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VIA EMAIL

August 25, 2025

The Honorable Governor Greg Gianforte
Montana State Capitol
P.O. Box 200801
Helena, MT 59620-0801

Re: Response to PSC Commissioner Jennifer Fielder's Unlawful Complaint to Immediately Suspend Commissioner Brad Molnar

Dear Governor Gianforte:

Less than 24 hours after NorthWestern Energy announced its proposed $3.6 billion sale to out-of-state conglomerate Black Hills Energy – a deal requiring approval from Montana's five-member Public Service Commission – PSC Commissioner Jennifer Fielder secretly dispatched a patently unlawful "confidential" complaint demanding you immediately suspend Commissioner Brad Molnar.

The timing isn't coincidental. It's calculated.

In 2007, Commissioner Molnar voted to reject another proposed buyout of NorthWestern Energy by Babcock and Brown Infrastructure, Ltd., another out-of-state conglomerate promising Montana ratepayers the moon. After lengthy and careful review, Commissioner Molnar and his colleagues rejected the deal because it "present[ed] the risk of harm to NorthWestern's financial integrity and to Montana customers of NorthWestern." History vindicated that judgment: Babcock and Brown collapsed into insolvency just two years later.

Every other commissioner who voted against the Babcock buyout has left office. Commissioner Molnar is the only current PSC member who has previously reviewed a NorthWestern buyout proposal. His experience equips the Commission with valuable institutional knowledge in evaluating the current proposal on its merits.

Commissioner Fielder knows this. That's why, on July 22, 2025, she led the charge to kill Commissioner Molnar's proposed rule requiring PSC staff to record their meetings with NorthWestern employees. The 3-2 vote rejecting transparency deprived Montanans of an added safeguard. Shortly thereafter, NorthWestern and Black Hills announced their proposed multi-billion dollar deal.

Commissioner Fielder's complaint appears less about workplace issues and more about discouraging rigorous oversight of regulated utilities. You should reject Commissioner Fielder's unlawful complaint because the law demands it. As detailed below, her complaint fails every legal standard Montana courts have established for gubernatorial suspensions of elected officials.

Commissioner Molnar would immediately challenge any suspension, and we are confident the courts would swiftly overturn your decision – leaving you to share in the legal and political wreckage.

More fundamentally, you should reject this complaint because Montana ratepayers deserve better. They deserve at least one commissioner willing to read the fine print, challenge the assumptions, and remember that utility regulators are supposed to regulate utilities – not serve as their enablers.

Commissioner Fielder's real complaint isn't that Commissioner Molnar violated workplace policies. It's that he won't violate his oath to the people of Montana. That's not grounds for suspension. Accordingly, Commissioner Molnar respectfully requests that you immediately reject Commissioner Fielder's covert invitation to skew the process in favor of corporate interests and, instead, uphold the law, allow the interests of Montana ratepayers to be considered, and preserve what remains of the PSC's integrity.

ANALYSIS

I. Commissioner Fielder Usurped the PSC's Authority and Violated the Montana Constitution's Right to Know by Sending Her Complaint to You Covertly

Commissioner Fielder's complaint is not just substantively deficient. By sending her complaint unilaterally and secretly, Commissioner Fielder violated both the PSC's own Internal Policy Manual and the Montana Constitution's Right to Know.

A. Commissioner Fielder Flagrantly Violated the PSC's Internal Policy Manual

The very policy manual that Commissioner Fielder criticizes Commissioner Molnar for not signing explicitly forbids what she has done. Section 2.17.1.2 of the PSC's Internal Policy Manual requires an affirmative vote of at least four commissioners before the Response Team, which Commissioner Fielder claims to be petitioning on behalf of, may file a complaint asking you to invoke Mont. Code Ann. § 69-1-113. Commissioner Fielder received no such vote.

The irony is breathtaking. Commissioner Fielder devotes significant space in her complaint to castigating Commissioner Molnar for refusing to sign the Internal Policy Manual, yet she herself brazenly violates the very policy she demands he follow. If adherence to internal policies is truly her concern, she should have obtained the required four-commissioner vote before sending any complaint to you.

B. Rule 2.17.1.2 Exists to Prevent Exactly This Abuse

The four-commissioner requirement is not bureaucratic formality—it is a critical safeguard against precisely the abuse Commissioner Fielder has committed. The rule prevents any single commissioner from weaponizing the complaint process to eliminate or coerce colleagues whose regulatory philosophy they oppose.

Commissioner Fielder's unilateral action reveals the wisdom of this requirement. Rather than building consensus among her fellow commissioners about alleged misconduct, she chose to circumvent the authority her colleagues share with her and appeal directly to executive power. This is not good governance; it is a misuse of process disguised as workplace administration.

Had Commissioner Fielder genuinely believed her allegations had merit, she could have called for a Commission vote. Her failure to do so speaks volumes about the strength of her case and the support she expected from her colleagues.

C. Commissioner Fielder's Concealment Violates the Montana Constitution's Right to Know

Even more troubling than Commissioner Fielder's procedural violations is her deliberate attempt to conceal them from both Commissioner Molnar and Montana ratepayers. The Montana Constitution guarantees that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government." Mont. Const. Art. II, § 9. Commissioner Fielder's complaint – sent by an elected public official to the Governor requesting the suspension of another elected official immediately following announcement of one of the largest proposed utility mergers in state history – is indisputably a public record of the highest public importance.

Yet Commissioner Fielder deliberately attempted to shield her complaint from public scrutiny by:

- Marking every page "CONFIDENTIAL" in large letters
- Refusing to provide Commissioner Molnar with a copy of the complaint that directly concerns him
- Failing to warn Commissioner Molnar that she had filed any complaint against him
- Attempting to conduct this entire process in secret.

We learned of Commissioner Fielder's complaint only after your General Counsel, Anita Milanovich, provided us with a copy. Commissioner Fielder's systematic concealment of her actions violates both the letter and spirit of Montana's constitutional commitment to transparent government.

D. The Timing Reveals Commissioner Fielder's True Motive

Commissioner Fielder's violations of both internal procedures and constitutional transparency requirements are not mere technicalities—they reveal the calculated nature of her strategy. By acting unilaterally and in secret, she sought to present you with a *fait accompli*: Commissioner Molnar's suspension would be announced before he could mount any defense or the public could scrutinize her motives.

This level of procedural manipulation, combined with her suspicious timing following the NorthWestern merger announcement, exposes Commissioner Fielder's complaint for what it truly is: not a good-faith effort to address workplace concerns, but a strategic attempt to remove a

commissioner with both the experience and independence to perform thorough regulatory review of major utility transactions. Commissioner Fielder's complaint should be rejected not only because it lacks legal merit, as explained below, but because it represents a fundamental abuse of the processes designed to protect both commissioners and the public they serve.

II. Commissioner Fielder's Complaint Lacks Good Cause and Violates Commissioner Molnar's Constitutional Rights

Commissioner Fielder invokes Mont. Code Ann. § 69-1-113[1] as authority for suspending Commissioner Molnar. The complaint fails at the threshold. No Montana case has ever interpreted "good cause" under this statute, but established precedent makes clear that suspension requires far more than Commissioner Fielder offers.

The Montana Supreme Court has consistently held that "for cause," in the context of gubernatorial suspensions or removals, means "for reasons which the law and sound public policy recognize as sufficient warrant for removal. . . that is 'legal cause' and not merely a cause which the appointing power, in the exercise of discretion, may deem sufficient." *State ex rel. Holt v. District Court*, 103 Mont. 438, 63 P.2d 1026, 1028 (1936) (citations omitted). Sound public policy necessarily requires that a public officer receive notice and a hearing before any suspension or removal. *Id.* at 1029, citing *State ex rel. Nagle v. Sullivan*, 98 Mont. 425, 40 P.2d 995, 999 (1935).

The notice requirement inherent in statutes such as Mont. Code Ann. § 69-1-113 includes a requirement of specificity – a public officer cannot be suspended or removed without first being apprised of the specific allegations against him or her. This requires that notice be "given to the officer of *the charges* made against him and he has been given an opportunity to be heard in his defense." *Holt* at 1028 (emphasis added); *id.* at 1028-29 (governors must provide "notice and the opportunity to disprove, if possible, the *charges* made.") (emphasis added). Commissioner Fielder's complaint fails to provide any such notice.

Moreover, suspension or removal of a public official by the governor requires actual evidence of misconduct. *State ex rel. Matson v. O'Hern*, 104 Mont. 126, 65 P.2d 619, 630 (1937) (prohibiting gubernatorial removal of public officials for cause when there is "an entire lack of substance in the charges or in the *evidence* to support them.") (emphasis added).

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[1] That statute states as follows:

> **Removal or suspension of commissioner.** If a commissioner fails to perform the commissioner's duties as provided in this title, the commissioner may be removed from office as provided by 45-7-401. Upon complaint made and good cause shown, the governor may suspend any commissioner, and if, in the governor's judgment the exigencies of the case require, the governor may appoint temporarily some competent person to perform the duties of the suspended commissioner during the period of the suspension.

Mont. Code Ann. § 69-1-113.

The cases cited above outline protections afforded by Montana law to *appointed* public officials. Commissioner Molnar enjoys even greater protection than that granted to appointed officials because he was elected by the people. *See, e.g., State ex rel. Ryan v. Norby*, 118 Mont. 283, 290, 165 P.2d 302, 305 (1946) (Morris, J., concurring) ("an elective public officer cannot be ousted without notice and an opportunity to be heard," thereby enabling the officer to "uphold the will of the electorate and exercise the public trust reposed in him until removed for cause."); see also *Israel v. DeSantis*, 269 So.3d 491, 498 (Fla. 2019) (Labarga, J., concurring) ("executive orders suspending officials pursuant to…the Florida Constitution must allege specific, detailed facts," which is "of paramount importance when the official in question was duly elected by the voters.").

Undermining Commissioner Fielder's complaint even more is that its conclusory allegations are based almost entirely on protected speech. Gubernatorial suspensions and removals may not be based on protected First Amendment activity because "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves." *Boquist v. Courtney*, 32 F.4th 764, 780 (9th Cir. 2022), quoting *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). Free speech rights of elected officials, such as Commissioner Molnar, are not encumbered by speech restrictions imposed on government employees. *Id.* (refusing to apply *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Pickering's* balancing test to legislator's First Amendment challenge to requirement to provide 12-hour notice of his intent to enter state capitol building). This protection extends to speech by Commissioner Molnar's attorney acting on his behalf. *Eng v. Cooley,* 552 F.3d 1062, 1076 (9th Cir. 2009) ("[a]n individual's personal First Amendment interest in his or her lawyer's speech on his or her behalf is a natural corollary of the First Amendment right to retain counsel").

The reasoning in *Warren v. DeSantis*, 631 F. Supp. 3d 1188 (N.D. Fla. 2022), counsels against any attempt by you to weaponize Commissioner Molnar's protected speech against him. Like Mont. Code Ann. § 69-1-113, the Florida Constitution authorizes gubernatorial suspensions of certain elected officials. In *Warren*, Governor Ron DeSantis exercised this power by suspending an elected prosecutor for publicly expressing a distaste for charging certain categories of crimes. The prosecutor challenged the suspension on First Amendment grounds. Governor DeSantis moved to dismiss, arguing that the prosecutor's lawsuit failed to state a cognizable claim under the First Amendment. *Id.* at 1192. The court denied the governor's motion, holding that "an elected official has at least as great a First Amendment right as a typical plaintiff." *Id.* at 1199.

Commissioner Fielder has listed eight "actions" she alleges warrant Commissioner Molnar's suspension. Each of them fails to meet the legal standards outlined above:

1. "<u>Threatened retaliation against anyone involved</u>"

Commissioner Fielder admits "Details pending completion of investigation" – meaning she provides *zero* facts or evidence supporting this conclusory – and inflammatory – allegation. This violates the basic requirement that gubernatorial suspensions or removals result from charges that are specific and supported by evidence. *Matson*, 65 P.2d at 630.

2. <u>"Claimed he is not subject to the policies adopted by the PSC"</u>

Commissioner Molnar's taking a legal position about the scope of his official duties constitutes core First Amendment activity. He has every right to assert legal positions about his role and responsibilities – this is precisely the type of speech that the Constitution protects. *Boquist*, 32 F.4th at 780.

3. <u>"Declined to participate in the fact-finding phase... because he was not allowed to confront. . . 'his accusers'</u>"

Commissioner Molnar's assertion of his constitutional right to confront accusers is legally protected conduct, not misconduct. His statement explaining his position constitutes protected speech. Penalizing him for merely asserting due process rights would be a blatant violation of the First Amendment.

4. <u>"Held a press conference to blow up publicity on an otherwise confidential HR matter"</u>

Public officials speaking to the press about matters of public concern receives the highest of constitutional protection. Commissioner Molnar is under no obligation to remain silent about the illegal and corrupt "investigation" pending against him – an investigation that appears designed to remove him and, thereby, silence a commissioner with experience evaluating major utility proposals. Commissioner Fielder's characterization ("blow up publicity") betrays improper hostility toward protected speech rights.

5. <u>"Made public comments that were dismissive, untruthful, and retaliatory in nature"</u>

Even if Commissioner Molnar's statements were criticisms or disputed factual claims, such speech enjoys robust First Amendment protection. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (extolling the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Moreover, Commissioner Fielder's labels ("dismissive," "untruthful," "retaliatory") are conclusory characterizations unsupported by analysis of what was actually said or why it was improper.

6. <u>"Demanded (through counsel) that the investigation be immediately terminated"</u>

This involves attorney advocacy on behalf of Commissioner Molnar, which receives independent First Amendment protection. *Eng*, 552 F.3d at 1076. Making legal arguments through counsel about the propriety of an investigation is core protected activity.

7. <u>"Stated (again through counsel) that as President, he will not approve any expenses DPSR incurs related to the investigation"</u>

This combines protected attorney advocacy with Commissioner Molnar's assertion of his official responsibilities regarding budget approval. Taking positions on spending priorities — even controversial ones — constitutes protected governmental speech.

8. <u>"Filed an official work session request to have the Commission negate the contracts</u>"

Filing official requests within established governmental processes represents quintessential protected speech. Commissioners have the right to bring matters before their colleagues through proper channels. Penalizing such conduct would chill democratic participation in government.

In short, every allegation by Commissioner Fielder against Commissioner Molnar is either:

- Conclusory (lacking factual specificity required by *Holt*)
- Factually unsupported (violating *Matson*'s evidence requirement)
- Protected First Amendment activity (immunized by *Warren*, *Boquist*, and *Eng*)
- Or a combination of the three.

Commissioner Fielder's complaint seeks to transform Commissioner Molnar's exercise of constitutional rights into grounds for suspension. This is precisely what federal courts have rejected as impermissible retaliation against protected speech. The complaint must be denied.

III. <u>The Underlying "Investigation" is as Unlawful as Commissioner Fielder's Complaint</u>

Commissioner Fielder cites Commissioner Molnar's refusal to authorize payment for the "investigation" against him as a basis for suspending him. That investigation is an absurd abuse of PSC resources by her and PSC staff. Commissioner Molnar has both a right and duty to refuse payment.

A. The Contract Exceeds the PSC's Legal Authority (Ultra Vires)

The PSC's authority to adopt its Internal Policy Manual derives from Mont. Code Ann. § 2-15-112, as explicitly stated in Section 2.2.1 of our Code of Conduct Policy. However, this very statute demonstrates why the current investigation lacks legal foundation.

Section 2-15-112(1)(b) provides that department heads may "establish policies to be followed by the department and its employees." The statute further authorizes the PSC to prescribe rules for the "conduct of the employees" under Mont. Code Ann. § 2-15-112(1)(f)(i)(B).

The Legislature's precise language is critical here. The statute consistently refers to "employees"—not "personnel," "officials," or "commissioners." This distinction is not accidental. Mont. Code Ann. § 2-18-103(1) explicitly excludes "elected officials" from the state personnel system, reflecting the fundamental legal distinction between employees and elected officials under Montana law.

The Legislature's deliberate use of the term "employees" in Mont. Code Ann. § 2-15-112, rather than broader terminology, confirms that department heads lack authority to establish investigative and disciplinary policies governing elected officials. Elected commissioners are not "employees" subject to the PSC's internal personnel policies.

And there is good reason for this distinction. Elected officials answer to the voters, not subordinate employees. When staff members hire outside counsel who demonstrably prioritize progressive causes and diversity initiatives over impartial legal analysis, they effectively usurp the authority voters delegated to elected commissioners. Montana voters chose Republicans for all five PSC seats precisely to avoid control by Helena's left-leaning political establishment.

Section 2-15-112 thus confirms that the PSC's Internal Policy Manual, including its Code of Conduct Policy, cannot lawfully be applied to elected commissioners. Any contract based on this unauthorized application of internal policies constitutes an ultra vires expenditure of public funds.

The contract for outside counsel was signed by PSC Chief Counsel Lucas Hamilton. He has announced that he will soon be working for Montana-Dakota Utilities, one of the utilities regulated by the PSC. That he commenced an investigation of Commissioner Molnar while simultaneously pursuing employment with a regulated utility is deeply troubling.

The outside counsel hired by Chief Counsel Hamilton, Amy Christensen, has recently attempted to defend this investigation by arguing that because the PSC collectively serves as the "department head," commissioners can somehow regulate themselves under Mont. Code Ann. § 2-15-112. This circular reasoning fundamentally misunderstands the statute's plain language and creates an absurd legal result. The fact that commissioners collectively constitute the "department head" does not transform individual commissioners into "employees" subject to departmental policies. Section 2-15-112 authorizes department heads to establish policies for their "employees" – it does not authorize them to establish policies governing themselves or other elected officials. If Ms. Christensen's interpretation were correct, any group of elected officials could circumvent the

Legislature's explicit exclusion in § 2-18-103(1) simply by voting to apply employee policies to themselves. This interpretation would erase the statutory distinction between elected officials and employees

Moreover, her argument ignores the fundamental principle that government entities cannot expand their own authority beyond what the Legislature has granted. The Legislature deliberately chose to exclude elected officials from the personnel system, and no amount of internal policy-making can override that statutory limitation.

B. Fundamental Due Process Violations

The investigation procedures outlined in the PSC's Code of Conduct Policy violate basic due process requirements. The policy provides no meaningful opportunity for notice or confrontation of accusers.

According to Section 2.16.1, the investigative file remains confidential throughout the process. Section 2.16.1.2 states that investigations "must be conducted consistent with ARM 2.21.4020 and 2.21.4021," rules designed for employees, not elected officials.

Most troubling, Section 2.17.1 allows the Response Team to simply "make a recommendation to the Commission" regarding disciplinary action, including removal from office as president (§ 2.17.1.1) or "a complaint to the Governor pursuant to MCA 69-1-113" (§ 2.17.1.2). The process provides no opportunity for the accused commissioner to:

- Review evidence before the Response Team's recommendation
- Cross-examine accusers or witnesses
- Present a defense with meaningful legal representation
- Challenge evidence or testimony before a decision is made

This procedure creates what can only be described as a star-chamber process where commissioners vote on removing a colleague based on a secret investigation and confidential recommendations, without the accused ever having a fair opportunity to defend himself.

C. Demonstrable Bias of Outside Counsel

Public records reveal that Amy Christensen has a consistent, decades-long pattern of partisan political activity that disqualifies her from conducting a fair investigation of any Republican elected official.

Campaign finance records show that Ms. Christensen has made political contributions exclusively to Democratic candidates over a 20-year period from 2004 to 2024, including donations to candidates for Governor, Attorney General, pro-abortion Supreme Court Justices, and various legislative offices. The record reflects no contributions to *any* Republican candidates.

Additionally, Ms. Christensen's professional associations include membership in the Diversity Law Institute, indicating her alignment with progressive political causes that will almost certainly influence her judgment in investigating a conservative commissioner.

This pattern of partisan political activity creates an appearance of bias that undermines the investigation's integrity. The citizens of Montana deserve investigations conducted by individuals who can demonstrate impartiality, not by attorneys with clear partisan motivations.

The expenditure of public funds on this unauthorized investigation constitutes a misuse of taxpayer resources and exceeds PSC's legal authority. As stewards of the public trust, Commissioner Molnar has an obligation to operate within the bounds of statutory authority and ensure that any proceedings involving elected officials meet fundamental standards of due process and impartiality.

CONCLUSION

We appreciate your instructing Ms. Milanovich to provide us with Commissioner Fielder's unlawful complaint. Nevertheless, we are disappointed that Commissioner Molnar should have to devote considerable time, and expend considerable attorney's fees, defending himself from a complaint that should have been summarily rejected within hours of its receipt. The complaint is based almost entirely on allegations constituting protected speech. Ms. Milanovich, an experienced First Amendment litigator, has undoubtedly reviewed the complaint and undoubtedly informed you of its frivolousness. You should have immediately rejected it.

Your timing raises troubling questions. The NorthWestern-Black Hills merger was announced Tuesday. Later in the day, you were publicly celebrating a deal so complex that teams of lawyers, accountants, and analysts will spend months dissecting its implications. Either you received considerable advance notice of this proposal, or your endorsement preceded any meaningful analysis.

You have privately urged legislators to eliminate voter control over utility regulation and transfer that power to gubernatorial appointees. Acceding to Commissioner Fielder's wishes would accomplish through executive fiat what the Montana Legislature has repeatedly rejected through the democratic process.

The PSC's job is to scrutinize whether or not the proposed merger will benefit not just the utility, its shareholders, your political allies, and Wall Street speculators, but Montana ratepayers, too. Commissioner Molnar is the only current commissioner who has experience reviewing NorthWestern buyout proposals and the only commissioner who remembers what rigorous regulatory oversight of such proposals looks like.

This is not about workplace conduct. This is about whether Montana will have independent utility regulation.

Commissioner Fielder's complaint should be rejected - not in weeks or months, but immediately. Every day it remains under consideration is another day that the regulatory process remains compromised by the specter of political retaliation against independent judgment.

The citizens of Montana elected Commissioner Brad Molnar to balance their interests with those of the utilities. Honor that choice, Governor: reject this complaint and allow democracy to do its work.

Sincerely,

Matthew G. Monforton
Attorney for Commissioner Brad Molnar