

STATEMENT OF DISSENT BY COMMISSIONER ROGER KOOPMAN

Sometimes the job of a commissioner requires as much moral courage as it does deliberative and sound judgment. In this matter, the commission's decision was devoid of both.

Let there be no misunderstanding. The bully on the block (Republic), exercising its legal rights, has succeeded in knocking out not only its opponent, but also the referee. Its opponent – L&L Site Services – had the moral courage to stand up to the multibillion dollar behemoth. The referee – the Montana Public Service Commission – did not.

The evidentiary record in this latest round of Jack Dempsey vs. The Gecko was essentially the same as in the previous round, when the commission, in Order #7594c, wisely reconsidered its earlier rejection of the L&L application for Missoula County, and granted them the authority to compete there with Republic Services. Staff maintained that the court's subsequent removal of Oregon-based financial data from the record sufficiently undermined the "need" test in L&L's case, that the commission should once again reverse itself, the application having been remanded back to the PSC by Judge McMahon. This commissioner strongly disagrees with that assessment.

In fact, several areas of evidence that were not noted in our Order on Reconsideration were brought up by this commissioner during our latest discussion – record evidence that markedly strengthens the Applicant's need test compliance. I'll discuss two examples.

First, it had been insufficiently noted that, prior to filing their application, L&L dispatched an employee to conduct an informal consumer survey in the Missoula market, by door-knocking in residential neighborhoods. In so doing, L&L secured well over one hundred affidavits stating that the signers wanted to see their company come to Missoula to provide competition and choice. While fewer than 10 percent of these individuals showed up at the hearing itself, that was to be expected, and does not diminish the significance of their signed statements.

Second, was the example of Republic Services' dramatically different pricing in Gallatin County before and after facing competition from L&L. Specifically, it was testified that the Belgrade School District – where Republic had enjoyed no competition – was being charged a greater amount than the much larger Bozeman School District, where Republic had to compete with bids from the City of Bozeman. Then, when L&L showed up to bid on the Belgrade contract, Republic's new bid suddenly came in at half the amount they'd been charging before. So unimpressed were school officials with Republic's cost calisthenics (and apparent hardball tactics) that they chose the higher L&L bid anyway.

It became apparent to me that much of the reason for the commission's retreat from good judgment and sound, statute-based analysis was simple fear. Fear of Republic Services' aggressive anti-competition posture, and the constant threat of legal action to protect their

exclusive markets. Fear of judges over-stepping their judicial function and replacing their robes with commissioner's caps.

But fear paralyzes, and in time will render this honorable commission ineffective and irrelevant. As I attempted, unsuccessfully, to impress upon my fellow commissioners, we have a discreet job to do that is distinct and independent from the role of the judiciary – and no less important. This does not imply a lack of respect for the courts. Not at all. It is simply a recognition that the Public Service Commission's quasi-judicial function is separate and apart from the judiciary itself. We cannot perform our mission or exercise our statutory authority if we are living under a self-imposed shadow of judicial intimidation and superiority. While always respecting the law, we must have the courage and independence to do what's right in the public interest.

During the work session, I also stressed that statutes do not exist in a vacuum. Their interpretation and application require a measure of congruence with our shared culture, traditions and national values. In a free society such as ours, there is, if you will, a "bias towards freedom." That is to say, where controlled and statist/collectivist societies apply their laws with a default toward limiting and prohibiting human activity and enterprise, a free society defaults toward trusting markets, trusting people, and allowing human enterprise to be conceived, born and flourish. In matters of subjective judgement, if we are to err, we err on the side of freedom.

In issues of law that are main and plain, it is the unquestioned responsibility of the PSC to apply both the letter and spirit of a statute with fidelity. We do not have the discretion to change or ignore the plain meaning of the laws under which we operate. This is so obvious it hardly needs to be stated. But when, as in this docket, the legal tests for Class D certification afford considerable latitude of judgment, the commission should maintain an unshakable dedication to the overriding public interest, and where other considerations are relatively equal, an unapologetic bias toward freedom. This commission failed miserably in upholding that solemn duty, and in reflecting that abiding faith in a free society we all claim to have.

Finally, it is this commissioner's considered opinion that, while it would not have changed the outcome, Commissioner Brad Johnson would have been well advised to recuse himself from voting in this matter, on the grounds of potential conflict. This subject was brought to the chairman's attention by me on two occasions. Briefly, it involves the acceptance by Johnson, of at least 7 maximum-amount campaign donations during his 2014 PSC race, from employees and managers of regulated Class D garbage disposal services, both within and outside of his district. These donations resembled an organized effort to support Johnson by that industry. Among the donors was a manager of Missoula Republic Services, who donated to him again in 2018.

Noting that a conflict exists is not an admission of wrongdoing by that individual, nor is it an accusation of wrongdoing by the person who brings it up. It was therefore unfortunate that Chairman Johnson proceeded to call this commissioner out of order when I mentioned the matter during the work session. Gaveling me down, he then rushed the commission to a vote. I was not "attacking" the chairman, and I was not out of order. I continue to believe that a voluntary recusal would have been the most appropriate and professional manner in which to handle this.

SIGNED:

