

FILED

JAN 25 2023

By **CJ RESTIVO** Clerk of District Court  
Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

ALLIED WASTE SERVICES OF  
NORTH AMERICA, LLC d/b/a  
REPUBLIC SERVICES OF  
MONTANA,

Plaintiff,

v.

MONTANA PUBLIC SERVICE  
COMMISSION,

Defendant,

Cause No. ADV-2022-538

**ORDER - PETITION FOR  
JUDICIAL REVIEW**

Before the Court is Petitioner Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana's (Republic) petition for judicial review. William W. Mercer, and Brianne C. McClafferty represent Republic. Ben Reed and Lucas Hamilton represent Respondent Montana Public

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1 Service Commission (PSC). Quentin M. Rhoades and Alison P. Garab represent  
2 Intervenor L&L Site Services, Inc. (L&L).

### 3 **ISSUE**

4 The issue before the Court is whether the PSC erred in granting  
5 L&L's application for a Class D license to haul waste in Missoula County.

### 6 **STATEMENT OF FACTS**

7 This petition for judicial review arises from the PSC's Final Order  
8 in Docket 2020.12.121, 7769(i), which granted L&L's application for a Class D  
9 license between all points and places within Missoula County and to any lawful  
10 disposal site. Under Montana law, the PSC regulates all motor carriers within the  
11 State, including garbage haulers. Mont. Code Ann. §§ 69-12-201, et seq.

12 Among other duties, the PSC regulates entry into the garbage hauling market.  
13 Republic is a national waste disposal company operating in 42 states. L&L is a  
14 Montana waste disposal company currently operating in Gallatin County.

15 Prior to the PSC's Order, Republic was the only waste disposal  
16 company authorized to provide residential services in Missoula County. On  
17 December 16, 2020, L&L filed an application for a certificate of public  
18 convenience and necessity (PCN) to haul garbage in Missoula County as a Class  
19 D motor carrier. Subsequently, Republic filed a protest in the docket which  
20 created a contested case under the Montana Administrative Procedure Act  
21 (MAPA). In response to Republic's protest, L&L amended its application on  
22 April 20, 2021.

23 In October 2021, the PSC held a five-day hearing on the matter. On  
24 April 29, 2022, the PSC issued its final order granting L&L's application. On  
25 June 30, 2022, Republic filed its petition for judicial review asking the Court to

1 reverse the PSC's order and remand the case with instructions to deny L&L's  
2 application. The Court heard oral argument on the petition on January 12, 2023.

### 3 **PRINCIPLES OF LAW**

4 The Montana Administrative Procedures Act (MAPA) governs  
5 petitions for judicial review. Montana Code Annotated § 2-4-704 provides the  
6 applicable standard of review:

7 (1) The review must be conducted by the court without a jury  
8 and must be confined to the record. In cases of alleged irregularities  
9 in procedure before the agency not shown in the record, proof of the  
10 irregularities may be taken in the court. The court, upon request,  
11 shall hear oral argument and receive written briefs.

12 (2) The court may not substitute its judgment for that of the  
13 agency as to the weight of the evidence on questions of fact. The  
14 court may affirm the decision of the agency or remand the case for  
15 further proceedings. The court may reverse or modify the decision if  
16 substantial rights of the appellant have been prejudiced because:

17 (a) the administrative findings, inferences, conclusions, or  
18 decisions are:

- 19 (i) in violation of constitutional or statutory provisions;
- 20 (ii) in excess of the statutory authority of the agency;
- 21 (iii) made upon unlawful procedure;
- 22 (iv) affected by other error of law;
- 23 (v) clearly erroneous in view of the reliable, probative, and  
24 substantial evidence on the whole record;

25 (vi) arbitrary or capricious or characterized by abuse of  
discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were  
not made although requested.

Mont. Code Ann. § 2-4-704

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“A review under the arbitrary and capricious standard ‘does not permit a reversal merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable or seemingly unmotivated based on the existing record.’ *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 25, 365 Mont. 232, 242-243, 280 P.3d 877, 885 (quoting *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 24, 363 MT 310, 268 P.3d 31) “A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made.” *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 25, 364 Mont. 128, 139, 272 P.3d 71, 81. The district court reviews an agency's interpretations and applications of law to determine whether they are correct. *Knowles v. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595.

## ANALYSIS

Republic asks the Court to reverse the PSC's order on four separate grounds. First, Republic argues the PSC's order is contrary to its own precedent. Second, Republic argues the PSC erred in granting L&L's application by failing to apply the plain language of Montana Code Annotated § 69-12-323. Third, Republic argues the PSC's findings regarding whether L&L is "likely to provide service between all points and places within Missoula County on a permanent and continuous basis throughout 12 months of the year" are clearly erroneous and not supported by evidence. Fourth, Republic argues the PSC acted erroneously, arbitrarily, and capriciously by ignoring L&L's expert opinion poll

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1 and relying solely on the testimony of limited shipper witnesses. The Court will  
2 address each argument in the order presented.

3 Republic first argues the PSC failed to follow its own precedent in  
4 granting L&L's application. Republic bases this contention on a 2019 PSC order  
5 involving the same parties. L&L first filed an application to serve Missoula  
6 County in March 2018. After a contested case proceeding, the PSC denied  
7 L&L's first application based on its finding Missoula County did not "need an  
8 additional carrier at this time." Republic relies on the following passage from the  
9 PSC's 2019 order:

10 Without evidence to investigate these issues, the Commission's  
11 analysis is less robust. To address these issues, the Commission puts  
12 all future applicants and protestants in Class D PCN applications  
13 concerning large and complex service areas on notice that both  
14 parties will be expected to provide operational and market analysis to  
15 support their arguments. This requirement does not eliminate the  
16 ability to present shipper witness testimony. Nor is this  
supplemental evidence required of parties. Rather, operational and  
market analysis will merely supplement the Commission's  
traditional PCN analyses.

17 Pet. Ex. A (internal citations omitted). Republic argues the PSC's 2019 order  
18 established precedent regarding evidence required for an applicant to demonstrate  
19 public need in Missoula County and other large, complex markets. In the recent  
20 proceedings, however, neither L&L nor Republic submitted the evidence  
21 identified in the PSC's 2019 order. As a result, Republic maintains the PSC's  
22 decision to grant L&L's application without the operational and market analysis  
23 evidence ignores the precedent set in the previous proceeding.

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1           The PSC argues its recent order follows its own precedent for  
2 evaluating Class D license applications. Pursuant to Montana Code Annotated  
3 § 69-12-323(2)(a), the PSC must issue a Class D certification if “public  
4 convenience and necessity require the authorization of the service proposed or  
5 any part of the service proposed.” The PSC considers three factors in meeting  
6 their statutory obligations in Class D license proceedings: (i) the transportation  
7 service being furnished by other motor carriers; (ii) the likelihood of the  
8 proposed service being permanent and continuous throughout 12 months of the  
9 year; (iii) the effect of the proposed service on other carriers that are essential and  
10 indispensable to the communities to be affected by the proposed license.  
11 Although the 2019 order put the parties on notice of the PSC’s expectations  
12 regarding evidence they would like to see, it also explicitly referred to the  
13 evidence as supplemental and not required. According to the PSC, the evidence  
14 on which the recent decision is based is the same type of evidence on which it  
15 relied in 2019. Both orders relied on shipper witness testimony—but the results  
16 differed because the content of the testimony differed.

17           Although the Court notes the language of the PSC’s 2019 order is  
18 somewhat confusing in referring to the expectation of providing operational and  
19 market analysis as “this requirement” but immediately thereafter indicating it is  
20 not required, the Court finds the paragraph read as a whole makes the PSC’s  
21 intentions clear. The PSC expressed a preference in the 2019 order but stopped  
22 short of holding it could not decide a case without the requested evidence. Given  
23 the PSC directed its request at both applicants and protestants, Republic’s  
24 argument falls short, as Republic was equally deficient in presenting such  
25 evidence for the PSC’s consideration. A party cannot argue the PSC’s decision is

1 not based on the correct type of evidence when that party bore equal  
2 responsibility for submitting such evidence. L&L argues the contextual,  
3 operational, and market analysis evidence presented during the 2021 hearing  
4 demonstrates more serious systematic issues with Republic's service, operations,  
5 and policies compared to the evidence of the 2019 hearing. Given the categories  
6 of evidence the parties chose to present, the PSC's consideration of the evidence  
7 followed previous Class D license application precedent.

8           Next, Republic argues the PSC erred in granting L&L's application  
9 by failing to apply the plain language of Montana Code Annotated § 69-12-323.  
10 Republic claims the PSC ignored the statute's directive requiring it to consider  
11 "the effect that the proposed transportation service may have on other forms of  
12 transportation that are essential and indispensable to the communities affected by  
13 the proposed transportation service or that might be affected by the proposed  
14 transportation service." Republic attempts to distinguish between the PSC's  
15 interpretation of the statute, which asks "will the granting of a new license  
16 nonetheless harm an incumbent carrier contrary to public interest," from the  
17 statutory language which refers to consideration of how a new hauler "might" or  
18 "may" affect the incumbent hauler.

19           Republic claims the PSC ignored evidence which demonstrates L&L's  
20 entry into the market may raise rates for Republic's rural customers. According  
21 to Republic, the vertical integration model it currently employs in Missoula  
22 County allows it to subsidize the cost of services to rural customers through its  
23 rates for urban customers. Republic presented testimony that L&L's entry into  
24 the Gallatin County market caused Republic to lose market density resulting in  
25 higher marginal cost per customer. The PSC, on the other hand, argues it did



1 consider Republic's argument regarding the effect granting L&L's application  
2 may have on Republic's rural customers and found it unpersuasive. The PSC  
3 concluded Republic's size and profit margin would mitigate against any revenue  
4 impacts it may experience due to competition from L&L. The Court finds the  
5 PSC met the requirements of Montana Code Annotated § 69-12-323 by  
6 considering the testimony presented by Republic's witnesses. The statute directs  
7 the PSC to consider potential effects as one factor when considering an  
8 application—it does not require it to automatically deny applications simply  
9 because there may be an effect.

10 Republic next argues the PSC's findings regarding whether L&L is  
11 "likely to provide service between all points and places within Missoula County  
12 on a permanent and continuous basis throughout 12 months of the year" are  
13 clearly erroneous and not supported by evidence. Republic argues the evidence  
14 in the record demonstrates L&L lacks the ability to serve the entire county upon  
15 receiving its Class D permit. At the time of the hearing, L&L admitted it only  
16 possessed five trucks dedicated for use in Missoula County and intended to use  
17 fewer than 1,000 total dumpsters and cans in the service area. Further, Republic  
18 argues L&L's budgeted salary line item for the first two years of its proposed  
19 Missoula County operations is insufficient to hire enough drivers to serve the  
20 entire area. Based on testimony from L&L's owner, Republic believes L&L will  
21 choose to serve only the most profitable areas and leave other customers for  
22 Republic to serve.

23 The PSC argues it is unreasonable to expect an applicant to have  
24 duplicated an incumbent carrier's fleet and personnel before the PSC even holds  
25 a hearing. Because the outcome of the hearing is unknown, the risk involved in



1 such an investment would effectively prohibit anyone from applying for a new  
2 Class D license. The PSC contends it is reasonable to grant authority to the new  
3 carrier on the assumption the new carrier will scale its operations to meet  
4 demand. The PSC considered not only L&L's current Missoula fleet but also  
5 L&L's track record in Gallatin County. Although the PSC considered Republic's  
6 arguments, it found the testimony of L&L's lead witness and L&L's  
7 demonstrated ability to expand to meet demand more persuasive.

8 Pursuant to Montana Code Annotated § 2-4-704(2), "[t]he court  
9 may not substitute its judgment for that of the agency as to the weight of the  
10 evidence on questions of fact." If an applicant were required to demonstrate it  
11 could meet the needs of an entire county immediately upon the PSC granting an  
12 application, the barrier to market would be insurmountable for all but the largest  
13 companies. It was not clearly erroneous for the PSC to place substantial weight  
14 to evidence of L&L's ability to perform in Gallatin County as an indicator of its  
15 ability to expand into the Missoula market.

16 Finally, Republic argues the PSC acted erroneously, arbitrarily,  
17 and capriciously by ignoring L&L's expert opinion poll and by relying solely on  
18 the testimony of limited shipper witnesses. L&L commissioned an opinion poll  
19 of Missoula County residents for the purpose of determining customer  
20 satisfaction related to Republic's services. The survey collected responses by  
21 sending a text message survey to 15,000 recipients and conducting phone  
22 interviews. The text message accompanying the survey informed recipients their  
23 participation could "result in more choice for [the recipient] and [the recipient's]  
24 family." Only 4% of the text message recipients completed the survey. Republic  
25 argues the low poll participation rate indicates Missoula County does not have an

1 unmet need for a new hauler. Of the approximately 600 people in Missoula  
2 County who responded to the poll, 81% of respondents were satisfied with  
3 Republic's waste and garbage hauling services. Republic argues the PSC's  
4 decision to ignore the poll results in favor of testimony of customer complaints  
5 from L&L's handpicked shipper witnesses is arbitrary and capricious.

6 The PSC states it did not rely on the opinion poll to make findings  
7 favoring either party because the results of the survey were mixed. Although  
8 81% of respondents said they were satisfied with Republic's service, half of  
9 respondents said they were unsatisfied with Republic's prices, and roughly 87%  
10 supported approval of another carrier. The survey did not clearly favor one party  
11 over the other and therefore was of limited use. On the other hand, the PSC has  
12 long relied on testimony of shipper witnesses in determining whether there is an  
13 unmet need in a particular service area. *See, e.g. McGree Corp. v. Mont. PSC*,  
14 2019 MT 75, 395 Mont. 229, 438 P.3d 326. L&L provided testimony from eight  
15 shipper witnesses, former and current Republic employees, L&L's owner and  
16 employees, one expert witness, and "a variety of other witnesses."

17 The PSC observes Republic's petition does "not challenge the  
18 evidence that the Commission cited to support its findings regarding unmet need  
19 for services and need for better" service. *McGree* at ¶ 29. There, the Montana  
20 Supreme Court stated, "public need is not simply unmet demand, but also  
21 includes a need for reasonable pricing and better customer service." *Id.* at ¶ 25.  
22 The PSC, relying on shipper witness testimony, cited several concerns regarding  
23 Republic's services and business practices including disproportionately high  
24 rates, charging customers for larger containers than were supplied, unjustifiably  
25 high rate increases, and requiring customers without negotiating power or




1 alternative options to enter long-term service contracts. The PSC's decision not  
2 to rely on the inconclusive poll data over the testimony of shipper witness  
3 testimony is not arbitrary and capricious. Additionally, the PSC's findings are  
4 not clearly erroneous because they are based on substantial evidence regarding  
5 Republic's current business practices and testimony from Republic's Missoula  
6 customers. Accordingly,

7 **ORDER**

8 **IT IS HEREBY ORDERED** Allied Waste Services, LLC d/b/a  
9 Republic Services of Montana's petition for judicial review is **DENIED**.

10 DATED this 25<sup>th</sup> day of January 2023.

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13 MIKE MENAHAN

14 District Court Judge

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17  
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