IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0035

BROAD REACH POWER LLC,
and
NORTHWESTERN ENERGY,

Appellants,

v.

THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION,
MONTANA PUBLIC SERVICE COMMISSION,

Appellee.

On Appeal from the Montana First Judicial District Court, Lewis & Clark County
Cause No. CDV 2020-27, Honorable Kathy Seeley

APPELLANTS BROAD REACH POWER LLC AND NORTHWESTERN ENERGY'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Montana Public Service Commission ("Commission"), an executive branch agency, attempts to strip the judiciary's oversight of its contested case procedures arguing the parties that regularly appear before it lack standing. The Commission's response acknowledges that Broad Reach Power LLC ("Broad Reach") and NorthWestern Energy ("NorthWestern") are regular litigants before the Commission and subject to its contested case procedures. Yet, the Commission's response unfoundedly argues that Broad Reach and NorthWestern cannot contest those procedures through a declaratory judgment. The vast majority of the Commission's response does not even address standing, but rather argues the merits of the case, which are not presently on appeal.

The portion of the Commission's response that addresses standing fails to appreciate the requirement of a fair and impartial tribunal as a component of procedural due process and misconstrues public utility and qualifying facility ("QF") law. Montana law requires the Commission to hold hearings to fix Broad Reach and NorthWestern's rates and this Court, on numerous occasions, has already ordered the Commission to provide all litigants due process. According to the Commission, however, neither Broad Reach nor NorthWestern can request the courts to require the Commission to provide due process until after they suffer through the Commission's unconstitutional procedures and demonstrate a taking of

their property rights. Contrary to the Commission's belief, it must comply with judicial precedent and provide Broad Reach and NorthWestern due process and an impartial tribunal in the statutorily required hearings.

The Commission's response also fails to appreciate that Broad Reach's QF projects are statutorily entitled to rates at the respective utility's avoided costs and NorthWestern is statutorily entitled to just and reasonable rates. Accordingly, Broad Reach and NorthWestern do indeed have property interests at stake in Commission proceedings and deserve a fair hearing before an impartial tribunal when fixing their rates.

Throughout the Commission's response, it also conflates standing with ripeness. The Commission claims that challenges to its procedures must be based upon an appeal from a specific contested case and disqualification procedures must be exhausted in each case prior to seeking judicial relief. The Commission presented these ripeness claims to the District Court and it rejected them. The Court should affirm that parties may seek judicial relief through a declaratory judgment prior to submitting themselves to the Commission's unconstitutional contested case procedures.

When discussing the merits of the case – whether the Commission's procedures violate due process by failing to provide a fair hearing before an impartial tribunal – the Commission's response boldly admits that it investigates

and "develop[s] the evidentiary record" while simultaneously serving as the tribunal in its contested cases.[1] Commission Response, p. 7. The Commission admitted before the District Court that, while serving as the tribunal in its contested cases, it simultaneously participates in discovery, conducts cross-examination, raises uncontested issues, and introduces evidence into the record. Doc. 9 – Commission Response to Petition, ¶¶ 16, 23, 26, 37 (Mar. 31, 2020). Now, on appeal, the Commission attempts to downplay its conduct by re-characterizing its investigatory practices as simply "asking pre-hearing questions of parties, questioning witnesses during hearings, and identifying issues for parties to address in advance of evidentiary hearings." Commission Response at p. 1. This Court must reject the Commission's disingenuous semantics as they conflict with its actual admissions and fail to capture the unconstitutional advocacy in the Commission's practices.

The Commission's admitted conduct flouts this Court's precedent governing its quasi-judicial role as the tribunal in contested cases. To be clear, Broad Reach and NorthWestern do not assert that the Commission lacks investigative authority,

[1] The Commission essentially asserts this century-old practice is not reviewable by the Courts. However, 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.

but due process and this Court's precedent precludes the Commission from simultaneously serving as both the tribunal and the investigator.

As regular litigants before the Commission, Broad Reach and NorthWestern have standing to contest the constitutionality of the Commission's procedures. Therefore, this Court must reverse the District Court's standing decision and remand for consideration on the merits.

ARGUMENT

I. The Commission's response failed to address Broad Reach and NorthWestern's constitutional and statutory right to a fair hearing, misconstrued public utility and QF law, and conflated standing with ripeness.

The issue on appeal is whether Broad Reach and NorthWestern adequately asserted standing to contest the constitutionality of the Commission's procedures through a declaratory judgment. 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. 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. Standing may arise from alleged or threatened violations of constitutional rights and due process is a fundamental right in Montana. *Weems v. State*, 2019 MT 98, ¶¶ 9, 11, 395 Mont. 350, 440 P.3d 4; Mont. Const. Art. II, § 17. "[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)).

A. Broad Reach and NorthWestern alleged violations of their constitutional and statutory right to due process sufficient to establish standing.

The Commission's response wholly failed to respond to Broad Reach and NorthWestern's argument that their allegations of constitutional violations were sufficient to establish standing. Due process of law includes not only notice and an opportunity to be heard, but also the right to a fair hearing before an impartial tribunal. *Allied Waste Servs. of North America, LLC v. Dept. Pub. Serv. Reg.*, 2019 MT 199, ¶ 17, 397 Mont. 85, 447 P.3d 463. Broad Reach and NorthWestern asserted that the Commission's contested case procedures wherein the Commission simultaneously participates as a party and the tribunal violates their right to a fair hearing before an impartial tribunal. The Commission's response presents a superfluous argument that the parties have to demonstrate their right to notice and an opportunity to be heard before the Commission has to provide them a fair hearing.

The Commission asks the Court to disregard the process that the Legislature already requires and, first, determine whether parties have asserted a taking or alleged the deprivation of a specific property interest in order to demand that the Commission provide a fair hearing. The Commission's argument is unnecessary

and defies logic. Montana law already requires the Commission to provide NorthWestern and Broad Reach notice and a hearing. *See* Mont. Code Ann. § 69-3-303; *MTSUN, LLC v. Mont. Dept. Pub. Serv. Reg.*, 2020 MT 238, ¶ 73, 401 Mont. 324, 472 P.3d 1154. Due process and this Court's longstanding precedent mandates the Commission to hold those hearings before a fair and impartial tribunal. *See Allied Waste*, at ¶ 17 (the Commission "must ensure that **all litigants** receive 'a fair and open hearing[.]'") (emphasis added; internal citation omitted); *Mont. Power Co. v. Pub. Serv. Comm'n*, 206 Mont. 359, 368-369, 671 P.2d 604, 609-610 (1983). Broad Reach and NorthWestern more than adequately asserted violations of their constitutional rights to establish standing.

The Commission's response failed to address this argument and the Court should consider its omission as an acknowledgment that the argument is well taken. Therefore, the Court should reverse the District Court's standing decision and remand this matter for a determination on the merits.

B. Broad Reach and NorthWestern have property interests at stake in Commission contested case proceedings sufficient to establish standing to demand a fair process.

The Commission's response misconstrues public utility and QF law and the property interests associated with each. The Commission's response cites *Munn v. Illinois* as authority for claiming public utilities are not entitled to due process of

law.[2] 94 U.S. 113 (1876). *Munn* involved a challenge to an Illinois statute that fixed a maximum price for the storage of grain in certain areas. *Id*. at 123. The Supreme Court determined that states may set rates for the use of private property in which the public has an interest. *Id*. at 134. The Supreme Court did not hold public utilities are not entitled to due process.

The Commission also cites to *Matter of Niagara Mohawk Power Corp. v. New York State Dept. Trans.*, 224 A.D.2d 767 (N.Y. App. Div. 1996). That case adjudicated whether a state agency could change its fee system for crossing canals under revocable permits held by utilities. The court concluded the utilities did not have a property interest in perpetual flat fees under the revocable permits. 224 A.D.2d at 768-769. Similarly, *RR Village Association v. Denver Sewer Corporation*, involved a homeowner's association's claim to existing rates provided by a sewage disposal company. 826 F.2d 1197 (2nd Cir. 1987). The court held that the ratepayers did not have a property interest in perpetual fixed rates meaning the local authority could change the rates prospectively. 826 F.2d at 1203.

Contrary to the Commission's assertions, the Supreme Court and this Court expressly ruled that public utilities have property interests in the rates fixed by the

[2] The Commission's reliance on *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2nd Cir. 1991) and *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 581 (2nd Cir. 1989) equally fails. Both cases decided whether providers had a property interest in continued participation in Medicare programs. The Second Circuit determined no such interest existed as the regulations and contracts allowed the governmental entity to terminate participation without cause. *See Kelly Kare*, 930 F.2d at 176; *Plaza Health*, 878 F.2d at 582.

Commission entitling them to constitutional due process protections. *Mont. Power Co.*, supra, 206 Mont. at 364-371, 671 P.2d at 607-611; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989). While public utilities subject themselves to regulation by submitting their property to serve the public, they do so in exchange for "a fair and reasonable rate of return on [their] investment." *Mountain States Tel. and Tel. Co. v. Dept. Pub. Serv. Reg.*, 191 Mont. 331, 334, 624 P.2d 481, 482-483 (1981). This constitutes the regulatory compact and, if the regulator sets rates too low or disallows necessary costs, an unconstitutional taking occurs. *Id.* at 339, 624 P.2d at 485 (holding the Commission may not set "rates so low that they are confiscatory and deprive the utility of its property without due process of law."); *State ex rel. Montana Power Co. v. Dept. Pub. Serv. Reg.*, 169 Mont. 99, 108, 548 P.2d 136, 141 (1975) (holding the Commission took Montana Power's property without due process by disallowing certain costs).

Distinguishable from the cases cited by the Commission, NorthWestern does not challenge the Commission's authority to set its rates nor does it assert that it is entitled to perpetual fixed rates. While the Commission has discretion in setting rates, the Commission must fix just and reasonable rates for NorthWestern. This case does not seek a determination that Commission established rates resulted in an unconstitutional taking. Rather, this case involves NorthWestern's request for the

Court's oversight to compel the Commission to hold fair hearings before an impartial tribunal in compliance with judicial precedent when fixing those rates.

Likewise, Montana and federal law require the Commission to set terms and conditions for QFs at the respective utility's avoided costs. *MTSUN*, supra, at ¶ 67; Mont. Code Ann. § 69-3-604; 18 C.F.R. § 292.304. The Commission's response wholly failed to address Broad Reach's property interests at stake in Commission QF proceedings. The Court should take the Commission's omission as an acknowledgement that Broad Reach's argument is well taken.

NorthWestern as a public utility and Broad Reach as a QF developer demonstrated their property interests at stake in Commission contested case proceedings. NorthWestern and Broad Reach have standing to request judicial oversight of the Commission's procedures when fixing their rates. Therefore, the Court should reverse the District Court's standing decision and remand this matter for a determination on the merits.

C. Broad Reach and NorthWestern properly challenged the Commission's unconstitutional procedures through a declaratory judgment action.

Throughout its response, the Commission erroneously conflates standing with ripeness. Standing determines whether the complaining party is the proper party before the court. *Bullock*, at ¶ 31. Ripeness determines whether the timing of the action presents an actual, present controversy as opposed to a hypothetical or

speculative dispute. *Advocates for School Trust Lands v. State*, 2022 MT 46, ¶¶ 19-20, 408 Mont. 39, 505 P.3d 825. "The more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id*. at ¶ 20 (internal quotation omitted).

The Commission's argument against Broad Reach and NorthWestern's standing challenges the timing of the action and sounds in ripeness. The Commission's response claims that Broad Reach and NorthWestern lack standing because their challenge arose from a petition for declaratory judgment and not from an appeal of a specific contested case, and neither exhausted disqualification procedures. The Commission raised the same argument before the District Court -- that parties cannot raise facial challenges to its procedures, but rather must submit themselves to its unconstitutional processes before vindicating their rights. While the District Court erroneously concluded Broad Reach and NorthWestern lack standing, it correctly determined that a declaratory judgment is an appropriate avenue for asserting facial challenges to the Commission's procedures expressly holding

> Where a party argues an agency's administrative procedure is unconstitutional, that party "has a right to declaratory judgment, rather than submitting himself to an ordinance or rule he deems unconstitutional."

Doc. 53 - Order on Cross-Motions for Summary Judgment, pp. 5-6 (Dec. 6, 2021) (quoting *Flowers v. Bd. of Personnel Appeals*, 2020 MT 150, ¶ 15, 400 Mont. 238, 465 P.3d 210); *see also McGillivray v. State*, 1999 MT 3, ¶¶ 9-12, 293 Mont. 19, 972 P.2d 804.

The Commission failed to cross-appeal that issue and now attempts to collaterally attack the District Court's ripeness determination by conflating ripeness with standing. Broad Reach and NorthWestern's declaratory judgment action does not involve a hypothetical or speculative dispute. The Commission admitted that, while serving as the tribunal in its contested cases, it simultaneously participates in discovery, conducts cross-examination, raises uncontested issues, and introduces evidence into the record. *See* Doc. 9, at ¶¶ 16, 23, 26, 37. The Commission's response, likewise, admits that, as the tribunal, it attempts "to develop the evidentiary record" in pursuit of the public interest. *See* Commission Response, at p. 7. Broad Reach and NorthWestern regularly appear before the Commission and are subject to these unconstitutional procedures in every case.

The question before the District Court undisputedly involves a matter of law – i.e., whether the Commission's admitted contested cases procedures comply with the due process requirement of a fair hearing before an impartial tribunal – and applies to the Commission's procedures in every case. Under the Commission's flawed logic, Broad Reach and NorthWestern would have to attempt to disqualify

every commissioner in every case for the same exact conduct, and then seek judicial review in every single case. Declaratory judgment actions were designed to address this exact situation – "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Mont. Code Ann. § 27-8-102. This matter presents an actual, present controversy and is ripe for review. Therefore, the Court should reverse the District Court's standing decision, and remand for a determination on the merits.

II. The Court should reject the Commission's arguments on the merits – the Commission cannot serve as a fair and impartial tribunal when it simultaneously investigates and develops the evidentiary record.

This appeal solely involves whether Broad Reach and NorthWestern have standing to contest the Commission's procedures. However, this dispute involves an issue of law and, if the Court desires to reach the merits, Broad Reach and NorthWestern encourage that result.[3]

A. The Commission's statutory role in contested cases precludes it from simultaneously acting as an investigator and adjudicator.

The Commission's response alleges that no language in Title 69 precludes it from exercising its broad investigatory authority to participate as a party in its

[3] Broad Reach and NorthWestern thoroughly briefed the merits before the District Court and respectfully direct the Court to that briefing. *See* Doc. 12 - Petitioners' Brief in Support of Motion for Summary Judgment (Oct. 13, 2020); Doc. 21 - Petitioners' Reply Brief in Support of Motion for Summary Judgment (Dec. 8, 2020); Doc. 26 – Petitioners' Response Brief Opposing Respondent's Motion for Summary Judgment (Dec. 15, 2020).

contested cases. The Commission has administrative law backwards – the Commission has "only the powers specifically conferred upon [it] by the legislature." *MTSUN*, at ¶ 70. No statute specifically allows the Commission to participate as a party. Regardless, the Commission's statutory authority must comply with constitutional due process requirements.

The Commission's response argued extensively that its broad investigatory authority and obligation to pursue the public interest allows it to participate as a party in its contested cases. This Court already rejected those propositions. "[N]o statute, regulation, administrative rule[,] or case [exists] ... to conclude that the Commission may suspend due process protections where, in the opinion of the Commission, doing so would be **in the public interest**." *Mont. Power*, supra, 206 Mont. at 370-371, 671 P.2d at 610-611 (emphasis added). In *MTSUN*, this Court further held "Montana law governing **quasi-judicial procedure**" prohibits the Commission from acting as a party by raising uncontested issues. *Id*. at ¶ 73 (emphasis added); *see* Mont. Code Ann. § 2-15-102(10). If the Commission truly had such unchecked investigatory power as alleged, this Court would have addressed them in the *MTSUN* decision. Yet, the Court explicitly rejected any combination of investigative and quasi-judicial power. *MTSUN*, at ¶ 73.

The Commission exercises its quasi-judicial function by serving as the tribunal in contested cases. *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT

75, ¶¶ 34-35, 395 Mont. 229, 438 P.3d 326. The Commission admitted it serves as the tribunal and renders decisions in all its contested cases. Doc. 9, at ¶ 37. The Commission's admitted practice of issuing discovery, noticing additional issues, cross-examining witnesses, introducing evidence, and otherwise advocating in its contested cases flouts its limited quasi-judicial role as decision-maker. *Id*. at ¶¶ 16, 23, 26, 37.

With that said, Broad Reach and NorthWestern do not contest the Commission's authority to investigate outside of contested cases. *See Qwest Corp. v. Mont. Dept. Pub. Serv. Reg.*, 2007 MT 350, ¶ 24, 340 Mont. 309, 174 P.3d 496. The Commission may address its public interest concerns through independent investigations and refer any discovered violations to the attorney general or appropriate county attorneys for enforcement as actually contemplated by statute. *See* Mont. Code Ann. § 69-3-110. [4] However, the Commission must leave the representation of the consuming public in contested cases to the constitutionally created Montana Consumer Counsel ("MCC"). Mont. Const. Art. XIII, § 2.

Contrary to the Commission's assertions, Broad Reach and NorthWestern do not request a rewrite of all the statutes discussing the Commission's investigatory

[4] NorthWestern and Broad Reach reserve judgment on the manner in which the Commission may choose to investigate and adjudicate in sequence in the future.

authority. As in *MTSUN*, the Court must interpret the Commission's statutory authority in the confines of the particular function the Commission occupies.[5] Under this construction, the Court can interpret the investigatory and quasi-judicial statutes harmoniously and give effect to each. Mont. Code Ann. § 1-2-101. When occupying its purely executive function, the Commission's statutory investigatory authority applies. *See* Mont. Code Ann. § 1-2-102 (particular statutes control over general). When occupying its quasi-judicial function in contested cases, the Commission's quasi-judicial statutory authority applies. *Id*.; *MTSUN*, at ¶ 73. Broad Reach and NorthWestern simply request the Court to confirm, consistent with *MTSUN*, the Commission may not simultaneously investigate and adjudicate. Therefore, the Court must order the Commission to stay within the confines of the role it occupies in contested cases.

B. The Montana Administrative Procedure Act and Rules of Evidence further preclude the Commission's practices.

Broad Reach and NorthWestern agree that the Commission must follow the Montana Administrative Procedure Act ("MAPA") and adhere to the Rules of Evidence. Mont. Code Ann. §§ 2-4-102(4), 69-3-303; *McGree Corp.*, at ¶¶ 34-35. The Commission's admitted procedures, however, do not comply. MAPA

[5] *See MTSUN*, ¶ 73 (distinguishing the Commission's quasi-judicial role from its investigatory function); *McGree Corp.*, ¶¶ 34-35 (distinguishing the Commission's quasi-judicial role from its quasi-legislative role).

incorporates the common law and statutory rules of evidence and allows "**parties** to respond and present evidence and argument on all issues involved." Mont. Code Ann. § 2-4-612(1) (emphasis added). Likewise, MAPA expressly limits the right of cross-examination to parties: "**A party** shall have the right to conduct cross-examinations required for a full and true disclosure of facts." Mont. Code Ann. § 2-4-612(5) (emphasis added).

The Commission relies on Montana Rule of Evidence 614 for the proposition that tribunals may cross-examine witnesses. While that rule authorizes tribunals to question witnesses, in order to prevent the tribunal from becoming an advocate, such questioning is limited. Mont. R. Evid. 614(b). Even the cases cited by the Commission recognize the limited nature of tribunal questioning. *State v. McConville*, 64 Mont. 302, 209 P. 987, 989 (1922) ("the examination of witnesses is, primarily, the appropriate function of the attorneys[,]" but rare and exceptional occasions allow limited judicial questioning); *State v. Richardson*, 69 Mont. 400, 222 P. 418, 419 (1924) (expressly limiting judicial questioning to clarifying questions that must be exercised with great care, must not be unduly extended, and must not betray bias or prejudice).

With respect to cross-examination, Rule 614 provides that the tribunal may "call witnesses and **all parties are entitled to cross-examine witnesses thus called**." Mont. R. Evid. 614(a) (emphasis added). Comparing a tribunal's limited authority to question witnesses under Rule 614 with parties' rights to cross-examine witnesses reveals the flaw in the Commission's theory:

> The office of cross-examination is to test the truth of statements of a witness made on direct examination. Cross-examination serves as a safeguard to combat unreliable testimony, providing a means for discrediting a witness' testimony, and is in the nature of an attack on his truth or accuracy . . . **The object of cross-examination, therefore, is to weaken or disprove the case of one's adversary**, and break down his testimony in chief, test the recollection, veracity, accuracy, honesty, and bias or prejudice of the witness, his source of information, his motives, interest, and memory, and exhibit the improbabilities of his testimony.

Northern Plains Resource Council v. Bd. of Natural Resources and Conservation, 181 Mont. 500, 537, 594 P.2d 297, 317 (1979) (emphasis added). Due to the advocacy necessary to conduct cross-examination, the Court expressly limited the right of cross-examination to parties. *Id*. at 533, 594 P.2d at 315.

The authority to ask limited clarifying questions does not provide a legal basis for conducting cross-examination, investigating the case, noticing additional issues, introducing evidence, or otherwise developing the evidentiary record. The Commission's attempt to distinguish the limited nature of judicial questioning to jury trials fails to appreciate the judiciary's independent constitutional obligation to remain neutral and impartial in cases. Mont. Const. Art. II, § 17; *see* Mont. Code Jud. Conduct. Even without a jury, judges may not cross the line and advocate via cross-examination as that would undermine the integrity and impartiality of the judiciary.

When the Commission "investigates" the case by issuing discovery, introducing evidence, noticing additional issues, and cross-examining witnesses, it abandons its role as an impartial tribunal and turns into an advocate, which is barred by due process, fundamental fairness, and binding judicial precedent.

MTSUN, at ¶ 73. While Broad Reach and NorthWestern recognize that the Commission may ask limited clarifying questions, the Commission's admissions that it conducts cross-examination undermine its characterization as harmless tribunal questioning in this case. Therefore, the Court must order the Commission to adhere to MAPA and the Rules of Evidence and refrain from participating as a party while serving as the tribunal.

C. The Commission's procedures violate basic principles of due process.

The Commission's response claims that "it is not a *per se* violation of due process for presiding officers to actively question witnesses." *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011) (quoting *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)).[6] Commission's Response, p. 20. While Broad Reach and NorthWestern may agree with that statement if such questioning was within the confines of clarifying questions as circumscribed by Rule 614, the Commission's admitted practice of issuing discovery, cross-examining witnesses, raising uncontested issues, and introducing evidence into the evidentiary record goes far beyond any permissible quasi-judicial conduct. *See MTSUN*, at n. 24 (recognizing, even when sua sponte authority is specifically conferred on an administrative

[6] Both cases cited by the Commission involved Social Security Administration proceedings. The Commission's comparison of its authority to Social Security Administrative Law Judges fails to appreciate that Social Security Administration proceedings are not contested cases under the Administrative Procedure Act. *See Aageson Grain & Cattle v. U.S. Dept. of Ag.*, 500 F.3d 1038, 1043 (9th Cir. 2007) (explaining that Social Security proceedings are not adversarial adjudications).

agency, that power must be used sparingly and only in truly exceptional situations).

In addition to the statutory bases precluding the Commission from combining its functions in contested cases, due process further prohibits such conduct. *In re Best*, 2010 MT 59, ¶ 23, 355 Mont. 365, 229 P.3d 1201. Due process demands impartiality on the part of those who function in **quasi-judicial** capacities. *Id*. at ¶ 22; *Mont. Power Co.*, supra, 206 Mont. at 367-368, 671 P.2d at 609-610. The Montana Supreme Court has always "'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. Bd. of Natural Resources and Conservation*, 200 Mont. 11, 45, 648 P.2d 734, 752 (1982) (internal citation omitted). The Commission must provide all litigants due process before a fair and impartial tribunal. *Allied Waste*, at ¶ 17.

The Commission's response cites *Best* for precedent on the notice and hearing components of due process, but strategically omits its precedent on the impartiality component. In *Best*, this Court held that the combination of investigatory and adjudicatory functions in the same personnel created an intolerably high risk of unfairness and violated the party's due process rights. *Best*, at ¶ 33. There, the tribunal, sua sponte, initiated a complaint against a party and then adjudicated it. *Id*. at ¶¶ 9, 32. The Court concluded that the tribunal's assumption of an advocacy role by initiating the complaint alone created an unconstitutional commingling of functions. *Id*. at ¶ 33. The Court held due process

does not exist if the same personnel participating in the case decide the case. *Best*, at ¶ 33; *see also Horne v. Polk*, 242 Ariz. 226, ¶ 27, 394 P.3d 651 (2017).[7] Therefore, the Court held that agency tribunals may not advocate in their contested cases because such conduct creates an intolerably high risk of unfairness. *Id.* at ¶ 33; *see also Horne*, at ¶¶ 20-27.[8]

Pursuant to *Best*, the Commission's participation as an advocate in its cases alone constitutes unconstitutional conduct. Moreover, the Commission's practices are far more egregious than *Best* as the Commission investigates, issues discovery, introduces evidence, notices additional issues, and cross-examines witnesses to develop the evidentiary record that it relies on to render its decisions. *See* Doc. 9, at ¶¶ 16, 18, 23, 26, 37. Upon objection to any of this conduct, the Commission itself gets to rule on the validity of its own conduct. This Court's on-point precedent in *Commissioner of Political Practices through Mangan v. Montana Republican Party* prohibits the Commission's conduct. 2021 MT 99, ¶ 15, 404 Mont. 80, 485 P.3d 741 (holding an administrative agency's broad investigatory authority does not allow it to simultaneously act as a party and a tribunal as that would raise due process concerns). The Commission's response failed to address that precedent. In fact, the Commission's response failed to cite any precedent that

[7] An impartial hearing does not exist where the tribunal is involved in the accusatory and confrontational process. *Welsh v. City of Great Falls*, 212 Mont. 403, 411, 690 P.2d 406, 410 (1984).

[8] "'The 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.'" *State v. Price*, 2006 MT 79, ¶ 21, 331 Mont. 502, 134 P.3d 45 (internal citation omitted).

allowed a tribunal to advocate in its own cases. The Commission's contested case procedures create an intolerably high risk of unfairness and violate litigants' due process rights to a fair hearing before an impartial tribunal. Therefore, this Court should declare the Commission's practices unconstitutional.

CONCLUSION

As litigants that regularly appear before the Commission in contested cases, Broad Reach and NorthWestern have standing to bring a declaratory judgment action concerning the legality of the Commission's procedures. The Commission's response failed to demonstrate that it may deprive public utilities and QFs of due process, including the right to a fair and impartial tribunal, in the hearings that the Legislature requires the Commission to hold.

The Commission's contested case procedures violate litigants' due process rights and defy this Court and the District Court's prior orders. Therefore, this Court should reverse the District Court's standing decision and remand for a decision on the merits. Alternatively, the Court should rule on the merits and declare the Commission's procedures unconstitutional.

Dated this 18th day of August, 2022.

/s/ *Michael Uda*
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/s/ *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 5,000 words, excluding the caption, table of contents, table of citations, certificate of compliance, and certificate of service.

/s/ *Clark Hensley*
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