

IN THE SUPREME COURT OF THE STATE OF MONTANA
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

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

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REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Montana Public Service Commission's ("Commission") response failed to demonstrate that it would cease the challenged practices and, instead, reaffirmed that it will continue to disregard judicial precedent by refusing to provide due process and a fair hearing. The Commission's failure to follow this Court's directives highlights the controversy at issue. Likewise, Big Foot Dumpsters and Containers, LLC's ("Big Foot") response failed to demonstrate that it would not refile for the same application and start this case over again as it publically announced. The Commission and Big Foot's responses unequivocally demonstrate that the exact issues present in this case remain unaltered at the Commission and will resurface before the district court.

The Court must reverse the district court's order dismissing this case as moot because the Commission doubled down on its unlawful contested case procedures now claiming that NorthWestern Energy ("NorthWestern") and Evergreen Disposal Inc. ("Evergreen") lack standing to contest the unfairness of the Commission's practices. Under the Commission's argument, a party can never contest the Commission's procedures. The Commission maintains that parties do not have due process rights and cannot seek judicial relief to determine those rights or assess the constitutionality of the Commission's procedures because they lack

standing to make those claims. The Court must refrain from entertaining such a circular argument.

This Court's longstanding precedent and Montana statutory law bestows the right to due process and the right to a fair and impartial hearing to all litigants that appear before the Commission, including NorthWestern and Evergreen.

Axiomatically, both parties have standing to contest the unfairness of the Commission's procedures where the tribunal issues discovery, cross-examines witnesses, introduces evidence, raises uncontested issues, and then renders the decision in the case.

Since the district court may still require the Commission to follow judicial precedent, this matter is not moot. 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, the district court also incorrectly concluded that none of the exceptions to the mootness doctrine apply. Therefore, this Court must reverse the district court.

ARGUMENT

The Commission's response emphasized the dire need for the judiciary to protect the rights of the litigants that appear before the Commission. The Commission continues to flout this Court's longstanding precedent asserting that it does not have to provide due process or a fair hearing. 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. 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.

The district court can still grant effective relief in this case by issuing a writ of mandate ordering the Commission to follow judicial precedent requiring due process and a fair hearing in all of its contested cases. The Commission's response attempts to isolate this Court's review solely to the procedures in this case. Yet, the Commission's response admits it will continue to conduct the same procedures in all of its cases. *See* Commission Answer, p. 23; Admin. R. Mont. 38.2.3301 (authorizing the Commission as the tribunal and hearing examiners to issue discovery). Thus, this case encompasses the Commission's procedures in all of its contested cases, involves a matter of great public importance, and is not moot.

Alternatively, due to the matters at stake and the likelihood of recurrence, the exceptions to the mootness doctrine apply. The Commission's response failed to demonstrate that it would cease the challenged practices and, instead, doubled down on them claiming it does not have to provide due process or a fair hearing. Likewise, Big Foot's response failed to demonstrate that it would not refile the

same application involved in this case as it publicly proclaimed. Therefore, the Court should apply the exceptions to the mootness doctrine to this case.

To protect the due process rights of all litigants that appear before the Commission, the Court must reverse the district court's order and remand it to evaluate the constitutionality of the Commission's procedures.

I. This appeal involves whether the district court can grant effective relief to Evergreen and NorthWestern because either a live controversy exists or an exception to mootness applies.

The Commission's response attempts to distract the Court from the actual issues on appeal (i.e. mootness and its exceptions) by claiming that no controversy exists between its procedures and judicial precedent. To advance that argument, the Commission relies on and misstates a recent district court decision in a separate case. *See Broad Reach Power, LLC v. Mont. Dept. Pub. Serv. Reg.*, Cause No. CDV-2020-27, Order on Cross-Motions for Summary Judgment (Mont. 1st Jud. Dist., Dec. 6, 2021).¹ Contrary to the Commission's response, the district court did not rule on the merits of whether the Commission's procedures violate litigants' constitutional rights in that case. Rather, the district court held the petitioners did not assert property rights to establish standing to contest the Commission's procedures. *Id.* at pp. 12, 14. Whether the Commission's procedures actually

¹ NorthWestern appealed that district court opinion to this Court and this Court will have an opportunity to review that opinion. *See* DA 22-0035.

comply with judicial precedent remains an issue for the district court to resolve on remand in this case. The present appeal seeks a determination of whether the district court may grant effective relief by issuing a writ of mandate despite Big Foot's withdrawal of its application or whether exceptions to the mootness doctrine exist to allow the district court to evaluate the constitutionality of the Commission's procedures.

The Commission's response claims that the district court may not issue a writ of mandate because Big Foot withdrew its application and the Commission closed the underlying docket. However, the Commission fails to recognize that Evergreen's request for mandamus to compel the Commission to follow judicial precedent was not limited to the underlying docket. *See* Doc. 1 – Cause No. BDV 2019-1792 - Emergency Petition (“Petition”), ¶ 64d. This case involves the Commission's procedures in all its contested cases, which prompted NorthWestern to intervene in this matter. Regardless of Big Foot's voluntary withdrawal, the Commission maintains its position that it does not have to follow judicial precedent or provide due process to all litigants. An actual controversy still exists and this Court should remand this matter to the district court to mandate the Commission to follow this Court's precedent and ensure that all litigants receive a fair hearing before an impartial tribunal.

A. The Commission’s response ironically highlights the actual controversy between its procedures and judicial precedent.

The Commission’s response cites the recent district court decision to claim this matter is moot and exceptions to mootness do not apply. To advance that argument, the Commission claims this case does not involve a matter of public importance because NorthWestern and Evergreen are not entitled to a fair hearing and do not have standing to contest the Commission’s procedures. *See* Commission Answer, at n.1, pp. 27-29. The Court must reject the Commission’s newfound appellate argument because this Court’s longstanding precedent and Montana statutory law entitle all litigants to due process and a fair hearing before an impartial tribunal. Over and over again, this Court has “zealously guard[ed] the right to fair and impartial hearings” and “warn[ed] ... all administrative boards and tribunals that they should zealously guard against any appearance of unfairness in the conduct of their hearings.” *State ex rel. Montana Wilderness Ass’n v. Board of Natural Resources and Conservation*, 200 Mont. 11, 45, 648 P.2d 734, 752 (1982) (quoting *State ex rel. Fish v. Industrial Accident Board*, 139 Mont. 246, 248-49, 251, 362 P.2d 852, 853, 855 (1961)). In this very case, this Court 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[.]’**” *Allied Waste Serv. of North America, LLC v. Dept. of Pub. Serv. Regulation*, 2019 MT 199, ¶ 17, 397 Mont. 85, 447 P.3d 463 (quoting *Mont. Power*

Co. v. Pub. Serv. Comm'n, 206 Mont. 359, 368-69, 671 P.2d 604, 609-10 (1983) (emphases added).

Pursuant to this Court's precedent, the Commission must provide due process and a fair hearing to NorthWestern and Evergreen as litigants that appear before it. The Commission's response demonstrates an actual controversy as it blatantly disregards that precedent. This Court's precedent also recognizes that public utilities, like NorthWestern, and motor carrier certificate holders, like Evergreen, have property and civil rights at stake in Commission proceedings, which entitle them to due process and a fair hearing before an impartial tribunal. Moreover, the Montana Legislature granted public utilities and motor carriers the right to a hearing before the Commission. The Commission's assertion that NorthWestern and Evergreen lack standing and do not have the right to due process and a fair hearing defies this Court's longstanding precedent and renders the statutory right to a hearing meaningless. Contrary to the Commission's response, this highlights the actual controversy at issue. This case provides the Court an opportunity to correct the Commission's procedures, protect the rights of litigants, and uphold judicial precedent. As a result, this matter is not moot and the Court must reverse the district court's decision.

B. The Commission’s response incorrectly asserts that NorthWestern and Evergreen lack standing to contest the Commission’s unlawful procedures.

The Court must reject the Commission’s newfound standing argument because both NorthWestern and Evergreen as regular litigants before the Commission have standing to contest its procedures. Standing determines whether the complaining party is the proper party before the court, not whether the issue itself is judiciable. *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. Standing is determined as of the time an action is brought. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80. Standing may arise from alleged or threatened violations of constitutional rights. *Weems v. State*, 2019 MT 98, ¶¶ 9, 11, 395 Mont. 350, 440 P.3d 4. Standing has two complementary components: (1) case-or-controversy standing; and (2) prudential standing. *Bullock*, at ¶ 28. A litigant has case-or-controversy standing if it alleges a past, present, or threatened injury to a property or civil right. *Id.* at ¶ 31. Civil rights include “the right of due process.” Black’s Law Dictionary (11th ed. 2019) (definition of “civil right”). The injury must be concrete, meaning actual or imminent, not abstract, conjectural, or hypothetical. *Bullock*, at ¶ 31. Prudential standing requires parties to assert their own constitutional rights and requires the injury complained of to be distinguishable from the injury to the public generally. *Id.* at ¶ 45. The Court also recognizes an exception to prudential standing where

the unconstitutional conduct may be immunized from review if the complainant is denied standing. *Id.*

As regular litigants before the Commission, NorthWestern and Evergreen are proper parties to contest the Commission's contested case procedures. They both have a civil right to due process and a fair hearing before an impartial tribunal. They both have property rights at stake in Commission contested case proceedings. Both parties are statutorily entitled to a hearing before the Commission. They both face actual and irreparable harm from the Commission's contested case procedures. If NorthWestern and Evergreen do not have standing to contest the Commission's procedures, then no party has such standing and the Commission's procedures will always evade judicial review. The Court must reject the newfound standing argument.

i. Evergreen and NorthWestern properly asserted their civil rights to due process and a fair hearing before an impartial tribunal.

At the time Evergreen filed its Petition, the Commission as the tribunal had threatened that it would ambush Evergreen with cross-examination because Evergreen successfully prevented the Commission from issuing discovery. *See* Petition, Exhibit 12, ¶ 14. The Commission admitted that it would ask Evergreen the same questions that it planned to elicit through discovery during the evidentiary hearing. *Id.* The Commission sought to avoid Judge Reynolds' order precluding it

from issuing discovery or participating in its cases as an advocate by re-characterizing its practices as cross-examination.² *See* Doc. 16 – DV-2018-318 - Temporary Restraining Order; Doc. 31 – Order on Petition for Preliminary Injunction.

The Commission fails to recognize cross-examination is the epitome of advocacy and only parties may conduct it. *See Northern Plains Resource Council v. Bd. of Natural Resources and Conservation*, 181 Mont. 500, 537, 594 P.2d 297, 317 (1979) (holding “The object of cross-examination, therefore, is to weaken or disprove the case of one’s adversary[.]”); *see also State v. Price*, 2006 MT 79, ¶ 21, 331 Mont. 502, 134 P.3d 45 (“[t]he purposes and modes of thought of the advocate and the [tribunal] are different and no person can successfully enact the dual role of [advocate] and [tribunal]. They are inconsistent.”). The Commission’s response attempts to downplay its advocacy as a tribunal by claiming its examination of witnesses during hearings constitutes lawful clarifying questions under Montana Rule of Evidence 614. However, the Commission’s prior briefing evinces its true character as it expressly claimed the right to “cross-examine” witnesses. *See* Doc. 106 – Commission Initial Brief, p. 10 (“The

² Contrary to the Commission’s response, that order was consistent with Judge Seeley’s order in the *L&L* case, which held the Commission “as the tribunal, should not engage in the discovery process as a party or advocate in a contested matter before the tribunal.” *See* NorthWestern’s Opening Brief, Appendix, Attachment 1.

Commission has cross-examined witnesses during evidentiary hearings for over a century.”); Doc. 115 – Commission Response Brief, p. 1 (“The Motor Carrier Act allows Commission cross-examination of witnesses during evidentiary hearings.”); Commission Answer, p. 23 (“The Commission concedes that it will continue examining witnesses during evidentiary hearings[.]”).

Words matter. The Commission’s prior acknowledgements demonstrate its actual intent. The Commission’s response admits that it routinely cross-examines witnesses during its contested case proceedings in stark contrast with this Court’s recognition that Rule 614 must be “exercised with great care, never unduly extended, and ... should not betray bias or prejudice[.]” *See State v. Richardson*, 69 Mont. 400, 222 P. 418, 419 (1924).

Evergreen’s Petition highlighted these concerns and unequivocally asserted its civil rights (i.e. due process and the right to a fair hearing before an impartial tribunal). Petition, at ¶¶ 38-63.³ Evergreen’s Petition further demanded the Commission to follow judicial precedent, which precluded the Commission from simultaneously participating in its cases as a party and tribunal. *Id.* at ¶ 64d. Likewise, NorthWestern intervened in this matter because as a public utility

³ This Court has recognized that motor carrier certificates constitute property rights entitling carriers to due process and a fair hearing before the Commission. *Wilson v. Dept. Pub. Serv. Reg.*, 260 Mont. 167, 171-172, 858 P.2d 368, 371 (1993).

regulated by the Commission it is regularly subject to the same unconstitutional contested case procedures at issue in this case.⁴ NorthWestern recognized that this case involved the constitutionality of the Commission's procedures generally and not just in the underlying docket. NorthWestern intervened to assert its own constitutional arguments to protect its rights in Commission proceedings.

Notably, the Commission did not contest Evergreen's standing at the time it filed its Petition and did not contest NorthWestern's standing at the time it moved to intervene in this matter. Until now, neither the Commission nor Big Foot has contested Evergreen's standing to contest the Commission's procedures, including during the first appeal to this Court. In *Allied Waste*, Evergreen sought judicial review of the Commission's procedures because the Commission as the tribunal sought to simultaneously occupy the role of a party in its contested case. *Allied Waste*, at ¶ 4. Evergreen's present Petition asserts the same basic unconstitutional commingling of functions argument as presented in *Allied Waste*.⁵ If Evergreen

⁴ This Court has also recognized that public utilities' rates constitute property rights entitling utilities to due process and a fair hearing. *Mont. Power Co.*, supra, 206 Mont. at 364-371, 671 P.2d at 607-611; *Mountain States Tel. and Tel. Co. v. Dept. Pub. Serv. Reg.*, 191 Mont. 331, 334, 624 P.2d 481, 482-483 (1981) (holding "It is a basic principle of utility regulation that a utility is entitled to receive a fair and reasonable rate of return on its investment[.]").

⁵ NorthWestern participated as an amicus in the first appeal to this Court, but since its constitutional arguments were not raised before the district court, this Court declined to determine the constitutionality of the Commission's procedures. *Allied*

had standing to seek judicial review before, it surely has standing now. Moreover, the Commission already attempted to dismiss NorthWestern from this appeal claiming it lacks standing and this Court implicitly rejected that argument. *See* Commission Motion to Dismiss (July 1, 2021); Order (July 27, 2021). Therefore, the Court must reject the Commission’s standing argument and reiterate its precedent that “all litigants” are entitled to a fair hearing before an impartial tribunal.

- ii. The Montana Legislature granted NorthWestern and Evergreen the right to a hearing before the Commission and it must conduct its hearings fairly as this Court has consistently required.**

The Commission’s response incorrectly asserts that the Court must conduct a *Mathews* test to analyze whether NorthWestern and Evergreen deserve due process and a fair hearing. *See* Commission Answer, p. 35. *Mathews* has no application in this case because Montana statutes already expressly provide NorthWestern and Evergreen a right to notice and a hearing. Courts conduct the *Mathews* three-part balancing test to “decid[e] what process is due” and when such process is due where statutes are silent or do not provide timely process. *Welsh v. City of Great Falls*, 212 Mont. 403, 409-410, 690 P.2d 406, 410-412 (1984); *Mathews v. Eldridge*, 424 U.S. 319, 332-349 (1976). Montana law requires the

Waste, at n. 6. NorthWestern intervened to ensure this Court has an opportunity to weigh in on the constitutionality of the Commission’s procedures this time around.

Commission to hold a hearing on any proposed rate changes for public utility services. Mont. Code Ann. § 69-3-303(1). Similarly, after receiving a protest, Montana law requires the Commission to hold a hearing on applications for motor carrier certificates. Mont. Code Ann. § 69-12-321. No matter how much process is required, the process itself must be fair. *Mathews*, 424 U.S. at 343- 345; *In re Best*, 2010 MT 59, ¶ 23, 355 Mont. 365, 229 P.3d 1201.

This case involves the fairness of the process that the Montana Legislature already bestowed upon NorthWestern and Evergreen. This case does not involve a determination of how much process NorthWestern and Evergreen are due or when that process is due. The Montana Legislature required the Commission to provide notice and a hearing for public utilities and motor carrier certificate holders. The Commission claims that it can hold the statutorily required hearings in any manner it sees fit, including allowing the tribunal to simultaneously participate as a party and then render the decision. NorthWestern and Evergreen are not asking for additional process or more timely process. They are asking for a fair process in the hearings the Legislature granted them.

This Court’s precedent controls this issue: “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[.]’** *Allied Waste*, at ¶ 17. The Commission simply chooses to ignore it. Therefore, this case is not moot

as a live controversy exists with respect to the Commission’s implementation of the statutorily required hearings.

iii. The Commission admitted it conducts the challenged procedures and claimed it will adhere to them, which demonstrates the recurrence of actual injury to all litigants that the Court must prevent.

The Commission’s response concedes that it historically has participated, regularly participates, and will continue to participate in its contested cases as both the tribunal and an advocate. The Commission even references its new administrative rule allowing the Commission and hearing examiners, as the tribunal, to issue discovery. *See* Admin. R. Mont. 38.2.3301.⁶ Those admissions demonstrate the actual controversy at issue and the dire need for the judiciary to constrain the Commission’s conduct. “[T]he deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The right to due process and an impartial tribunal is imposed by the constitution. *In re Best*, at ¶ 22. The period of time over which unconstitutional conduct has occurred does not vitiate the Court’s obligation to restrain such conduct. *Weems*, *supra*, at ¶

⁶ Compare the Commission’s authority to issue discovery and rule on objections thereto under Admin. R. Mont. 38.2.3301 with *Commissioner of Political Practices through Mangan v. Mont. Republican Party*, 2021 MT 99, ¶ 15, 404 Mont. 80, 485 P.3d 741 (holding an agency’s issuance of a subpoena and attempt to compel the production of documents thereunder violated due process and the right to an impartial tribunal).

26. Neither statutes, regulations, nor long standing custom can “turn a biased adjudicator into an impartial adjudicator.” *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1310 (9th Cir. 2003) (Noonan, concurring). When dealing with constitutional rights, “it is never too late to backup and correctly apply the law[.]” *State v. Running Wolf*, 2020 MT 24, ¶ 29, 398 Mont. 403, 457 P.3d 218.

NorthWestern and Evergreen’s concerns are neither hypothetical nor abstract. The Commission has admitted to the challenged conduct throughout this case and asserted it will adhere to them, which demonstrates NorthWestern and Evergreen’s concerns are real and actual. Instead, the Commission attempts to justify its conduct by claiming the parties do not deserve due process or a fair hearing, and, even if they do, its procedures are fair because it has always conducted contested cases in the challenged manner and the parties may seek judicial review of its decisions. In essence, the Commission requests this Court to turn a blind eye to the unfairness of its contested case procedures and to condone constitutional violations at the agency level.

The Commission’s request defies this Court’s longstanding precedent mandating due process at the agency level. *See Smith v. Board of Horse Racing*, 1998 MT 91, ¶ 11, 288 Mont. 249, 956 P.2d 752 (rejecting the State’s position that the opportunity for judicial review obviated the need to provide due process and a fair hearing before the agency tribunal); *see also Flowers v. Mont. Dep’t of Fish*,

Wildlife & Parks, 2020 MT 150, ¶ 15, 400 Mont. 238, 465 P.3d 210 (holding parties need not suffer through unconstitutional conduct prior to seeking judicial redress). The Court cannot tolerate the Commission’s unconstitutional non-acquiescence to judicial precedent and must proscribe its conduct regardless of how long the Commission has violated litigants’ rights. NorthWestern and Evergreen asserted actual and threatened injury to their constitutional rights as a result of the Commission’s contested case procedures. The Commission’s response exemplified the present conflict, which the district court may resolve by mandating the Commission to follow judicial precedent and provide fair hearings before an impartial tribunal. Thus, this matter is not moot and the Court must remand for consideration of whether the Commission’s procedures comply with due process and provide for an impartial tribunal.

II. NorthWestern’s argument that this matter is not moot comports with its role as an intervenor in this case.

The Commission’s response baselessly claims that NorthWestern is expanding upon Evergreen’s Petition by arguing this matter is not moot because the Court may still issue a writ of mandate requiring the Commission to follow judicial precedent. The district court granted NorthWestern intervention without any limitations. *See* Doc. 82 - Order Granting Intervention. An intervenor “is a party to the action and as a result must necessarily have the same power as the original parties.” *Allman v. Potts*, 140 Mont. 312, 315, 371 P.2d 11, 13 (1962). An

intervenor may seek additional relief beyond that requested by the petitioner if it has standing to seek such relief. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S.Ct. 1645, 1651 (2017).

NorthWestern and Evergreen have both consistently argued that the Commission's procedures are unconstitutional throughout this proceeding. Evergreen's Petition requested a "writ of mandate ordering the [Commission] to comply with prior court orders" generally and not solely in its underlying Commission docket as its other requests for relief. *See* Petition, at ¶ 64d. Since that request was not limited to the underlying Commission docket, Big Foot and the Commission could not have rendered that claim moot by voluntarily withdrawing and closing that docket. NorthWestern's advocacy in that regard comports with its role as an intervenor in this case and the Court should reject the Commission's argument to the contrary. Additionally, even accepting the Commission's dubious argument, NorthWestern may still advocate for a writ of mandate requiring the Commission to provide due process and a fair hearing because it has standing to make that request.

III. The Commission's strategic closure of the underlying docket cannot further moot this case as it does not affect the likelihood of recurrence.

The Commission's response claims that changed circumstances mandate the dismissal of this case. The Commission alleged that it closed the underlying docket in this matter and either NorthWestern or Evergreen were required to seek a stay to

preserve their arguments. The Commission failed to recognize that it adheres to the challenged conduct and Big Foot has not disclaimed its intention of seeking the same certificate at issue in this case. The closure of the docket has no effect on the district court's ability to issue a writ of mandate ordering the Commission to comply with judicial precedent. Similarly, the closure of the docket does not prevent Big Foot from refile and starting this debacle all over again. Therefore, the issues in this case remain judicable.

IV. The public interest exception allowed the district court to maintain this case and rule on the merits of the Commission's procedures.

This matter involves conflicts between the branches of government and the constitutional rights of all litigants that appear before the Commission. 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 v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867.

The Commission's response conceded the latter two elements and only challenged whether this case involves a matter of public importance. The Commission claims that this matter is not important because recent litigants have not challenged the Commission's conduct and litigants do not have due process rights anyway. Recent litigants likely never challenged the Commission's conduct for fear of being ambushed as the Commission threatened Evergreen. Litigants are

also put in an awkward position of challenging the tribunal they seek to persuade. The reasons for the lack of contest demonstrate why this issue continues to evade review not because the matter is not important.

This case involves a conflict between the executive branch and the judicial branch in that the Commission defies this Court's precedent. This case further involves a conflict between the executive branch and the legislative branch as the Commission's procedures flout statutory hearing requirements. More importantly, this case involves the due process rights of all litigants that appear before the Commission. This case involves a matter of great public importance. Therefore, the Court must find the public interest exception applies.

V. The voluntary cessation exception also applies as neither the Commission nor Big Foot's response demonstrated that the exact issues in this case will not recur.

The Commission's response doubled down on the challenged conduct and Big Foot failed to renounce its intention of reapplying for the same certificate at issue in this case. Under the voluntary cessation exception, the party asserting mootness based on its own voluntary conduct bears the "'heavy burden' of demonstrating 'the challenged conduct cannot reasonably be expected to start again[.]'" *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 10, 405 Mont. 259, 494 P.3d 892. A case may only become moot by a party's voluntary conduct

when it is “‘absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.’” *Wilkie*, at ¶ 14.

The Commission and Big Foot failed to demonstrate that the issues in this case will not recur. Instead, the Commission’s response points to Big Foot’s voluntary withdrawal and claims it precludes the application of the voluntary cessation exception. The Commission fails to recognize that Evergreen’s Petition challenged its conduct and Big Foot’s withdrawal had no effect on the Commission’s adherence to the challenged conduct. This case is synonymous to *Wilkie*.

In *Wilkie*, the plaintiff challenged the insurance carrier’s refusal to produce its insured’s policy. *Id.* at ¶¶ 2-3. The insured voluntarily produced the policy and the insurance carrier claimed that mooted the issue. *Id.* at ¶ 4. Relying on the voluntary cessation doctrine, this Court disagreed because the insurance carrier failed to renounce its practice of refusing to provide insureds’ policies to third-party claimants. *Id.* at ¶¶ 15-19.

An even more compelling issue exists here. Not only has the Commission doubled down on the challenged conduct, but Big Foot announced that it would seek the same application that initiated this case. Neither the Commission nor Big Foot have renounced their positions. Pursuant to *Wilkie*, the voluntary cessation

exception applies. Therefore, this Court must reverse the district court's order, which failed to address this exception.

CONCLUSION

This case is not moot because the district court can still require the Commission to follow judicial precedent. Additionally, the exceptions to mootness apply given the Commission's adherence to the challenged conduct and Big Foot's intent on refileing. Therefore, this Court should reverse the district court's order.

Respectfully submitted this 26th day of January, 2022.

/s/ Clark Hensley

Clark Hensley
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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 4,999 words, excluding the caption, table of contents, table of citations, certificate of compliance, and certificate of service.

/s/ Clark Hensley

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CERTIFICATE OF SERVICE

I, Clark Robert Hensley, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-26-2022:

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