

Decision No. R23-0048

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22G-0435CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

WILD SIDE 4 X 4 TOURS LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
APPROVING SETTLEMENT AGREEMENT WITH
MODIFICATIONS**

Mailed Date: January 23, 2023

I. STATEMENT AND BACKGROUND

A. Summary

1. This Decision partially grants the Joint Motion for Approval of the Joint Stipulation and Settlement Agreement (Motion) and approves the Joint Stipulation and Settlement Agreement (Settlement Agreement or Agreement) filed on January 10, 2023 with two minor modifications. Specifically, this Decision modifies ¶¶ 9(A)(ii) to dismiss CPAN Count 3 without prejudice, which automatically converts to a dismissal with prejudice once the agreed-upon penalty payment is made. The Decision also modifies and ¶ 9(B)(ii) to require the

agreed-upon penalty payment to be made within 15 days of the date that this Decision becomes a final Commission Decision.

B. Procedural History¹ and Background

2. Staff of the Colorado Public Utilities Commission (Staff) initiated this matter on October 12, 2022 by filing Civil Penalty Assessment or Notice of Complaint to Appear (CPAN) No. 132328 against Wild Side 4x4 LLC (Wild Side).

3. The CPAN alleges that Wild Side violated two of the Commission Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6 and § 40-10.1-104, C.R.S., for a total of three Counts.

4. On November 2, 2022, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition.²

5. With input from the parties, the ALJ scheduled an in-person evidentiary hearing on the CPAN for January 27, 2023, and established procedures and deadlines related to the evidentiary hearing.³

6. On January 10, 2023, Staff filed the Motion and Settlement Agreement.

II. FINDINGS AND CONCLUSIONS

7. The Motion, filed simultaneously with the Settlement Agreement, asks that the Commission approve the Settlement Agreement, which resolves all outstanding issues, and vacate the hearing and all deadlines in this Proceeding.⁴ The Motion states that the Agreement

¹ Only the procedural history necessary to understand this Decision is included.

² Decision No. C22-0680-I (mailed November 2, 2022).

³ Decision No. R22-0691-I (mailed November 15, 2022).

⁴ Motion at 4.

will not have any precedential effect on any other Commission matter, and asks that the response time to it be waived given that it is unopposed.⁵

8. Given that the Motion is unopposed, the ALJ finds good cause to waive the response time to it and will do so.⁶

9. The Settlement Agreement states that on October 23, 2022, Wild Side acknowledged liability for CPAN Count 1 (violation of Rule 6015, 4 CCR 723-6); paid a penalty in the amount of \$287.50 for that Count; and requested a hearing on the remaining two CPAN Counts.⁷

10. The Agreement states that the parties have reached an agreement as to the remaining two CPAN Counts. Specifically, Wild Side agrees to admit liability for CPAN Count 2 and pay a total civil penalty of \$1,265.00 for that Count, which includes a \$165.00 surcharge as permitted by § 24-32-108(2), C.R.S.⁸ The total penalty must be paid within 15 days “after the date [the] settlement is approved by the Commission.”⁹ If Wild Side does not make the payment as required, unless the parties agree otherwise, Wild Side’s Commission-issued Off-Road Charter (ORC) Permit No. 00244 will be revoked, and Wild Side will be disqualified from applying for a new ORC permit for three years from the date of revocation, per § 40-10.1-304(1), C.R.S. In addition, Wild Side agrees to comply with §§ 40-10.1-201 and 40-10.1-302, C.R.S.¹⁰

⁵ *Id.* at 3.

⁶ *See* Rule 1308(c) of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1.

⁷ Settlement Agreement at 3.

⁸ *Id.* at 3 and 5.

⁹ *Id.* at 5.

¹⁰ *Id.* at 5-6.

11. In consideration of the above, Staff agrees to dismiss CPAN Count 3 after Wild Side executes the Agreement and pays the agreed-upon penalty of \$1,265.00.¹¹

12. In reaching the Agreement, Staff considered as mitigating factors that: Wild Side resolved CPAN Count 1 by admitting liability and paying the civil penalty; Wild Side initiated discussion with Staff to attempt to resolve the remaining two CPAN Counts; Wild Side has applied for a Certificate of Public Convenience and Necessity (CPCN); Wild Side will operate within the scope of its existing permit (No. ORC-00244) while it awaits the outcome of its CPCN Application; Wild Side misunderstood in good faith the limitations of its permit based on prior communications with Staff and immediately attempted to achieve compliance and avoid future violations as soon as the CPAN was issued; Wild Side has agreed to comply with Commission statutes and regulations; and Staff has not previously issued Wild Side or its predecessor a CPAN.¹²

13. The Agreement also provides that if it is not approved entirely without modification, that either party may withdraw from it via notice filed in this Proceeding within seven days of such an order.¹³

14. The parties state that the Settlement Agreement promotes administrative efficiency and is entered into in the spirit of compromise and to avoid the uncertainties of litigation.¹⁴ The parties submit that the Agreement serves the public interest and is just and

¹¹ *Id.* at 4.

¹² *Id.* at 4-5.

¹³ *Id.* at 6. The Agreement also includes other general terms and conditions not outlined above (*e.g.*, it may be signed in counterparts).

¹⁴ *Id.* at 6.

reasonable because it requires Wild Side to pay a civil penalty of \$1,265.00, and reduces the penalties owed in recognition of the above mitigating factors.¹⁵

15. As noted, the Agreement requires that Wild Side pay the agreed-upon penalty within 15 days “after the date [the] settlement is approved by the Commission.”¹⁶ The ALJ construes the referenced Commission approval as referring to a final Commission decision approving the Agreement.¹⁷ In addition, the Agreement provides that Staff will dismiss CPAN Count 3 after Wild Side has paid the agreed-upon penalty.¹⁸ Given that the penalty payment will be due 15 days after the Commission issues a final decision approving the Agreement, CPAN Count 3 will not be dismissed until after this Proceeding is closed by virtue of a final Commission decision. Thus, by the time that Staff would seek to dismiss CPAN Count 3, Staff will not have a formal avenue within which to dismiss CPAN Count 3. As such, the timelines for these Agreement terms are misaligned and not possible to implement.

16. To effectuate the spirit and intent of these Agreement terms, the ALJ will modify ¶¶ 9(A)(ii) and 9(B)(ii) of the Agreement as follows. Paragraph ¶ 9(A)(ii) is modified such that CPAN Count 3 is dismissed without prejudice and that such dismissal will automatically convert to a dismissal with prejudice when Staff receives the penalty payment. Because the ALJ is not approving the Agreement as is, the ALJ must also modify Agreement language in ¶ 9(B)(ii) that establishes the timeline for the penalty payment based on when the Commission approves the Settlement Agreement. The ALJ modifies ¶ 9(B)(ii) to require the agreed-upon penalty payment

¹⁵ *Id.*

¹⁶ Settlement Agreement at 5.

¹⁷ It would make little sense to require payment before a final Commission decision is issued (*i.e.*, within 15-days of the date this Decision issued) because Wild Side would pay the penalty at a time when the Commission could still reject or modify the Agreement. As such, the ALJ construes this Agreement term to reference a final Commission decision.

¹⁸ Settlement Agreement at 4.

to be made within 15 days of the date that this Decision becomes a final Commission decision, if that is the case.¹⁹ Without this change, the timeline for the penalty payment in that paragraph will not be triggered unless the Commission reverses this Decision and approves the Agreement as originally drafted (without the modifications discussed above).

17. The ALJ recognizes that the Agreement allows the parties to withdraw from it if the Commission modifies the Agreement. While the above modifications open the door to this possibility, the ALJ finds that the modifications are necessary to approve the substantive Agreement terms. What is more, the minor modifications give both parties certainty; create an appropriate procedural avenue to dismiss CPAN Count 3; preserve the interests the parties' sought to protect through the modified Agreement terms; do not prejudice any party; and ensure that the substantive Agreement terms may be implemented without procedural defects or deficiencies that may need to be addressed in the future. Indeed, if Wild Side fails to make the payment within 15 days after this Decision becomes final, Staff may pursue CPAN Count 3 since it will not be dismissed with prejudice unless and until the payment is made.²⁰ And, if Wild Side makes the payment as required, it will do so knowing that dismissal of CPAN Count 3 will automatically be converted to dismissal with prejudice without the need for further action.

18. The ALJ finds that with the above minor modifications, the Agreement serves the public interest. The ALJ also finds that the modified Agreement appropriately balances the interests at stake by considering the mitigating factors discussed above; establishing a reduced penalty amount for CPAN Count 2; and dismissing CPAN Count 3. Approving the modified

¹⁹ *Id.* at 5 (¶ 9(B)(ii)).

²⁰ These changes do not impact other Agreement terms providing Staff other remedies in the event that Wild Side fails to make the required payment. *See e.g.*, Settlement Agreement at 5-6, ¶ 9(B)(iv).

Agreement is consistent with the Commission's policy to encourage settlement of contested Proceedings.²¹ As such, the ALJ approves the Agreement with the modifications discussed above.

19. In accordance with § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this proceeding along with this written recommended decision and recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. The Joint Motion for Approval of the Joint Stipulation and Settlement Agreement filed on January 10, 2023 is partially granted consistent with the above discussion.

2. The Joint Stipulation and Settlement Agreement filed on January 10, 2023 (attached as Appendix A) is approved with the modifications discussed above.

3. All procedural deadlines established by Decision No. R22-0691-I (mailed November 15, 2022) and the evidentiary hearing scheduled for January 27, 2023 are vacated.

4. Proceeding No. 22G-0435CP is closed.

5. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

6. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

7. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own

²¹ Rule 1408 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1/

motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

8. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

9. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge