order.

Finally, the PSC’s continued instance in its supplemental briefing that its position is proper and correct is itself a circumstance indicating the case is not moot. *Ramon*, ¶ 25 (“[the defendants] argument that their actions are lawful indicate that they plan to continue operating under the same terms leading to this very same issue recurring in the future and necessitating a judicial declaration as to its legality”).

Even though Evergreen stated the case was moot soon after Big Foot filed its Motion to Dismiss, the subsequent actions of Big Foot and PSC clearly showed that the case was not moot. These changes in circumstances justifies the change in Evergreen’s position.

V. CONCLUSION

Despite repeated holdings from this Court and the District Court that the PSC cannot insert itself as a party in a contested case it is adjudicating, the PSC continues to do so. The Court should find that the District Court erred, and that both the voluntary cessation and public interest exceptions to mootness apply here. Therefore, the Court should reverse the District Court’s Order, and remand the

case for consideration of the merits of Evergreen’s Petition, so that the District Court can provide instruction to the PSC as to the bounds of its statutory and constitutional authority in contested case proceedings before it.¹⁰

DATED this 14th day of October, 2021.

DONEY CROWLEY P.C.

/s/ Jacqueline R. Papez

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¹⁰ Given that a remand to the District Court would likely constitute a but temporary stop before this case is appealed again to this Court for a third appeal regarding this purely legal issue, Evergreen would be open to the Court finding that the case is not moot and converting it to an original proceeding so the Court could reach and decide the merits of Evergreen’s constitutional claims following an opportunity for supplemental briefing. *See e.g. Douglas v. State Bar*, 183 Mont. 149, 598 P.2d 1078, 1080 (1978) (converting an appeal to an original proceeding after reaching the merits of the appeal).

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *Appellant's Opening Brief* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is not more than 10,000 words, excluding the caption, Tables and Certificate of Compliance.

DATED this 14th day of October, 2021.

/s/ Jacqueline R. Papez

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CERTIFICATE OF SERVICE

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