

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

<p>IN THE MATTER OF the Application of) UTILITY SOLUTIONS, LLC to) Implement Initial Rates and Charges) for Water Services in its Elk Grove) Subdivision, Gallatin County, Montana) Service Area)</p>)	<p style="text-align:center">UTILITY DIVISION</p> <p style="text-align:center">DOCKET NO. D2005.11.163</p>
<p>IN THE MATTER OF the Application of) UTILITY SOLUTIONS, LLC to) Implement Initial Rates and Charges) for Wastewater Services in its Elk) Grove Subdivision, Gallatin County,) Montana Service Area)</p>)	<p style="text-align:center">Consolidated with</p> <p style="text-align:center">UTILITY DIVISION</p> <p style="text-align:center">DOCKET NO. D2005.11.164</p>

MOTION FOR DISQUALIFICATION OF COMMISSIONER

Pursuant to § 2-4-611(4), MCA, Utility Solutions, LLC, respectfully moves the Commission for the disqualification of Commissioner John Vincent in this matter. Utility Solutions hereby integrates its brief in support of the motion. Utility Solutions files concurrently with this Motion the supporting affidavits of Barbara Campbell and John Alke as required by § 2-4-611(4), MCA.

LEGAL BASIS FOR MOTION

This motion seeks disqualification of Commissioner John Vincent pursuant to the specific statutory procedure for disqualification of a "hearing examiner or agency member" contained in § 2-4-611, MCA.¹ The statute provides:

¹ Utility Solutions believes that the fair hearing guarantees in the due process provisions of both the Montana and United States Constitutions require the disqualification of Commissioner Vincent in this docket. However, the existence of the statutory remedy set forth in § 2-4-611 MCA renders recourse to the Constitutional protections unnecessary.

(4) On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing.

As this brief and the attached Affidavits demonstrate, there exists ample evidence which would lead a reasonable person to question the impartiality of Commissioner Vincent in this matter. The Montana Legislature made clear in enacting the Administrative Procedure Act, § 2-4-101 et seq. (the "Act"), that a "major principle" embraced by the Act was "the assurance of fundamental fairness in administrative adjudicative hearings." Administrative Procedures Act Subcommittee Comments, Title 2, Chapter 4, Part 1, MCA (Annotations). Prior to the Act's enactment, Montana law recognized no method for the substitution or disqualification of Public Service Commission members. *Montana Power Co. v. Public Service Commission*, 12 F. Supp. 946 (D. Mont. 1935). In including subsection (4) in § 2-4-611, MCA, the Legislature clearly indicated its belief that the guarantees of fundamental fairness may at times necessitate the removal of an agency member, including a commissioner, in cases where the commissioner cannot be considered an impartial decision-maker.

FACTUAL BACKGROUND

Commissioner Vincent's relationship with Barbara Campbell, the principal owner of Utility Solutions, dates back to Commissioner Vincent's role as Gallatin County Commissioner. During a public hearing in June 2005, Campbell appeared before the commission seeking changes to conditions placed on a subdivision she was in the process of developing. Vincent publicly stated that he had information from Fergus and Mineral counties that Campbell had not been truthful regarding projects she had worked on there, and refused to reveal the source

of this alleged information. The resulting firestorm provided the lead story on the front page of the following day's Bozeman Daily Chronicle. Nick Gevock, *Official Accused of Slandering Developer*, Bozeman Daily Chronicle A1 (June 22, 2005) (attached as Exhibit 4 to Campbell Affidavit). Campbell's attorney at the time was quoted in the Chronicle as stating to Vincent: "[y]our reckless disregard for the truth or decency has single-handedly resurrected McCarthyism in Montana," and "[y]ou have abdicated your responsibility as a neutral decision-maker in favor of self-promotion and in the process taken steps to ruin someone's reputation and her family." This highly publicized exposition of the ill will between Campbell and Vincent sets the stage for the current proceeding, which likewise involves Gallatin County, Campbell, and Vincent.² The relevant factual background in the current proceeding is set out in the Affidavit of John Alke and need not be repeated at length here.

ARGUMENT

I. **Standards for Disqualification in Applicable Law.**

The language of § 2-4-611(4), MCA, indicates that a commissioner may be disqualified for "personal bias" or "lack of independence"; "by law," or for other valid reasons. Montana's Administrative Procedure Act is based on the Model State Administrative Procedure Act of 1961. The Model Act has gone through four iterations (1946, 1961, 1981, and 2010) and has been modified to varying degrees by the individual states, but its central provisions have remained largely unchanged and are present in the majority of states. Even in states that have not explicitly adopted the Act, statutes governing administrative procedure have obviously been drawn up with reference to its basic concepts. The contemplation of disqualification of an administrative decision-maker for bias or prejudice is one such central provision based on the

² The facts surrounding the actions of PSC Commissioner Vincent as a Gallatin County Commissioner are set forth in the Affidavit of Barbara Campbell.

Model Act and mirrored in numerous states (and federal law--the Federal APA and the '46 Act were developed side-by-side). See e.g. 5 U.S.C. § 556; N.C. Gen. Stat. §§ 150B-36, 150B-40; 66 Pa. Consol. Stat. § 331; Wis. Stat. § 227.46; Col. Rev. Stat. § 24-4-105; Mich. Comp. Laws § 24.279; NY CLS St Admin P Act § 303; Model Act of 1981 § 4-202; Model Act of 2010 § 402(c).

Montana case law involving the statute sheds little light on the analysis to be performed under the statute. Reference to § 2-4-611(4) in Montana case law has most often been made in the context of a party complaining of bias or prejudice *post*-decision. Courts have reminded complaining parties that they must avail themselves of the statute *prior* to a decision being handed down, and have refused to entertain untimely attempts at its application. E.g. *Schneeman v. Dept. of Labor and Industry*, 257 Mont. 254, 848 P.2d 504 (1993); *Wiser v. State*, 2006 MT 20, 331 Mont. 28; 129 P.3d 133; *In re Sorini*, 220 Mont. 459, 717 P.2d 7 (1986); *Matter of Reier Broad. Co.*, 2005 Mont. Dist. LEXIS 762 (Eighteenth Jud. Dist. Ct. 2005).

In the sole Montana decision discussing the analysis to be performed under the statute, the First Judicial District Court followed the lead of courts in other jurisdictions in turning to well-established rules governing judicial recusal and disqualification. In *Erickson v. State*, 1996 Mont. Dist. LEXIS 921 (First Jud. Dist. Ct. 1996), *aff'd*, 282 Mont. 367, 938 P.2d 625, the court evaluated the possible bias of a Board of Medical Examiners hearing examiner using a judicial recusal test. The court stated, “[t]he test for whether the hearing examiner should be disqualified is ‘whether a reasonable person, knowing all the relevant facts, would harbor doubts about the [hearing examiner’s] impartiality.’” *Erickson* at *5 (citing *Tonkovich v. Kansas Bd. of Regents*, 924 F. Supp. 1084, 1087-1088 (D.Kan. 1996) (the precise quote from *Tonkovich*, as the court noted in *8, is “...doubts about the *judge’s* impartiality.”)). The court

concluded, “[b]ased on the record in this case, a reasonable person would harbor doubts about the hearing examiner’s impartiality.” *Id.* at *5.

The principle that allegations of bias or prejudice against quasi-judicial decision-makers such as Public Service Commissioners should be analyzed with reference to the same basic framework as judges is not new in Montana law. *Montana Power Co. v. Public Service Commission*, 12 F. Supp. 946 (D. Mont. 1935) (termining Public Service Commissioners “judicial officers” in the context of a claim of impermissible bias); *State ex rel. Mueller v. District Court*, 87 Mont. 108, 285 P. 928 (1930) (same, with respect to Police Commissioners); (both of these early cases eventually denied disqualification under the “rule of necessity,” a common law theory applicable to judges, because no provision was made for the substitution of commissioners).

The strong weight of authority supports the conceptual framework that allegations of bias should be treated similarly when made against both judges and quasi-judicial decision-makers such as Public Service Commissioners. The United States Supreme Court has echoed the observation that administrative agencies serving in a quasi-judicial role must be held to the same or similar standards as the judiciary. In *Winthrow v. Larkin*, 421 U.S. 35, 46 (1975), the Court explained:

[A] “fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but “our system of law has always endeavored to prevent even the probability of unfairness.” *In re Murchison*, *supra*, at 136; cf. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

A leading treatise frames it succinctly: “there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding.” R. Pound, *Administrative Law* 75 (1942). The Arkansas Supreme Court reasoned, when confronted with

a claim of bias on the part of a member of the Arkansas Highway Commission, “the members of the Commission, although not judges and therefore not subject to the appearance of bias standard in the Judicial Code of Conduct, perform a quasi-judicial function and therefore, by analogy, should be subject to the appearance of bias standard for judges.” *Acme Brick Co. v. Missouri P. R. Co.*, 821 S.W.2d 7, 10 (Ark. 1991). The Hawaii Supreme Court similarly incorporated judicial standards when faced with an allegation of bias on the part of a civil service commissioner. The court reasoned:

Because an impartial tribunal is an essential component of due process in a quasi-judicial proceeding and "justice must satisfy the appearance of justice[.]" *Offutt v. United States*, 348 U.S. 11, 14 (1954), we conclude "an appearance of impropriety" is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal.

Sussel v. Honolulu Civil Serv. Comm'n, 784 P.2d 867, 868 (Haw. 1989).

Erickson’s application of standards for judicial disqualification to quasi-judicial decision-makers is thus well-grounded in settled law. As reflected above, there is ample authority for this practice in other jurisdictions. *E.g. Sussel; Acme Brick Co.; Municipal Servs. Corp. v. State*, 483 N.W.2d 560 (N.D. 1992); *Appeal of Seacoast Anti-Pollution League*, 482 A.2d 509 (N.H. 1984). Furthermore, Montana’s standard for judicial disqualification follows the majority rule—whether a “reasonable person” would conclude that an “appearance of bias” is present. Given the preeminence of these two legal principles—that the correct standard for administrative decision-makers is to be determined by reference to judicial standards; and that this judicial standard is whether a reasonable person would conclude an appearance of bias is present—it is unsurprising that secondary sources arrive at a virtually identical formulation of the standard for disqualification as did the *Erickson* court. If there is “**any reasonable doubt about the adjudicator’s impartiality** at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice.” M. Redish & L. Marshall,

Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 483-84 (1986) (emphasis added). “Administrative proceedings, in addition to actually adhering to due process notions of fairness, must also give the appearance of being fair.” 4 Stein, Mitchell and Mezines, *Administrative Law* § 35.03[1] (1992). Perhaps most convincingly, the most recent version of the Model Act states explicitly: “[a] presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in Section 408, or any other factor **that would cause a reasonable person to question the impartiality** of the presiding officer or agency head.” Model Act § 402(c) (emphasis added).

The precise analysis to be performed under § 2-4-611(4), MCA, thus must be determined by reference to Montana’s specific formulation of the majority rule governing judicial recusal. This standard was most recently discussed at length in *Washington v. Montana Mining Properties*, 243 Mont. 509, 515-16 (1990). Montana Mining Properties successfully petitioned the Montana Supreme Court for a writ of supervisory control in a case involving a disputed sale of mining equipment. The Court, while proclaiming that such writs should only issue in “extraordinary situations,” determined that the facts of the case had “snowballed to create an appearance of impropriety.” *Id.* at 516. The petitioners “recited numerous facts which could indicate bias”: the judge’s son was interning at the defendant’s law firm, the judge associated on a social basis with members of the firm, and the judge allowed testimony from an attorney participating in the plaintiff’s defense. The Court opined,

Rule 4 of the Canons of Judicial Ethics requires that a judge's conduct should be free from the appearance of impropriety. Factors present in this case, in particular the newspaper article, render the realization of this standard a virtual impossibility.

Additionally, we note that Rule 33 of the Canons of Judicial Ethics requires a judge, when engaged in pending or prospective litigation, to be particularly careful to avoid any action that may reasonably tend to awaken the suspicion

that his social or business relations or friendships constitute an element in influencing his judicial conduct. The facts here have raised questions of impropriety. They evidence an impression of impropriety and bias.

Justice must satisfy the appearance of justice. *Jones v. City of Chicago*, 610 F.Supp. 350, (N.D.Ill.E.D. 1984). As eloquently stated by Lord Hewart,

" . . . a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. *Rex v. Sussex Justices* (1924), 1 k.b. 256, 259."

Id. at 516.

This principle was not new in *Washington* and had been cited several times by Montana courts dealing with allegations of bias or prejudice. *E.g. Shields v. Thunem*, 220 Mont. 449, 452, 716 P.2d 217 (1986) (judges' actions must be "both fair in fact and ha[ve] the appearance of fairness"); *In re Marriage of Miller*, 239 Mont. 12, 19, 778 P.2d 888 (1989) ("a judge's official conduct is to be free from even the appearance of impropriety[.]"). It has likewise been repeated in the years after *Washington*. *Lutz v. Nat'l Crane Corp.*, 267 Mont. 368, 386, 884 P.2d 455 (1994) (quoting *Washington*) (superseded on other grounds by § 27-1-719, MCA).

The central principles applicable to the present case can be restated as follows: Montana law is in accordance with the majority of jurisdictions in applying judicial disqualification standards when the impartiality of a quasi-judicial decision-maker is questioned. This standard in Montana law is whether a reasonable person would question the impartiality of the judicial officer—that is, whether an "appearance of impropriety" is present.

II. Analysis.

The facts in the present case have quite clearly "snowballed to create an appearance of impropriety." *Washington, supra*, at 516. The personal animosity Commissioner Vincent holds against the principal owner of Utility Solutions has long been widely known to the public. Nick Gevock, *Official Accused of Slandering Developer*, Bozeman Daily Chronicle A1 (June 22,

2005)(attached as Exhibit 4 to Campbell Affidavit). Against this backdrop, which alone would lead an objective observer to reasonably question his impartiality, Commissioner Vincent's recent actions have rendered the appearance of impartiality in this matter an unattainable goal. These actions fit into four general categories: Vincent's continued public comments regarding his belief that Ms. Campbell is untrustworthy; his pattern of off-the-record communication with, and encouragement of, potentially adverse parties in interest to Utility Solutions in the current docket; his dubious compliance with the public records request made in this docket; and his lack of candor regarding the reasons for delay in this docket. Each of these four general categories would alone provide sufficient basis for disqualification. Taken in the aggregate, they unmistakably demonstrate that the Commission has no alternative but to disqualify Commissioner Vincent in the present proceeding.

A. Commissioner Vincent's Continued Allegations that Barbara Campbell is Untruthful.

In a telephone conversation with a customer served by Utility Solutions, which was subsequently relayed to a much wider group of people via email, Commissioner Vincent stated that the Public Service Commission "is quite sure Barb is withholding information[.]" (Exhibit 6 to Alke Affidavit, p. 4) This accusation is nearly identical to Commissioner Vincent's assertion when he was a County Commissioner that he had information from Fergus and Mineral counties that Campbell had not been truthful regarding projects she worked on there. When confronted with this written summary of his oral statements, Commissioner Vincent confirmed that the call had taken place, did not dispute the summary, and stated: "[t]he statements I made in that phone call were factual and accurate." (Vincent email of March 31, 2010) (Exhibit 6 to Alke Affidavit, p. 1). Vincent is thus *again* on public record stating that his belief that Campbell is dishonest.

As detailed in (B) and (C) below, it is not at all unreasonable for Utility Solutions to believe this pattern of slandering Ms. Campbell is commonplace behavior for Commissioner Vincent, as all efforts to gain evidence to the contrary have been rebuffed. The only difference between Commissioner Vincent's previous assertions that Ms. Campbell is dishonest and his present assertions is that he has learned from the mistake of making such comments in the middle of a public hearing where they will become front-page newspaper fodder.

Even in states imposing a higher burden for disqualification of an administrative adjudicator, statements made by a commissioner indicating his or her belief that a party appearing before the tribunal is untruthful have led to disqualification. In *Northwestern Bell Tel. Co. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990), for example, the South Dakota Supreme Court upheld a trial court's involuntary disqualification of a public utilities commissioner when the commissioner stated that the utility was "lying to the public about wanting fair competition," among other statements made about the utility's ethical shortcomings. The court imposed a strict prejudgment standard—the standard for disqualification in a small minority of jurisdictions—but still found the commissioner to have failed the test. (Other examples of the minority view include: *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583 (D.C. Cir. 1970); *Falmouth Sch. Comm. v. B.*, 106 F. Supp. 2d 69 (D. Me. 2000); *Strain v. Rapid City Sch. Bd.*, 447 N.W.2d 332, 336 (S.D. 1989)). As in *Stofferahn*, it is difficult to imagine how the Commission could avoid the appearance of bias when one of its members is on public record stating outright that he believes the owner of a utility appearing before the Commission is a liar, and has been unwittingly exposed for doing the same thing out of public view.

B. Commissioner Vincent's External Communications with Interests Adverse to Utility Solutions.

Perhaps the most persuasive evidence of Commissioner Vincent's bias is the continuous contact he has had with the members of the Elk Grove Subdivision, which obtains its water and sewer services from Utility Solutions. The public website of the Elk Grove Home Owners Association reveals the subdivision's residents to be actively opposed to Utility Solutions in much the same way as Commissioner Vincent. While Elk Grove did not seek to intervene in this docket, and thus Commissioner Vincent's contact with them may not technically fall under the statutory prohibition against *ex parte* communications, his exceptionally high level of contact with Elk Grove residents triggers an unmistakable "aura of possible bias and prejudice." *Washington*, 243 Mont. at 516.

The strong prohibitions against such contact demonstrate the law's extreme disapproval of off-the-record communication between adjudicators and interests adverse to a party appearing before the judicial body. Section 2-4-613, MCA, provides:

2-4-613. Ex parte consultations. Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.

This specific statutory provision reflects the stated desire of the Legislature to ensure "the exclusion of factual material not properly presented and made part of the record," as critical to the "[a]ssurance of fundamental fairness." Administrative Procedures Act Subcommittee Comments, Title 2, Chapter 4, Part 1, MCA (Annotations). The provision is complemented by admonishments in Montana case law against the judicial officer being involved in the case beyond that involvement occurring in full view of the public. "Where the judge is the trier of fact, he must be most scrupulous both to avoid losing his impartiality and

to maintain his unfamiliarity with disputed matters which may come before him and with extraneous matters which should not be known by him." *Shields v. Thunem*, 220 Mont. 449, 452, 716 P.2d 217 (1986) (quoting *Furtado v. Furtado*, 402 N.E.2d 1024, 1036 (Mass. 1980)). Such communications "violate the basic fairness of a hearing." *National Small Shipments v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1978). "When a party cannot know what evidence is offered or considered and is not given an opportunity to test, explain, or refute, there is no meaningful hearing." *Municipal Servs. Corp. v. State*, 483 N.W.2d 560, 564-565 (N.D. 1992) (internal quotation marks omitted). Administrators must offer their opinions in full view of the public so that "interested parties are at least aware of which opinions they must persuade an administrator to change." *Id.* (citing E. Gellhorn & G. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue* 48 U.Chi.L.Rev. 201, 218 (1981)).

Here, Commissioner Vincent engaged in a running dialogue with a party with adverse interests to Utility Solutions for years, in a manner which simply cannot be characterized as without bias. Jerry Meek, the administrator for the Elk Grove Community website, describes the relationship as one of "ongoing emails with John Vincent just to stay in touch," describes how he has been "staying in touch with John," and states that "John has been as generous as he can with information regarding [the case]." (Exhibit 8 to Alke Affidavit, p. 1-2). He also states that "[s]ince the PSC Hearing, I've had a couple of **long conversations** with John Vincent." (Emphasis added) (Exhibit 8 to Alke Affidavit, p. 4). Vincent is praised on the website for his "work in the public sector," and "for his personal sacrifice in doing so"; the website administrator attests to his "hope that **[Vincent] is our advocate** in commission deliberations." (Emphasis added) (Exhibit 8 to Alke Affidavit, p. 4-5).

Vincent further elicited the participation in the public hearing of a resident *outside* Utility Solution's service area who is deeply entangled in a heated dispute with Utility Solutions and

is a personal friend of Vincent. The Commissioner's friend, Tony Kolnik, was given permission to appear at the hearing in the case and speak despite a lack of standing, and despite the strenuous objection of Utility Solution's counsel. Vincent admitted that "Tony and I do go 'way back,' " and "[h]e is a friend, and as with all my students, I have encouraged him to actively participate in government, politics, and public affairs." (Exhibit 6 to Alke Affidavit, p. 1). Although Vincent denied specifically encouraging Mr. Kolnik to participate in the Utility Solutions docket, *id.*, emails provided in response to the public records request tell a different story. Sarah Carlson, an employee of the Commission at the time, wrote to then-Commissioner Jergeson that "Tony Kolnik...has been in the office numerous times and has discussed these issues with Leroy, Al, myself, and **John Vincent**. He frequently calls and emails with questions." (Carlson email of March 19, 2010) (Exhibit 4 to Alke Affidavit, p. 1). Furthermore, the decision to allow Mr. Kolnik to testify at the May 3rd public hearing, despite his undisputed lack of standing to do so, was made at a non-public meeting involving only *two* Public Service Commissioners. (Carlson email of March 23, 2010) (Exhibit 5 to Alke Affidavit, p. 1). The lack of transparency in this decision is troubling and is another factor giving rise to the appearance of impropriety in this proceeding.

C. Commissioner Vincent's Noncompliance with the Public Records Request.

Despite the publicly-available proof of numerous instances of Commissioner Vincent's discussion of the case with outside parties—such as Jerry Meek's reference to his "ongoing emails with John Vincent" regarding the case, and Meek's reproduction of several of these emails in their entirety—Vincent produced *not a single email he authored* in response to the public records request filed by Utility Solutions' counsel. (Exhibit 1 to Alke Affidavit). Commissioner Vincent had over a year to collect such emails, some of which were even authored during that period. As Justice Brandeis famously stated nearly a century ago,

"[s]ilence is often evidence of the most persuasive character." *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149 (1923). If Commissioner Vincent's failure to produce these emails (and others he assuredly authored discussing the case) is due to their being sent from a private email account rather than his public account, such a circumstance would be even greater cause for concern. It is unimaginable that a pattern of discussing pending cases with interested parties outside Commissioner Vincent's public office, outside even the long reach of an official public records request, would not give rise to a sufficient appearance of impropriety.

D. Commissioner Vincent's Untruthfulness Regarding Reasons for Delay in this Docket.

The Elk Grove Community website also reveals that Commissioner Vincent offered demonstrably false reasons for the delay in the docket on at least two occasions. On February 1, 2010, counsel for Utility Solutions filed a public records request asking for all emails sent to or received by the Commission in which Ms. Campbell or the pending Utility Solutions dockets were discussed. The Commission replied that it would comply with the request. A full five months later, on July 1, 2010, Commissioner Vincent informed residents of Elk Grove that the proceeding was delayed while the PSC compiled the information requested by Utility Solutions. This statement was truthful, although it did not explain the delay in responding. In November of 2010, however, Commissioner Vincent deliberately misled the Elk Grove Community and attributed the failure to move ahead to a wholly fictional basis involving Utility Solutions' counsel. He wrote:

[Utility Solutions'] attorney is in the hospital and will be for some time, plus recuperation (sic). This will delay proceedings on the docket, **though the PSC is ready to go**. Sorry to report this, but wanted you to know right away. I'll keep you posted. (Emphasis added) (Exhibit 8 to Alke Affidavit, p. 2)

While counsel for Utility Solutions was, indeed, in the hospital, the delay in the docket was **solely** due to the continued failure of the PSC to provide the information requested in

Utility Solutions' public records request, as Commissioner Vincent well knew. The PSC was not at all "ready to go," as by agreement, the briefing of the docket was on hold until the PSC's compliance with the request.

In early May of 2011, Commissioner Vincent *again* misled Elk Grove residents regarding the delay in the proceedings, and *again* attempted to blame Utility Solutions. He wrote: "Mary Wright at the Consumer Council told me just a few days ago that it's still the John Alke request (demand) that's holding things up." (Exhibit 8 to Alke Affidavit, p. 1). Of course, as Commissioner Vincent was well aware, it was highly misleading to state that a public records request filed *over a year* prior to this statement being made was the cause of the hold-up.

III. Conclusion.

The applicable standard to motions for disqualification under § 2-4-611(4) is whether "a reasonable person, knowing all the relevant facts, would harbor doubts about the [hearing examiner's] impartiality." *Erickson v. State*, 1996 Mont. Dist. LEXIS 921, *5 (First Jud. Dist. Ct. 1996), *aff'd*, 282 Mont. 367, 938 P.2d 625. This standard has also been described as being "free from the appearance of impropriety." *Washington v. Montana Mining Properties*, 243 Mont. 509, 516 (1990).

As in *Washington*, the evidence in the present case has "snowballed to create an appearance of impropriety." The Commission has no choice but to disqualify Commissioner Vincent pursuant to § 2-4-611(4), MCA.

DATED this 19th day of October, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing MOTION FOR DISQUALIFICATION OF COMMISSIONER was served upon the following by mailing a true and correct copy thereof on October 19th, 2011, addressed as follows:

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