

Decision No. R24-0137

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23G-0407CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

JOHN CLARK DOING BUSINESS AS COLORADO CANYON CONNECTION, LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
ASSESSING CIVIL PENALTY**

Mailed Date: March 5 2024

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, John Clark, doing business as Colorado Canyon Connection, LLC (Colorado Canyon Connection).

2. On August 2, 2023, Staff issued Civil Penalty Assessment Notice or Notice of Complaint to Appear (CPAN) No. 135722 to Colorado Canyon Connection and commenced this proceeding.

3. On November 1, 2023, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition by minute entry during the Commission's weekly meeting.

4. Staff and Colorado Canyon Connection are the only parties to this proceeding.

5. The CPAN assesses a total penalty of \$13,915.00 for one violation of Rule 6202(a), 4 *Code of Colorado Regulations* (CCR) 723-6, for operating and/or offering to operate as a common carrier in intrastate commerce without first having obtained a certificate of public convenience and necessity (CPCN) from the Commission, and one violation of § 40-10.1-107(1), C.R.S for the failure to maintain and file evidence of financial responsibility in sums as required by the Public Utilities Commission. Hearing Exhibit 105. This filing commenced this Proceeding.

6. By Decision Nos. R23-0765-I, issued November 20, 2023, and R23-0869-I, issued December 28, 2023, a hearing was scheduled to commence in this proceeding on January 31, 2024.

7. At the scheduled time and place, the undersigned ALJ called the matter for hearing. Staff appeared through counsel. Respondent failed to appear. During the course of the hearing, Hearing Exhibits 100-105 were identified, offered, and admitted into evidence. Jay Estrada, Criminal Investigator, testified on behalf of Staff.

8. The undersigned ALJ has considered all arguments and evidence presented, even if such argument and/or evidence is not specifically addressed herein, in reaching this Recommended Decision.

9. In accordance with Section 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS

10. Mr. Estrada works with the Public Utilities Commission as a Criminal Investigator. As part of his duties, he investigates complaints regarding motor carrier compliance. He was

assigned to investigate two complaints against Colorado Canyon Connection, one of which led to the issuance of CPAN No. 135722.

11. As a result of his investigation, Mr. Estrada concluded that Mr. Clark operated as a common carrier without first obtaining a required CPCN from the Commission and that he failed to maintain and file required evidence of financial responsibility with the Commission.

12. Mr. Clark is the owner and member/partner of Colorado Canyon Connection. Hearing Exhibit 100. Colorado Canyon Connection previously applied for three different types of permits from the Commission (Charter Scenic Bus permits, twice, one Luxury Limousine permit, and one Common Carrier permit), but all were dismissed. *Id.* The most recent application was for a common carrier permit on May 24, 2022. *Id.* Colorado Canyon Connection has thus never held any type of authority to operate issued by the Commission.

13. According to the Commission's Integrated File Management System (IFMS), Colorado Canyon Connection has also never filed any insurance information for their company with the Commission.

14. During December 2021, Mr. Estrada received the first complaint about Colorado Canyon Connection operating without a permit. The Complainant, a person who worked for a transportation provider in Estes Park, explained to Mr. Estrada that they had witnessed Colorado Canyon Connection operating and carrying passengers around town and that they were aware that Colorado Canyon Connection did not have a permit.

15. Mr. Estrada then confirmed via IFMS, the Secretary of State database, and other Commission databases, that Colorado Canyon Connection was registered with the Colorado Secretary of State but had no active permit from the Commission. Mr. Estrada searched online to determine if Colorado Canyon Connection had been advertising their services online; he

found a website associated with the company, advertising their services. Mr. Estrada saved copies from the website on January 6, 2022. Hearing Exhibit 102.

16. Colorado Canyon Connection's website included a photo of a vehicle with signage related to the company and a summary of the services they provided. These services included both shuttle service and personal service through several different areas, including to and from the Denver International Airport, various cities, and tours through the Estes Valley and Rocky Mountain National Park. Hearing Exhibit 102 at 2-7. These types of transportation describe services regulated by the Commission for which a company is required to obtain a permit before offering or providing such services.

17. Because Mr. Estrada had determined that Colorado Canyon Connection was providing and offering to provide various transportation services without a permit from the Commission and without filing evidence of financial responsibility, he prepared a warning letter to Mr. Clark citing these violations. Hearing Exhibit 101. The letter was dated April 20, 2022. *Id.* at 1. Mr. Estrada, with Investigator Joe Potts, personally served the warning letter upon Mr. Clark. While serving the letter, Mr. Estrada verbally advised Mr. Clark about the violations in the letter and advised him not to advertise or operate further until a permit was obtained. Mr. Clark indicated that he understood Mr. Estrada's advisements.

18. After receiving the warning letter and Mr. Estrada's verbal warnings, Mr. Clark applied for a CPCN on May 24, 2022. Hearing Exhibit 103 at 1. This Application initiated Proceeding No. 22A-0216CP; however, it was dismissed by Decision No. R22-0651, issued October 25, 2022. Hearing Exhibit 103.

19. Despite the warning letter, Mr. Estrada's verbal advisements, and Mr. Clark's Application for a CPCN being dismissed, Mr. Clark offered transportation services without a

permit and without filing evidence of proper insurance. This led to a second complaint to the Commission and Mr. Estrada initiating a second investigation against Colorado Canyon Connection.

20. The second complaint regarding Colorado Canyon Connection was received in April, 2023. This complaint was similar to the first, alleging that the complainant had witnessed Colorado Canyon Connection operating and transporting customers in a van marked with Colorado Canyon Connection signage in the Estes Park area. Mr. Estrada investigated the second complaint to determine whether Colorado Canyon Connection had a permit and whether they had been advertising transportation services.

21. During his investigation, Mr. Estrada again found a website for Colorado Canyon Connection. Hearing Exhibit 104. Mr. Estrada accessed this website in August of 2023, and noticed it contained the same business name, phone number, and vehicle (with the same signage on the vehicle) found during the last investigation.

22. Like the website discovered in the first investigation in 2022, Colorado Canyon Connection's 2023 website contained a summary of services they provided. These services still included both shuttle service and personal service through several different areas, including to and from the Denver International Airport, various cities, and tours through the Estes Valley and Rocky Mountain National Park. Hearing Exhibit 104 at 2-7.

23. Mr. Estrada thus confirmed that despite a previous violation letter and verbal warnings, Mr. Clark and Colorado Canyon Connection had continued operating and offering to operate without authority from the Commission and without maintaining and filing evidence of financial responsibility with the Commission. Mr. Estrada then prepared a CPAN alleging these two violations and personally served it on Mr. Clark on August 8, 2023. Hearing Exhibit 105.

24. Mr. Estrada also spoke with Mr. Clark after serving him the CPAN. He stated Mr. Clark initially did not seem to recall the previous warning violation and conversation, but later recalled it vividly. Mr. Clark stated that he had previously applied for a CPCN, but decided to no longer pursue it once other carriers intervened in the proceeding, and that he did not understand why others could intervene and possibly prevent him from receiving a CPCN. Mr. Clark did not deny operating without a permit.

25. Staff asked that both violations and penalties be sustained against Mr. Clark and Colorado Canyon Connection, based on Mr. Clark's knowledge of the requisite rules and requirements for operation and his disregard for these rules, even after a violation warning letter, a verbal warning from Mr. Estrada, and a dismissed CPCN proceeding.

III. DISCUSSION

26. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence. The Commission only has penalty assessment authority to the extent provided by statute, and the Commission must follow the provisions of those statutes when it imposes such penalties against common carriers.

27. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."¹ As provided in Commission Rule 4 CCR 723-1-1500 of the Commission's Rules of Practice and Procedure, "[t]he proponent of the order is that party commencing a proceeding." Here, Staff is the proponent, since it commenced the proceeding through issuance of the CPAN. Complainant

¹ § 24-4-105(7), C.R.S.

bears the burden of proof by a preponderance of the evidence.² The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.³ While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

28. Section 40-7-116, C.R.S., mandates a number of procedures for the imposition of civil penalties by the Commission. After specifying that the listed officials are the ones authorized to issue civil penalty assessments for violations of law, § 40-7-116(1)(a), C.R.S., states that, “When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice.” Section 40-7-116(1)(b), C.R.S., further directs that the civil penalty assessment notice “shall be tendered by the enforcement official, either in person or by certified mail, or by personal service by a person authorized to serve process under rule 4(d) of the Colorado rules of civil procedure.”⁴ Section 40-7-116(1)(b) (I)-(VII), C.R.S., further directs that the civil penalty assessment notice “...shall be tendered by the enforcement official;” and that it “shall contain” the “name and address of the person cited for the violation; [a] citation to the specific statute or rule alleged to have been violated; [a] brief description of the alleged violation, the date and approximate location of the alleged violations; and the maximum penalty amounts prescribed for the violation; [t]he date of the notice; [a] place for the person to execute a signed acknowledgement of receipt of the civil penalty assessment notice; [a] place for the person to execute a signed acknowledgement of

² See § 13-25-127(1), C.R.S. and 4 CCR 723-1-1500.

³ *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985).

⁴ § 40-7-116, C.R.S.

liability for the violation; and [s]uch other information as may be required by law to constitute notice of a complaint to appear for hearing if the prescribed penalty is not paid within ten days.”⁵

29. The evidence establishes the Commission’s jurisdiction in this proceeding. The CPAN was served upon Respondent in person, in accordance with Section 40-7-116, C.R.S.

30. Commission Staff met its burden of proof when the evidence, on the whole, tipped in its favor and was not rebutted by Respondent.

31. Motor carriers are required to maintain and file with the Commission evidence of financial responsibility as the Commission deems necessary to adequately safeguard the public interest. § 40-10.1-107(1), C.R.S. Here, the evidence shows that Respondent offered transportation services without maintaining and filing evidence of financial responsibility as required.

32. Common carriers are not allowed to operate or offer to operate in intrastate commerce without first having obtained a certificate of public convenience and necessity from the Commission. 4 CCR 723-6-6202(a). Here, the evidence shows that Respondent operated and offered to operate common carrier services after written and verbal violation warning and after his application for a certificate of public convenience and necessity was dismissed.

33. Having found the above violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. § 40-7-113, C.R.S., authorizes the Commission to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments.

⁵ *Id.*

34. In accordance with Rule 1302(b), Rules of Practice and Procedure:

[T]he Commission may impose a civil penalty, when provided by law, after considering evidence concerning...the following factors:

- (I) [T]he nature, circumstances, and gravity of the violation;
- (II) [T]he degree of the respondent's culpability;
- (III) [T]he respondent's history of prior offenses;
- (IV) [T]he respondent's ability to pay;
- (V) [A]ny good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- (VI) [T]he effect on the respondent's ability to continue in business;
- (VII) [T]he size of the business of the respondent; and
- (VIII) [S]uch other factors as equity and fairness may require.

Rule 1302(b) of the Rules of Practice and Procedure, 4 CCR 723-1.

35. Despite receiving a previous violations warning letter for similar violations by Commission Staff, filing an application for a CPCN, which was later dismissed, and being aware of Commission rules, Respondent again offered transportation services without a CPCN and required proof of financial responsibility.

36. Respondent did not appear at the evidentiary hearing to rebut or dispute any of the violations listed in CPAN No. 135722. Staff did not testify to any factors in mitigation.

37. The undersigned considers Mr. Clark's conduct related to Proceeding No. 22A-0216CP to be aggravating to the present circumstances.

38. The Commission performs an important health and safety function of assuring that common carriers maintain proof of current, effective insurance on file for the benefit of the traveling public.

39. Respondent's knowing and intentional disregard for the safety of the traveling public, despite previous warnings and advisements, inclines the undersigned toward the strongest enforcement available to the Commission.

40. Mr. Clark is the designated agent and the member/partner of Colorado Canyon Connection.

41. Mr. Clark failed to appear to the evidentiary hearing in this proceeding. The only information available about his actions comes from his conduct and statements made to Mr. Estrada. Mr. Clark indicated to Mr. Estrada that he understood the Commission's rules after receiving the first violations letter from Mr. Estrada; he demonstrated this fact by filing the application for a CPCN which initiated Proceeding No. 22A-0216CP. After effectively abandoning the application and it being dismissed, Mr. Clark informed Mr. Estrada at the time he received CPAN No. 135722 that he had abandoned the application because he wasn't aware others could intervene and possibly prevent him from receiving a CPCN. However, he operated and offered services, despite knowing he did not have the required permit.

42. If assessed the maximum amount in this proceeding, total outstanding obligations to the Commission would total \$13,915.

43. Based on the evidence presented and findings of fact, the ALJ finds that assessing the maximum civil penalty achieves the following purposes underling civil penalty assessments within the Commission's jurisdiction: (a) deterring future violations, whether by similarly situated carriers or by Respondent; and (b) punishing Respondent for its past illegal behavior.

44. A civil penalty of \$13,915 amount consisting of a \$12,100 penalty, plus a 15 percent surcharge of \$1,815, pursuant to § 24-34-108(2), C.R.S., will be assessed for the proven violations in Counts 1 and 2 of CPAN No. 135722.

IV. ORDER

A. The Commission Orders That:

1. Mr. John Clark, doing business as Colorado Canyon Connection, LLC (Colorado Canyon Connection) is assessed a civil penalty of \$12,100, plus an additional 15 percent surcharge in the amount of \$1,815 for the violations discussed and found above, totaling \$13,915.00.

2. No later than 30 days following the date of the final Commission decision issued in this Proceeding, Respondent John Clark shall pay to the Commission the civil penalties and the surcharge assessed in Ordering Paragraph No. 1.

3. Proceeding No. 23G-0407CP is closed.

4. 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.

5. 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.

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

6. 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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director