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PUBLIC SERVICE COMMISSION FOR THE STATE OF MONTANA

IN THE MATTER of the Petition of Bull	)	REGULATORY DIVISION
Mountain Sanitation, LLC, for a Declaratory	)	Docket No.: T-14.23.DR
Ruling concerning exemption from Class D	)	
Motor Carrier Certification requirements	)	<b>RESPONSE IN OPPOSITION TO</b>
	)	<b>REQUEST OF REPUBLIC SERVICES</b>
	)	<b>FOR DEFFERAL OF DECLARATORY</b>
	)	<b>RULING</b>
	)	

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Bull Mountain Sanitation, LLC opposes the Request of Republic Services for Deferral of Declaratory Ruling for the following reasons:

**A. The PSC has authority from the Legislature to issue declaratory rulings.**

The Public Service Commission (the "PSC") has been invested with the authority by the legislature to issue declaratory rulings. See Mont. Code Ann. § 2-4-501:

Declaratory rulings by agencies. Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

The PSC adopted the declaratory ruling procedures used by Petitioner in ARM § 38.2.101.

Moreover, the PSC has been invested with the statutory duty “to supervise and regulate the operations of public utilities, common carriers, railroads, and other regulated industries listed in this title.” Mont. Code Ann. § 69-1-102. The PSC “has the power and authority and it is its duty to supervise and regulate every motor carrier in this state.” Mont. Code Ann. § 69-12-201(1)(a). Included therein would be a determination as to when an exemption would apply.

Finally, the exemption at issue herein, Mont. Code Ann. § 69-12-102(1)(c), specifically invests in the PSC the determination to decide if the exemption applies. The statute states that the exemption applies “as determined by the commission.” *Id.*

When a state agency has been delegated authority to decide matters, district courts should defer to agency authority until judicial review, whereupon the district court’s review is made as set forth in the Administrative Procedures Act, Mont. Code Ann. § 2-4-704. Moreover, “[w]hen an agency has not adjudicated the issues raised on appeal, there is no final agency action upon which a district court can assume jurisdiction.” *Qwest Corporation v. Montana Public Service Commission*, 2007 MT 350, ¶ 30, 340 Mont. 309, 174 P.3d 496.

Accordingly, the PSC is invested with the authority to proceed to issue the declaratory ruling and need not defer at this time to the District Court.

In *Grouse Mountain Associates v. Public Service Commission*, 284 Mont. 65, 67, 943 P.2d.971, 972 (1997), the Supreme Court noted favorably that the District Court stayed consideration of a complaint while the PSC considered a petition for declaratory ruling. The Supreme Court set forth the correct standard to challenge declaratory ruling-- judicial review by the District Court, not deferring entirely to the District Court. “The PSC's conclusion that

Grouse Mountain is subject to motor carrier regulation is a conclusion of law subject to review in the first instance by the District Court. Mont. Code Ann. § 2-4-501; Mont. Code Ann. § 2-4-702.” *Grouse Mountain*, 284 Mont. at 68, 943 P.2d at 973 (emphasis added).

Accordingly, the PSC should proceed according to its governing statutes and administrative rules to rule upon Bull Mountain Sanitation’s Petition for Declaratory Ruling.

**B. Bull Mountain Sanitation has been given the right to seek a declaratory ruling.**

Likewise, Bull Mountain Sanitation, as petitioner, has been granted by the legislature and the PSC the right to obtain declaratory ruling from a state agency. See Mont. Code Ann. § 2-4-501. There is no provision in the Montana Administrative Procedures Act or governing administrative rules that permit a nonparty to the Petition to intercede and deny a Petitioner its right have the Petition ruled upon. It is noteworthy that Republic has not cited any legal authority for divesting Petitioner of its right to a declaratory ruling under the Administrative Procedures Act and the administrative rules of Montana.

**C. The PSC is not a party to the district court proceeding and is not bound by it.**

The PSC is not a party to the District Court case. Accordingly, any ruling by the District Court is not binding upon the PSC. Typically, only parties are bound by a court ruling. In Montana, a person who is not a party to an action cannot be a party to the judgment of that action. *Warnack v. Coneen Family Trust*, 266 Mont. 203, 207, 879 P.2d 715, 718 (1994). The Montana Supreme Court noted that “[i]t is a fundamental principle of our jurisprudence that it is only against a party to the action that a judgment can be taken and that the **judgment is not binding against a stranger to the action.**” *Id.* (emphasis added).

Republic's assertion that the judgment to be entered in the District Court proceeding, where the PSC is not even a party, should somehow bind the PSC is not supported by law. The PSC is not a party to District Court proceeding and is therefore not bound by the judgment.

**D. Republic is not a party to the Petition for Declaratory Ruling and therefore does not have standing to have it deferred.**

Republic is not a party to this declaratory ruling process and should not be permitted to collaterally attack the declaratory ruling by doing an end run to the district court.

The PSC has adopted the declaratory ruling process set forth in ARM 1.3.226 *et seq.* "A **party** may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the **party's** legal rights." (emphasis added). The party to this declaratory ruling is Bull Mountain Sanitation, not Republic. Other than as the PSC may solicit public comment, Republic does not play any role in the PSC's ruling upon a Petition. Republic's use of a district court proceeding is nothing more than a collateral attack on the PSC's authority to issue declaratory rulings. Republic is not, and cannot be, a party to the Petition.

The questions presented by Bull Mountain Sanitation's Petition pertain to a statute or rule administered by this PSC. See Mont. Code Ann. § 2-4-501. The questions pertain to whether Bull Mountain Sanitation's operations are exempt under the statutes and rules administered by the PSC. These questions must be construed by the agency governing in this area. This PSC has exclusive oversight, subject to judicial review, over the interpretation of its statutes and rules pertaining to garbage hauling exemptions.

There aren't even any administrative rules that permit Republic to intervene in a declaratory ruling petition and move for a deferral. "A declaratory ruling is binding between the **agency and the petitioner** concerning the set of facts presented in the petition." ARM § 1.3.229

(emphasis added). Republic does not play any role in the process of a Petition for Declaratory Ruling permitting it to request a deferral.

**E. Republic overstates the effect of the Complaint and the import of its timing.**

Republic claims that “the issue in both the District Court action and Bull Mountain’s Petition is the same—the meaning of the term ‘village’ under § 69-12-102(1)(c).” Request for Deferral, p. 2. Puzzlingly, the District Court Complaint is completely devoid of any reference of the term “village.” Likewise, it is obvious from the face of the Petition that more than just the term “village” is at issue before the PSC. What is clear is that if the PSC rules that Bull Mountain Sanitation is exempt from a Class D license under Mont. Code Ann. § 69-12-102(1)(c), the Complaint will be moot.

Moreover, Republic attempts to grant itself appeal rights that are not found in the declaratory ruling statutes and administrative rules. Republic erroneously states, “Whatever declaratory ruling the PSC were to make, either party may want to seek judicial review of the issuance of any injunction—and thus the District Court proceeding would likely be a more efficient forum for the PSC and the parties.” Request for Deferral, p. 2.

Assuming that the “injunction” is what this PSC may issue under Republic’s hypothetical, Republic would definitely not have the right to judicial review of that decision. The Declaratory Ruling administrative rules are quite clear, the ruling is binding on only the **Petitioner** and the PSC (ARM § 1.3.229); thus, only the Petitioner has the right to seek judicial review of any agency declaratory ruling. Republic is an intermeddler in the process. “A declaratory ruling or notice of refusal to issue a ruling is a final agency decision subject to judicial review in the same manner as decisions or orders in contested cases.”

ARM § 1.3.229(2). Under the judicial review sections of the Montana Administrative

Procedures Act, only the aggrieved party is entitled to judicial review. See Mont. Code Ann. § 2-4-702(1)(a). Since the declaratory ruling is binding on only the Petitioner and the PSC, only Petitioner is an aggrieved party for purposes of judicial review. Republic would play no role in that process.

Thus, Republic's argument that going to District Court now would be the more efficient forum is irrelevant since only the Petitioner, Bull Mountain Sanitation, may appeal the PSC ruling. Bull Mountain Sanitation has the right to a Declaratory Ruling and the right to appeal any adverse ruling to the District Court. Republic plays little role in that process, other than as an interested member of the public.

To the extent that Republic's argument is that its District Court complaint should be decided first based on a convoluted "first in time is first in right" theory, Republic misstates who filed first. Bull Mountain Sanitation filed a Petition received by the PSC on September 23. Staff members informed the undersigned of an error on the first page of the Petition and asked that corrected copies of the first page be submitted. Upon review, counsel found a similar error on page 5. Upon consulting with staff at the PSC, staff determined that it would be more convenient to resubmit the corrected petition rather than substituting out the offending pages.

In substance, Bull Mountain Sanitization's Petition certainly could be considered retroactive to September 23. Republic attempts to elevate form over substance in parsing which pleading arrived first. However, [t]he law respects form less than substance." Mont. Code Ann. § 1-3-219. If even relevant, the corrected Petition was received by the PSC on September 26 at 9:55 AM. See Fed Ex Receipt attached as Exhibit A. Republic fails to offer any proof as to the time its Complaint was filed. Accordingly, the only competent evidence is that the Petition was filed first.

**F. The District Court Complaint is subject to dismissal.**

Finally, Republic's District Court Complaint fails to meet statutory prerequisites. The Complaint filed is based upon Mont. Code Ann. § 69-12-209(2), which states:

(2) If any motor carrier shall operate in violation of the provisions of this chapter or shall fail or neglect to obey any lawful order of the commission, the commission or any party injured may apply to any court of competent jurisdiction, in any county where such motor carrier is engaged in business, for the enforcement of this chapter or such order. The court shall enforce obedience thereto by writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier or its officers, agents, employees, or representatives from further violation of this chapter or such order or to enjoin upon it or them obedience to the same.

A prerequisite to bringing suit under this statute is that the motor carrier "operate in violation of the provisions of this chapter" or "neglect to obey any lawful order of the commission." The PSC is invested with the authority to determine if Bull Mountain Sanitation is operating contrary to provisions of the statutory chapter or whether the exemption applies under Mont. Code Ann. § 69-12-102(1)(c) ("as determined by the commission.") Moreover, Bull Mountain Sanitation has not violated "an order of the Commission" since the PSC has not issued any order pertaining to Bull Mountain Sanitation. Accordingly, the Complaint is premature. The PSC rightfully should decide the Petition first.

WHEREFORE, Bull Mountain Sanitation requests that the PSC proceed to rule upon Bull Mountain Sanitation's Petition for Declaratory Ruling.

DATED this 6<sup>th</sup> day of October, 2014.

CROWLEY FLECK PLLP

By

  
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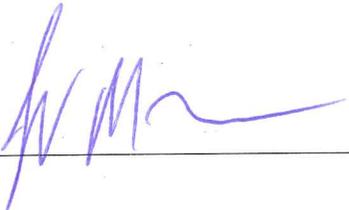
**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of October, 2014, I served a true and exact copy of the foregoing document by depositing the same in the U. S. Mail, first-class postage prepaid, addressed to the following:

R. Allan Payne  
Frank C. Crowley  
Jacqueline R. Papez  
Doney Crowley P.C.  
P.O. Box 1185  
Helena, MT 59624-1185

And via email to:

[rpayne@doneylaw.com](mailto:rpayne@doneylaw.com)  
[fcrowley@doneylaw.com](mailto:fcrowley@doneylaw.com)  
[jpapez@doneylaw.com](mailto:jpapez@doneylaw.com)

  
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## Shipment Receipt

**Address Information**

<b>Ship to:</b>	<b>Ship from:</b>
Public Service Commission	Jared M. Le Fevre
State of Montana	Crowley Fleck PLLP
1701 Prospect Avenue	490 North 31st Street, Suite
	500

HELENA, MT	Billings, MT
59601	59101
US	US
406-444-6199	4062557267

**Shipment Information:**

Tracking no.: 771269429765  
 Ship date: 09/24/2014  
 Estimated shipping charges: 17.32

**Package Information**

Pricing option: FedEx Standard Rate  
 Service type: Priority Overnight  
 Package type: FedEx Envelope  
 Number of packages: 1  
 Total weight: 0.50 LBS  
 Declared Value: 0.00 USD  
 Special Services:  
 Pickup/Drop-off: Use an already scheduled pickup at my location

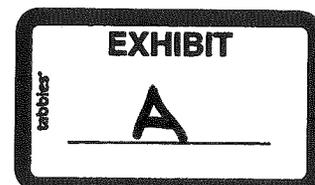
**Billing Information:**

Bill transportation to: 105775644-644  
 Your reference: 18-387-001/jml  
 P.O. no.:  
 Invoice no.:  
 Department no.:

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**771269429765**

Ship (P/U) date :  
**Thur 9/25/2014 5:19 pm**

Actual delivery :  
**Fri 9/26/2014 9:55 am**

Billings, MT US

**Delivered**

HELENA, MT US

*Signed for by: A.LOWE*

Let us tell you when your shipment arrives. [Sign up for delivery notifications](#)

**Travel History**

Date/Time	Activity	Location
<b>9/26/2014 - Friday</b>		
9:55 am	Delivered	HELENA, MT
9:32 am	On FedEx vehicle for delivery	HELENA, MT
9:24 am	At local FedEx facility	HELENA, MT
6:58 am	At destination sort facility	GREAT FALLS, MT
5:03 am	Departed FedEx location	MEMPHIS, TN
12:28 am	Arrived at FedEx location	MEMPHIS, TN
<b>9/25/2014 - Thursday</b>		
5:50 pm	Left FedEx origin facility	BILLINGS, MT
5:19 pm	Picked up	BILLINGS, MT
<b>9/24/2014 - Wednesday</b>		
3:27 pm	Shipment information sent to FedEx	

**Shipment Facts**

<b>Tracking number</b>	771269429765	<b>Service</b>	FedEx Priority Overnight
<b>Weight</b>	2 lbs / 0.91 kgs	<b>Delivered To</b>	Receptionist/Front Desk
<b>Total pieces</b>	1	<b>Total shipment weight</b>	2 lbs / 0.91 kgs
<b>Shipper reference</b>	18-387-001/jml	<b>Packaging</b>	FedEx Envelope
<b>Special handling section</b>	Deliver Weekday		