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**MONTANA PUBLIC SERVICE COMMISSION**

R. Allan Payne  
Frank C. Crowley  
Jacqueline R. Papez  
DONEY CROWLEY P.C.  
Diamond Block, Suite 200  
44 West 6th Avenue  
P.O. Box 1185  
Helena, MT 59624-1185  
Telephone: (406) 443-2211  
Facsimile: (406) 449-8443  
Email: rpayne@doneylaw.com  
fcrowley@doneylaw.com  
jpapez@doneylaw.com

*Attorneys for Republic Services of Montana*

**PUBLIC SERVICE COMMISSION FOR THE STATE OF MONTANA**

IN THE MATTER OF the Petition of Bull Mountain Sanitation, LLC for a Declaratory Ruling concerning exemption from Class D Motor Carrier Certification requirements

Cause No.: T-14.23.DR

**REPLY IN SUPPORT OF  
REQUEST FOR DEFERRAL OF  
DECLARATORY RULING**

COMES NOW Republic Services of Montana (“Republic”) and, in accordance with the deadline set by the Public Service Commission (“PSC”) for this Reply, submits its Reply in support of its Request for Deferral of Declaratory Ruling Pending District Court Ruling as follows:

**I. INTRODUCTION**

Republic takes this opportunity to clarify the factual background for the PSC’s information and convenience. After learning that Bull Mountain Sanitation, LLC (“Bull Mountain”) was hauling solid waste throughout Musselshell County without a Certificate of Public Convenience and Necessity, Republic sent Bull Mountain a letter asking that it cease

operations outside the scope of the exemption contained in Mont. Code Ann. § 69-12-102(c). Bull Mountain's attorney responded that he had taken the matter under advisement, but did not specify what action, if any, Bull Mountain would take. Counsel for Republic attempted to call counsel for Bull Mountain to discuss the meaning of his letter, but counsel for Bull Mountain chose to ignore the calls and Republic's attempts to informally resolve this issue. Instead, Bull Mountain attempted to file its first Petition with the PSC, but that Petition was rejected.<sup>1</sup> When it learned of Bull Mountain's rejected Petition, Republic initiated a civil action for injunctive relief in the District Court for Musselshell County ("District Court Action"), as provided in Mont. Code Ann. § 69-12-209(2). That District Court Action was filed on the same day Bull Mountain successfully filed its corrected *Petition for Declaratory Ruling* ("Petition") before the PSC.

Now, Bull Mountain would have the PSC resolve the issue between just the PSC and Bull Mountain and as an end-run around Republic's rights of due process by refusing to allow Republic any meaningful involvement in its resolution. As described more fully below, Republic simply requests that the PSC defer acting on the Petition until the District Court has had the opportunity to rule in Republic's District Court Action. Such action is appropriate, as the District Court Action is the only forum in which all the parties will obtain the full relief they seek, as guaranteed under Montana statutes, and as the District Court Action has proceeded with Republic's submission of its *Motion for Summary Judgment*. Conversely, if the Petition proceeds before the PSC without deferral, the result will be that it will inevitably end up before

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<sup>1</sup> Of note, Bull Mountain seeks to mislead the PSC as to the import of its rejected filing, claiming that "[i]n substance, Bull Mountain Sanitization's [sic] Petition certainly could be considered retroactive to September 23." Response at 6. However, Bull Mountain acknowledges that, because of (significant) errors in its Petition, the Petition was rejected by PSC staff. *Id.* Pursuant to Mont. Admin. R. 38.2.315, rejected documents are not considered filed. As such, the rejected Petition cannot serve as basis for when Bull Mountain filed its Petition. Instead, it was filed upon acceptance by the PSC—on September 26, 2014.

the District Court in any case: either as an appeal by Republic if Bull Mountain's position prevails, or as an action for injunctive relief to enjoin illegal hauling by Bull Mountain if the PSC disagrees with Bull Mountain. To be clear, such a deferral does not deny Bull Mountain its rights to a Petition—it simply delays determination by the PSC until the District Court Action is concluded.

## II. ARGUMENT

The PSC should defer a decision on Bull Mountain's Petition until after the District Court Action filed by Republic against Bull Mountain is resolved.

### **A. The District Court action is the only action where all parties can obtain full relief, and is the proper venue for the applicable statutory interpretation.**

It is entirely appropriate and proper for the PSC to defer any action on Bull Mountain's Petition under the circumstances, as (1) the District Court Action is the only forum under which all the parties can obtain the full relief sought; (2) the statutory interpretation necessary for the matter is not an matter within the PSC's special expertise; and (3) the requested deferral would be entirely congruent with the PSC's previous actions when faced with a similar issue.

#### 1. The District Court action will afford full relief to all parties

First, the District Court Action is the only forum where both the scope of the statutory waste hauling exemption and Republic's right to an injunction can be fully adjudicated—thereby addressing the concerns of all parties. Mont. Code Ann. § 69-12-209(2) gives Republic the right to a District Court action, providing that

[i]f any motor carrier shall operate in violation of the provisions of [the Motor Carrier code] . . . 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 [the Motor Carrier code] . . .

Thus, Mont. Code Ann. § 69-12-209(2) clearly grants Republic (as the entity harmed by Bull Mountain's operations outside the statutory exemption for unlicensed haulers) the right to seek

relief in the District Court. Moreover, contrary to Bull Mountain's unsupported assertions, nothing in this statute requires that Republic *first* go to the PSC for a relief, and *then* go to the District Court—in fact, that is plainly contrary to the statutory language, and contrary to Montana Supreme Court precedent. In *Stoner v. Underseth*, 85 Mont. 11, 277 P. 437, 440 (1929), the Montana Supreme Court held that the hearing process of the predecessor to the PSC was “not such plain, speedy, and adequate remedy as to deprive a court of equity of jurisdiction to grant injunctive relief.” *Id.* Therefore, a party licensed as a motor carrier does not have to wait “until the matter in controversy has been ‘thrashed out’” by the PSC, before asking a district court to enjoin “a competitor operating without a license.” *Id.* Republic's actions are congruent with both the statutory provision and Montana precedent, and the PSC should defer to the District Court Action before making its determination.

Moreover, this matter will likely end up before the District Court in any case. If the PSC does not defer the Petition before it, and agrees with Bull Mountain's interpretation of the statutory exemption (finding that all “rural areas” are exempt from PSC regulation), Republic will likely appeal such determination to the District Court as an aggrieved person.<sup>2</sup> Conversely, if the PSC determines that Bull Mountain's hauling throughout Musselshell County is not exempt from PSC regulation, either Republic or the PSC will have to ask the District Court to enjoin Bull Mountain from such illegal hauling, pursuant to the mandates of Mont. Code Ann. § 69-12-209(2). In the interest of conserving time and efforts of Republic, the PSC, and Bull Mountain, the PSC should defer action in favor of the District Court Action, as that is the only

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<sup>2</sup> Mont. Code Ann. § 2-4-702(1)(a) allows any person “who is aggrieved by a final written decision” of an agency the right to appeal to the District Court. Clearly, if the PSC determined that Bull Mountain could haul throughout Musselshell County without the necessity of a certificate of public necessity and convenience, such decision would be appealable by Republic, as it would affect Republic's ability to fully utilize its certificate, making Republic aggrieved under the statute. See *Montana Power Co. v. Montana Dep't of Pub. Serv. Regulation*, 218 Mont. 471-480-81, 709 P.2d 995, 1000 (1985) (person or nonparty is aggrieved, with standing to appeal an administrative agency decision, where one has a direct, immediate, and substantial interest in the decision, and would be prejudiced by the judgment or benefited by its reversal.).

course of action which will save all parties the two-step process of determination before both tribunals.

2. The statutory interpretation necessary to determine whether Bull Mountain's hauling is lawful is properly a question for the District Court

Further, the requested deferral is correct and appropriate, as the statutory interpretation necessary for Republic's District Court Action is a matter properly before the District Court, and not particularly within the specialized expertise of the PSC. Bull Mountain does not dispute that it does not possess a Certificate of Public Convenience and Necessity allowing it to haul in Musselshell County and, thus, its hauling is lawful *only* if within the statutory exemption for haulers. The only applicable statutory exemption provides that the Motor Carrier Code does not apply to and regulate:

[t]he transportation of household goods and garbage by motor vehicle in a city, town, or village with a population of less than 500 persons according to the latest United States census or in the commercial areas of a city, town, or village with a population of less than 500 persons, as determined by the commission.

Mont. Code Ann. § 69-12-102(c).<sup>3</sup> Thus, the ultimate question as to the propriety of Bull Mountain's hauling is whether its activities have been limited to a "city, town, or village" of under 500, or the commercial areas adjacent thereto.<sup>4</sup>

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<sup>3</sup> Bull Mountain also erroneously claims that the PSC might issue an "injunction" in response to Bull Mountain's Petition. See Response at 5. However, under Mont. Code Ann. § 69-12-102(c), an injunction may *only* be sought before the District Court—either by an injured party, or the PSC. *Id*; *Mont. Power Co. v. Pub. Serv. Comm'n.*, 206 Mont. 359, 378, 671 P.2d 604, 614 (1983).

<sup>4</sup> Curiously, Bull Mountain would have the PSC believe that the ultimate determination of whether Bull Mountain is operating lawfully does not necessarily include an interpretation of the word "village." See Response at 5. This is either absurd, or Bull Mountain has failed to set forth a basis for the PSC to grant its sought-after relief in its Petition. The only exemption to PSC regulation, and to the requirement for a certificate of public convenience and necessity, is found for haulers operating in "cities, towns, or villages," or the commercial areas thereto, which are under 500 persons in population. Mont. Code Ann. § 69-12-102(c). See *Petition for Declaratory Ruling* at 6:2-3 ("[Bull Mountain] contends that it . . . falls within the exemption provided in M.C.A. § 69-12-102(1)(c).") While cities and towns are defined under Montana statutes (see Mont. Code Ann. § 7-1-4111), villages are not—and thus the definition of "villages" is the *only* basis Bull Mountain can claim for the propriety of its operations. If this is not Bull Mountain's basis, it has failed entirely to set forth any basis for the PSC to grant the declaration it seeks, and the Petition should be dismissed.

A court is to defer to an agency's legal determination where the agency is interpreting a statute it has been legislatively authorized to administer. *Lewis v. B & B Pawnbrokers, Inc.*, 1998 MT 302, ¶ 43, 292 Mont. 82, 968 P.2d 1145 (citations omitted). Moreover, "[t]he PSC is specifically *not* vested with judicial powers." *Williamson v. Montana Public Service Com'n.*, 2012 MT 32 ¶ 31, 364 Mont. 128, 272 P.3d 710. Here, Mont. Code Ann. § 69-12-102 provides exemptions from PSC regulation, those areas over which the PSC has no administrative powers. While Mont. Code Ann. § 69-12-102(c) does provide that the PSC is to determine what constitutes the "commercial areas of a city, town or village" under 500, it does not provide PSC administrative authority to make a determination of what a "city, town, or village" is under the statute. This interpretation of the statute is entirely congruent with the PSC's past actions, as the PSC has, by regulation, determined the extent of "commercial areas," while it has, properly, not defined cities, towns, or villages. Mont. Admin. R. 38.3.106. Thus, the determination of what constitutes a "city" "town" or "village" (necessary to determine whether Bull Mountain's activities fall within the exemption) is properly a question for the District Court in the litigation filed by Republic. However, until such determination has been made by the District Court, the PSC should defer a determination on Bull Mountain's Petition.

Moreover, the determination of what constitutes a "city," a "town," or a "village" is not an area of particular agency expertise for the PSC. Rather, the District Court in Musselshell County would have the peculiar knowledge of the area to best decide this issue.<sup>5</sup> When "the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility." *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1104 (3d Cir., 1995) (citation omitted);

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<sup>5</sup> Moreover, deferral by the PSC would not have the effect of disclaiming an interest in statutory interpretation. The District Court could, of course, remand all or part of proceedings before it if it determines that the expertise of the PSC is necessary or appropriate for any determination of the issues between Republic and Bull Mountain.

see also, e.g. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114–15, 96 S.Ct. 1895, 1910–11, 48 L.Ed.2d 495 (1976) (court does not defer to agency determination in area outside of agency’s expertise); *Johansen v. State*, 1999 MT 187, ¶ 9, 295 Mont. 339, 983 P.2d 962. The PSC has substantial expertise in many areas, including utility ratemaking and oversight, and oversight of regulated motor carriers. However, a determination of what constitutes different classes of municipal areas within the state of Montana is not one of them. Instead, such a determination is properly the provenance of the District Court and, as such, the PSC should stay determination of Bull Mountain’s Petition until the District Court Action has been concluded.

3. The PSC has deferred action in favor of a District Court proceeding in the past

Finally, deferring Bull Mountain’s Petition would be entirely in line with the PSC’s prior precedent—in the only case involving similar issues, the PSC *did* initially defer to the District Court Action. Although Bull Mountain cites to the Montana Supreme Court’s decision in *Grouse Mt. Associates, Ltd. v. Montana Dept. of Pub. Serv. Reg., Montana Pub. Serv. Com’n.*, 284 Mont. 65, 943 P.2d 971 (1997), it fails to appreciate that the PSC decided “as a matter of courtesy, if not a legal requirement,” to stay its proceedings on a pending Petition for Declaratory Ruling filed by an unlicensed motor carrier in favor of a district court action addressing the same issues filed by a licensed motor carrier. See *In the Matter of Grouse Mountain Lodge*, PSC Docket T-93-33 DR (May 3, 1993). Although the District Court later determined to defer to the PSC on the issue (at the request of the parties to the matter), as a matter of courtesy, if not a legal requirement, the Commission should stay this proceeding in favor of the District Court Action in Musselshell County. Moreover, unlike the *Grouse Mountain* case, the issue in the Bull Mountain Petition does not involve any of the several areas of the PSC’s administrative expertise, but in essence, as described above, simply requires a statutory interpretation of the word

“village” under Montana law. Accordingly, the PSC should defer any action on Bull Mountain’s Petition pending the outcome of the District Court Action.

**B. The requested deferral does not deny Bull Mountain its rights.**

Bull Mountain claims that the PSC should not defer because it “has been granted by the legislature and the PSC the right to obtain declaratory ruling from a state agency,” and there is no provision allowing a non-party to deny Bull Mountain its “right to have the Petition ruled upon.” *Response* at 3. This is a misstatement of the applicable administrative law. Bull Mountain is not entitled by law to have its Petition ruled upon—it is entitled to *apply* for a declaratory ruling, not to have one issued. The PSC is free to grant, deny, or defer its decision on this Petition, and the decision of the agency to issue a ruling or refuse to do so is subject to judicial review. Mont. Code Ann. § 2-4-501. Republic is not asking the PSC to deny Bull Mountain any rights accorded to it. Instead, Republic respectfully suggests that, as described above, where there is a correlative statute authorizing relief directly from the District Court, the PSC has the discretion to defer a Petition for Declaratory Ruling, and protocol suggests that such a deferral, especially under the facts of this case, would be the most efficient and expedient course of action for the parties, the PSC, and the Court. As such, Republic simply asks the PSC to defer any ruling on Bull Mountain’s Petition until the District Court Action has been resolved.

**C. Bull Mountain misstates the law applicable to governmental agencies.**

Bull Mountain would have the PSC believe that it need not follow the holding of a district court regarding statutory interpretation. *See Response* at p. 3, § C. Bull Mountain misapprehends the PSC’s status—the PSC is a governmental agency, not a would-be litigant. As the District Court for the District of Minnesota aptly put it, “[a]s was first made clear in the

Supreme Court case of *Marbury v. Madison*, [1 Cranch 137, 2 L.3d 60 (1804)], it is the duty of government agencies to follow the law as interpreted by the courts.” *Polaski v. Heckler*, 585 F. Supp. 997, 1002 (D. Minn., 1984). An order of a District Court judge is binding throughout the state on “all matters presented to or heard by them.” Mont. Code Ann. § 3-5-312(1). As such, Bull Mountain’s arguments regarding the precedential effect of a court ruling on the PSC should not be given credence.

**D. Bull Mountain’s interpretation of PSC procedures would effectively deny Republic its due process rights.**

Bull Mountain argues that Republic is nothing more than an “intermeddler” with no right to intervene in this matter, no right to ask a district court to issue an injunction under Mont. Code Ann. § 69-12-209, and no right to appeal an adverse decision. First, Bull Mountain clearly does not understand the PSC’s procedures in a declaratory ruling action, claiming that, because Republic is not a party to its Petition, it has no rights related to the Petition, and “does not play any role in the PSC’s ruling.” Response at 4. However, under Mont. Admin. R. 38.2.2403, any person desiring to appear and participate in a proceeding before the PSC may petition for intervention in the proceeding. Further, the PSC has granted such requests for intervention. *See In the Matter of the Petition by Mountain Water Company for Declaratory Rulings*, Notice of Commission Action Granting Intervention, PSC Doc. No. D2011.1.8 (May 24, 2011) (granting the Clark Fork Coalition the right to intervene in a Petition for a Declaratory Ruling filed by Mountain Water). As such, if the PSC decided to take up this matter while the District Court Action is still pending, Republic has the right to seek intervention and the right to appeal if intervenor status is denied. *See* Mont. Code Ann. §§ 2-4-701 and 69-3-402.

Further, and more importantly, to accept Bull Mountain’s interpretation of the applicable procedures would be to deny Republic its right to protect its significant and protectable interest

in this matter, which would amount to a violation of Republic's due process rights. Bull Mountain argues that the Republic's District Court Complaint should be dismissed, and that "Republic is some intermeddler in [Bull Mountain's Petition]," who should "not play any role in the PSC's ruling upon [its] Petition." *Id.* at 4, 5 (emphasis in original). Bull Mountain offers that Republic may participate only "as an interested member of the public," and insinuates that only Bull Mountain could appeal a decision of the PSC.<sup>6</sup> *Id.*, at 6.

If Bull Mountain's position prevails, any business could transport garbage for hire anywhere in the state, except within the boundaries of the 83 cities, towns, and villages in Montana with a population over 500.<sup>7</sup> Moreover, Bull Mountain would have all of this happen without Republic (or any other Class D certificate holder) having the opportunity to intervene or the right to appeal an adverse decision, even though, as licensed haulers, they would have a significant interest in any such decision.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Montana Power Co. v. Montana Public Service Com'n.*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), which in turn quotes *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As the Commission is well aware, "[a]dministrative agencies are not exempt from the constitutional restraints of due process . . ." *Id.* Bull Mountain would have Republic's interests determined in a manner where it has no meaningful opportunity to be heard, no right to file an action with the district court, and no right to appeal an adverse decision. This is plainly contrary the due process protections enshrined in the Montana and U.S. Constitutions, and would make a mockery of the

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<sup>6</sup> See Footnote 2, *supra*.

<sup>7</sup> See American FactFinder <http://factfinder2.census.gov/>

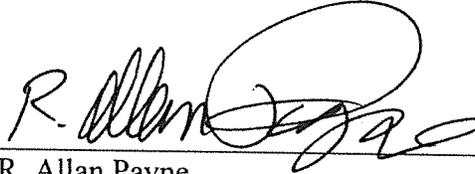
PSC's and the Court's processes meant to protect such rights. As such, the PSC should give Bull Mountain's interpretation of the PSC's and the District Court's procedures no credence.

### III. CONCLUSION

With all due deference to the PSC and its adjudicatory procedures, the District Court is the only forum through which all parties can obtain the full relief—both statutory interpretation and, if necessary, injunctive relief to enjoin Bull Mountain from hauling outside the statutorily exempt areas of Musselshell County. Therefore, in order to conserve the time and resources of the PSC, Republic, Bull Mountain, and the Court, Republic respectfully requests that the PSC defer any determination upon Bull Mountain's Petition until the District Court action filed by Republic is resolved. Such deferral will serve to expedite the relief sought by both Bull Mountain and Republic, and will serve to obviate the need for two separate proceedings before two tribunals.

DATED this 14<sup>th</sup> day of October, 2014.

DONEY CROWLEY P.C.

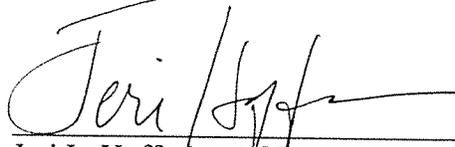
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R. Allan Payne  
Frank C. Crowley  
Jacqueline R. Papez  
*Attorneys for Republic Services of Montana*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Reply in Support of Request for Deferral of Declaratory Ruling* was served via U.S. mail, first-class postage prepaid, on this 14 day of October, 2014, upon the following:

Jared M. Le Fevre / Emily L. Royer  
Crowley Fleck PLLP  
P.O. Box 2529  
Billings, MT 59103-2529  
Attorney for Petitioner Bull Mountain Sanitation, LLC

  
\_\_\_\_\_  
Jeri L. Hoffman, ACP  
Paralegal to R. Allan Payne