

# Montana Public Service Commission



James Brown, Chairman  
Brad Johnson, Vice Chairman  
Tony O'Donnell, Commissioner  
Randall Pinocci, Commissioner  
Jennifer Fielder, Commissioner

January 13, 2021

Chairman Mercer, Vice-Chairman Howard, and members of the Joint Appropriations Subcommittee on Judicial Branch and Law Enforcement

Dear Chairman Mercer and Committee Members:

As requested in today's budget hearing for the Montana Public Service Commission ("Commission"), this letter breaks down the major obstacles the Commission has encountered in implementing HB 597 insofar as it pertains to implementation of a hearing examiner process.

1. **The Commission is finding it difficult to effectively separate functions with its current resources** – Parties appearing before the Commission have complained of the Commission comingling advocacy and judicial roles. This argument has been raised by parties in Mont. First Jud. Dist., Lewis and Clark Cause Nos. CDV-2020-27, *Broad Reach Power et al. v. PSC* and CDV-2018-318, *In re Application of Big Foot Dumpsters*. Specifically, the parties in these cases contend that, despite what the Commission believes to be administrative and statutory authority to the contrary, it is unconstitutional for the Commission to exercise its investigative authority in any contested case in which it will ultimately render a decision. These cases do not directly challenge the Commission's hearing examiner process, but the parties to those cases have taken the position that the foregoing critique applies equally to hearing examiner dockets and the Commission may not investigate and adjudicate even in a hearing examiner docket unless a complete separation of roles exists internally at the Commission (meaning permanently segregated staff—both physically and by role—into at least two, and possibly three "teams"). Other parties appearing before the Commission have echoed these concerns. The Commission maintains that its procedures and practices in administering contested cases are lawful and disputes the foregoing claims. However, even if the Commission were to agree that the foregoing concerns should be addressed, implementing the necessary changes to address those concerns would require at least one hearing examiner counsel, along with one (and likely more) advocacy counsel. Each of those groups of attorneys would be supported by separate teams of regulatory staff to assist and advise. It would also be beneficial—if not necessary—for a third "team" of advisory staff (both legal and regulatory) to advise the Commission itself on final contested case decisions. Current Commission resources are significantly deficient to address this type of separation of roles.
2. **Commissioners have expressed skepticism about the hearing examiner process** – MAPA standards of review would limit the ability of Commissioners to modify findings of fact made by hearing examiners in a contested case. Commissioners have expressed concerns that the hearing examiner process would therefore prevent them from exercising their authority as elected officials

and would hinder their ability to represent their constituents. Because of the limits imposed by MAPA in reviewing a hearing examiner's decision, there is legitimacy to these concerns.

3. **Commission contested case procedures would need to be updated to accommodate a hearing examiner process** – The Commission's current procedural rules are built around preservation and recognition of the Commission's investigative authority. These rules would need to be revised to better outline procedures and functions of staff in a hearing examiner process. The cases in which hearing examiners have been appointed thus far were intended, in part, to aid in identifying which administrative rules should be amended.
4. **Pending litigation will materially affect the value of the hearing examiner process.** The foregoing cases (*Broad Reach Power* and *Big Foot Dumpsters*) have challenged the Commission's traditional exercise of its investigative authority in contested cases on constitutional grounds, despite statutory authorization for the Commission to investigate any matter, at any time. The outcome of that litigation will affect how the Commission addresses the functional concern that led to HB 597. For instance, if the court rules against the Commission and declares that it can no longer investigate matters in contested case proceedings, the separation of judicial and alleged advocacy roles will be largely resolved. To the extent the legislature intended for the hearing examiner process to resolve that alleged combination of roles, it will be largely unnecessary. A hearing examiner process might still be valuable in that scenario, but would be driven largely by workload rather than a need to separate functions. This situation creates significant uncertainty in implementing any hearing examiner process.

We hope that this answers the questions posed during today's budget hearing, and we appreciate the opportunity to provide additional information on the topic. If further clarification is required, we are happy to do so upon request.

Sincerely,

/s/ James Brown

James Brown, Chairman (District 3)