Decision No. R14-0626

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0195EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ALL ACCESS TRANSPORTATION INC.,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MANA L. JENNINGS-FADER DISMISSING THE CPAN WITH PREJUDICE, TAKING ADMINISTRATIVE NOTICE OF SPECIFIC FACTS, AND WAIVING PORTION OF COMMISSION RULE

Mailed Date: June 12, 2014

TABLE OF CONTENTS

I. STATEMENT

1. On March 1, 2014, the Commission sent, by certified mail (return receipt requested), Civil Penalty Assessment Notice or Notice of Complaint No. 108832 (the CPAN) to All Access Transportation, Inc. (All Access or Respondent) at the Fairplay, Colorado mailing address known to the Commission and shown on the CPAN. The CPAN commenced this Proceeding.

2. On March 18, 2014, Respondent requested an evidentiary hearing. By doing so, Respondent acknowledged receipt of the CPAN and entered a general appearance in this Proceeding.

3. On March 21, 2014, counsel for Trial Staff of the Commission (Staff) entered his appearance in this Proceeding. In that filing and pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1007(a),[1] Staff counsel identified the trial Staff and the advisory Staff in this Proceeding. On March 25, 2014, co-counsel for Staff entered her appearance in this Proceeding.

4. Staff and All Access, collectively, are the Parties.

5. On March 26, 2014, by Minute Order, the Commission assigned this Proceeding to an Administrative Law Judge (ALJ).

6. On March 28, 2014, by Order Setting Hearing and Notice of Hearing, the Commission scheduled the evidentiary hearing in this Proceeding for May 7, 2014. In subsequent Interim Decisions, the ALJ also informed Respondent of the May 7, 2014 evidentiary hearing date.

[1] This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* (CCR) 723.

7. On April 4, 2014, by Decision No. R14-0361-I, the ALJ informed the Parties of the scheduled May 7, 2014 evidentiary hearing and established the procedural schedule in this Proceeding.

8. On April 4, 2014, by first-class mail, the Commission mailed Decision No. R14-0361-I to Respondent at the Fairplay, Colorado mailing address known to the Commission and shown on the CPAN. Decision No. R14-0361-I was not returned to the Commission as undeliverable. Respondent is presumed to have received, and to have notice of the filing requirements in, Decision No. R14-0361-I.

9. In accordance with the procedural schedule, Staff filed its list of witnesses and complete copies of its exhibits.

10. In accordance with the procedural schedule, Respondent was to file, not later than April 23, 2014, its list of witnesses and complete copies of the exhibits it would offer in its case. Decision No. R14-0361-I at ¶ 17 and Ordering Paragraph No. 4.

11. Respondent did not file its list of witnesses and did not file complete copies of its exhibits. Respondent did not request additional time within which to comply with the filing requirements in Decision No. R14-0361-I. Respondent's failure to comply with the filing requirements in Decision No. R14-0361-I was unexplained and was unexcused.

12. On April 15, 2014, by Decision No. R14-0400-I, the ALJ ordered All Access to obtain legal counsel in this Proceeding. All Access's counsel was to enter an appearance in this matter no later than April 22, 2014. In Decision No. R14-0400-I, the ALJ informed All Access of the consequences if it failed to obtain legal counsel:

> **[All Access] is advised, and is on notice, that it cannot proceed in this case without an attorney who is admitted to practice law in, and who is in good standing in, Colorado.**

> **[All Access] is advised, and is on notice, that if its legal counsel does not enter an appearance in this Proceeding as required by this Interim Decision, [All Access] will not be able to participate in, or to make filings in, this Proceeding.** This means, among other things, that [All Access] will not be able to participate in the evidentiary hearing in this case.

Decision No. R14-0400-I at ¶¶ 18 and 19 (bolding in original); *see also id*. at Ordering Paragraphs No. 1 and No. 3 (same).

13. On April 15, 2014, by first-class mail, the Commission mailed Decision No. R14-0400-I to Respondent at the Fairplay, Colorado mailing address known to the Commission and shown on the CPAN. Decision No. R14-0400-I was not returned to the Commission as undeliverable. Respondent is presumed to have received, and thus to have notice of the requirements in, Decision No. R14-0400-I.

14. No counsel for All Access entered an appearance in this Proceeding. All Access did not request additional time within which to obtain counsel.

15. Without explanation, Respondent failed to comply with the Decision No. R14-0400-I requirement that Respondent retain legal representation in this Proceeding. In clear language, the ALJ advised Respondent of the consequences if it failed to comply with Decision No. R14-0400-I. In accordance with the advisements in the Interim Decisions previously issued in this Proceeding, on April 24, 2014, by Decision No. R14-0429-I, the ALJ prohibited Respondent from participating in this Proceeding, including the May 7, 2014 evidentiary hearing. In Decision No. R14-0429-I at ¶ 21, the ALJ noted that, if Respondent's legal counsel entered an appearance in this Proceeding and if that legal counsel made an appropriate motion, then the ALJ would reconsider her ruling prohibiting Respondent from participating in this Proceeding.

16. On April 24, 2014, by first-class mail, the Commission mailed Decision No. R14-0429-I to Respondent at the Fairplay, Colorado mailing address known to the Commission and shown on the CPAN. Decision No. R14-0429-I was not returned to the Commission as undeliverable. Respondent is presumed to have received Decision No. R14-0429-I.

17. On the date, at the time, and in the place scheduled, the ALJ called this matter for hearing. Staff was present, was represented, and was prepared to proceed.

18. Respondent is presumed to have been aware of the scheduled evidentiary hearing. Neither Respondent nor a representative of Respondent was present when the matter was called for hearing. In addition, Respondent neither made a filing nor otherwise contacted either the ALJ or Commission Staff to request that the hearing be rescheduled. Further, Respondent has had no contact with the Staff counsel or with Commission Staff, including the ALJ, concerning this Proceeding. Respondent's failure to appear was unexplained and unexcused, other than the advisements in Decisions No. R14-0400-I and No. R14-0429-I that Respondent could not participate in the evidentiary hearing without legal counsel and further order of the ALJ.

19. Staff's counsel and witness were present and prepared to proceed.

20. The ALJ and court reporter were present and prepared to proceed.

21. For these reasons, the ALJ conducted the scheduled evidentiary hearing in Respondent's absence.

22. At the hearing, the ALJ heard the testimony of one witness: Mr. Nathan Riley. Ten exhibits were marked. Hearing Exhibits No. 1, No. 4 through No. 6, Confidential Exhibit No. 6A,[2] and No. 8 through No. 11 were offered and were admitted into evidence.[3]

23. At the conclusion of the hearing, the evidentiary record was closed. The ALJ took the matter under advisement.

24. As of the date of this Decision, Respondent has made no filing in this Proceeding other than the March 18, 2014 request for a hearing.

25. As of the date of this Decision, no counsel for Respondent has entered an appearance in this Proceeding.

26. In accordance with, and pursuant to, § 40-6-109, C.R.S., the ALJ transmits to the Commission the record of the Proceeding together with a written recommended decision.

II. FINDINGS OF FACT

27. The facts in this case are undisputed.

28. Staff is Trial Staff of the Commission as identified in the Rule 4 CCR 723-1-1007(a) notice filed in this Proceeding.

[2] Confidential Hearing Exhibit No. 6A contains personal information about Respondent's driver (*i.e.*, driver's license number and driver's date of birth). This confidential information is redacted from Hearing Exhibit No. 6.

Because the relevant substance of the two Hearing Exhibits is identical and for ease of reference, unless the context indicates otherwise, reference in this Decision to Hearing Exhibit No. 6 is to both Hearing Exhibit No. 6 and Confidential Hearing Exhibit No. 6A.

[3] Hearing Exhibit No. 2 was offered but was not admitted. Hearing Exhibit No. 3 was not offered. No Hearing Exhibit No. 7 was marked.

29. Respondent is a Colorado corporation that, as of February 19, 2014, was not in compliance with its filing obligations with the Colorado Secretary of State. Hearing Exhibit No. 9 (printout of information concerning All Access on the Colorado Secretary of State website). At all times relevant to this Proceeding and notwithstanding Respondent's noncompliant status, the Colorado Secretary of State had not suspended Respondent or otherwise prohibited Respondent from conducting business in Colorado.

30. At all times relevant to this Proceeding, Respondent owned, controlled, operated, or managed at least one motor vehicle that provided transportation in intrastate commerce in Colorado. Thus, at all times relevant to this Proceeding, Respondent was a "motor carrier" as defined in § 40-10.1-101(10), C.R.S.

31. In January 2014 and on February 7, 2014 (the dates of the violations alleged in the CPAN), Respondent held PUC Authority No. LL-01796.[4] This authority allows Respondent to provide luxury limousine service in Colorado, subject to applicable Colorado statutes and applicable Commission rules.

32. At all times relevant to this Proceeding, Respondent provided luxury limousine service, as defined in § 40-10.1-301(8), C.R.S.

[4] Hearing Exhibit No. 1 is Luxury Limousine Permit No. LL-01796. This authority became active on December 27, 2013.

33. In January 2014 and on February 7, 2014 (the dates of the violations alleged in the CPAN), Respondent was subject to the Safety Rules in the Rules Regulating Transportation by Motor Vehicle, Part 6 of 4 *Code of Colorado Regulations* (CCR) 723 (Part 6 Rules).[5] [6]

[5] This Rule is found in the Rules Regulating Transportation by Motor Vehicle, Part 6 of 4 CCR 723, as those Rules were in effect from August 1, 2012 through February 13, 2014. New Part 6 Rules became effective on February 14, 2014. The ALJ takes administrative notice of these facts.

The Part 6 Rules are substantive Rules that establish -- and give Respondent notice of -- the standards to which Respondent is held and that Respondent must meet. The violations alleged in the CPAN occurred in January 2014 and on February 7, 2014. Consequently, the Part 6 Rules in effect on the dates of the alleged violations govern this Proceeding. Unless the context indicates otherwise, reference in this Decision to any Part 6 Rule is to that Part 6 Rule as in effect from August 1, 2012 through February 13, 2014.

[6] In this Decision (*see*, *e.g.*, footnote 5), the ALJ *sua sponte* takes administrative notice of facts pertaining to *Commission* rules. As relevant to this Decision, Rule 4 CCR 723-1-1501(c) provides that the "Commission may take administrative notice of ... state and federal ... rules, and regulations; ... of ... matters within the expertise of the Commission; and [of] facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In taking administrative notice of facts in this Decision, the ALJ does so because the facts relate to Commission rules and because they are matters within the expertise of the Commission. In addition, the limited and administratively-noticed facts are necessary in order to understand the bases of this Decision.

As relevant here, Rule 4 CCR 723-1-1501(c) states: "Every party shall have the opportunity on the record and by evidence, to controvert evidence admitted by administrative notice." The facts of which the ALJ takes administrative notice in this Decision all pertain to the effective date of or the language of Commission Rules (or both). The nature of the administratively-noticed facts is such that no evidence can controvert them. Reopening the evidentiary record in order to give the Parties the opportunity to present evidence to controvert the facts of which the ALJ takes administrative notice in this Decision would serve no purpose. In addition, the decision not to reopen the evidentiary record under these circumstances does not affect any party's due process rights. For these reasons, and pursuant to Rule 4 CCR 723-1-1103, the ALJ will waive the quoted provision in Rule 4 CCR 723-1-1501(c).

In this Decision, the ALJ *sua sponte* does *not* take administrative notice of facts pertaining to the cited *federal* regulations and pertaining to the substance of Rule 4 CCR 723-6-6103(d)(II)(C) for two reasons.

First, in the CPAN, Staff alleges that Respondent violated specific federal regulations and a specific Commission Rule. As discussed *infra*, Staff bears the burden of proof in this Proceeding and, as part of its proof with respect to each count in the CPAN, must prove two elements: (a) the substance (*i.e.*, the requirements) of the federal regulations and of the Commission Rule that Respondent is alleged to have violated and how Respondent violated each; and (b) each of Respondent's violations was intentional. Although Rule 4 CCR 723-1-1501(c) is the means by which Staff could have requested administrative notice of the federal regulations and Commission Rule in order to prove these elements, Staff made no request that the ALJ take administrative notice of those regulations or that Rule. When it put neither the federal regulations nor the Commission Rule into the evidentiary record, Staff made a litigation decision with which it must live. The ALJ will not put into the evidentiary record by administrative notice the documents that Staff should have put into the evidentiary record. This is a matter of maintaining the ALJ and the Commission as objective and neutral decision makers.

Second, as discussed *infra*, the federal regulations are as revised on October 1, 2007 and as revised on October 1, 2010. As discussed *supra*, the Commission Rule is the Rule effective from August 1, 2012 until February 13, 2014. The substance of each document is a fact to be proven. As pertinent here, Rule 4 CCR 723-1-1501(c) requires "the person requesting administrative notice [to] provide a complete copy of the document that contains any fact to be noticed as an exhibit in the proceeding." If the ALJ *sua sponte* took administrative notice of the federal regulations and the Commission Rule, the ALJ would have to do at least the following: (a) locate the appropriate version of each document; (b) copy the 2007 version and the 2010 version of each federal regulation and copy the Part 6 Rule; and (c) issue an Interim Decision that reopens the evidentiary record to place a copy of each version of each federal regulation and a copy of the Part 6 Rule in the evidentiary record as a separately-marked hearing exhibit (for a total of five additional hearing exhibits). Locating, copying, and placing in the evidentiary record a copy of each pertinent version of the federal regulations and of the Part 6 Rule are the responsibility of the party relying on the federal regulations and the Commission Rule (in this case, Staff); these activities are not the responsibility of the ALJ.

The Safety Rules are Rules 4 CCR 723-6-6100 through 723-6-6199, which incorporate by reference specific federal regulations.

34. The U.S. Department of Transportation issues the Federal Motor Carrier Safety Regulations, which are codified in Parts 300 to 399 of Title 49 of the *Code of Federal Regulations* (49 CFR Parts 300 to 399). In order to enforce those federal regulations in Colorado, the Commission incorporates by reference the federal regulations (with modifications) into the Part 6 Rules. Rule 4 CCR 723-6-6102 accomplishes the incorporation by reference.

35. When the Commission issues a rule that incorporates by reference all or any part of a federal agency's regulations, § 24-4-103(12.5)(a)(II), C.R.S., requires that the Commission provide specific information about the incorporated-by-reference regulations, including the date of the version that is incorporated by reference. In addition, § 24-4-103(12.5)(a)(II), C.R.S., specifies that the incorporation by reference cannot include any later amendments to, or editions of, the incorporated-by-reference federal regulations.

36. The CPAN alleges that Respondent violated 49 CFR § 391.21(a), § 391.51(a), and § 396.3(b), as incorporated by reference by Rule 4 CCR 723-6-6102(a)(I). Rule 4 CCR 723-6-6102(a)(I) incorporates by reference 49 CFR Parts 391, 395, and 396, as those rules were revised on October 1, 2010.[7] Rule 4 CCR 723-6-6102(b) states: "No later amendments to or editions of the [*Code of Federal Regulations*] are incorporated into" the Part 6 Rules.[8]

37. The cited federal regulations (as revised on October 1, 2010) are not in evidence in this Proceeding.

38. The CPAN alleges that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C).

[7] The ALJ takes administrative notice of this fact.
[8] The ALJ takes administrative notice of this fact.

39. The cited Rule is not in evidence in this Proceeding.

40. Staff witness Riley is employed, and at all times pertinent to this Proceeding was employed, as a Criminal Investigator in the Investigations and Compliance Unit of the Commission's Transportation Section. In the course of his responsibilities and assigned duties as a Criminal Investigator, Staff witness Riley investigated Respondent in response to a complaint that Respondent was operating without authority.[9] During the course of the investigation, Staff witness Riley conducted the February 7, 2014 Safety and Compliance Review (2014 SCR) of Respondent that led to the issuance of the CPAN.[10]

41. The purpose of a Safety and Compliance Review is to determine whether a regulated motor carrier is in compliance with all applicable state and federal regulations pertaining to the motor carrier's vehicles and drivers. To achieve this purpose, it is the Investigations and Compliance Unit's usual practice to conduct a full, on-site audit of the motor carrier's paperwork and to conduct a physical inspection of the vehicles used by the motor carrier to provide the authorized transportation.

42. As part of his investigation of Respondent and preparatory to conducting the 2014 SCR, Staff witness Riley reviewed Commission records and found that, on June 9, 2010, Investigator Cliff Hinson of the Investigations and Compliance Unit conducted a SCR of Respondent (2010 SCR). All information available in this Proceeding about the 2010 SCR is contained in the Transportation Safety and Compliance Review Final Report for the 2010 SCR (2010 SCR Final Report).[11] Staff witness Riley has no personal knowledge of the 2010 SCR.

[9] The CPAN does not allege that Respondent operated without authority because, during the course of the investigation, Staff witness Riley determined that Respondent held a valid Commission authority.

[10] Hearing Exhibit No. 8 is the CPAN.

[11] Hearing Exhibit No. 5 is the 2010 SCR Final Report.

43. At the time of the 2010 SCR, Respondent had one driver (*i.e.*, Mr. Timothy Gardner) and one vehicle that it used to provide luxury limousine service. Hearing Exhibit No. 5 at 1.

44. The 2010 SCR Final Report contains a list of violations of applicable federal regulations and Colorado Rules that Investigator Hinson identified during his audit of Respondent's records. Hearing Exhibit No. 5 at 2-3.

45. The 2010 SCR Final Report contains a list of requirements, some of which are directed toward the listed violations. The 2010 SCR Final Report states: "**The Commission may assess civil penalties for any violation noted above in this report. Please take remedial action to correct all deficiencies.**" Hearing Exhibit No. 5 at 5 (bolding and underlining in original). The reference is to the violations listed on the 2010 SCR Final Report (Hearing Exhibit No. 5) at 2-3.

46. Lastly, the 2010 SCR Final Report informs Respondent that: "**This review determines your compliance with PUC rules and regulations[.] You may also be subject to other State and Federal Regulations. It is your responsibility to ensure you are in compliance with all applicable rules and regulations.**" Hearing Exhibit No. 5 at 5 (bolding in original). Following this statement are the signature of Timothy Gardner, who is the President of All Access, and this statement: "**I have received a copy of this report and the noted violations have been explained to me.**" *Id*. (bolding in original).

47. At the time of the 2010 SCR, the Rules Regulating Transportation by Motor Vehicle in effect were the Part 6 Rules in effect from July 30, 2009 through October 15, 2010

(2009-10 Part 6 Rules).[12] The 2009-10 Part 6 Rules included Safety Rules, which were Rules 4 CCR 723-6-6100 through 723-6-6199 and incorporated by reference 49 CFR Parts 391, 395, and 396, as those rules were revised on October 1, 2007.[13]

48. The rules listed in the 2010 SCR Final Report as the rules that Respondent violated are: (a) 49 CFR § 391.21(a) (one violation); (b) 49 CFR §§ 391.23(a)(1) and 391.23(b) (one violation); (c) 49 CFR § 391.23(i)(1) (one violation); (d) 49 CFR § 391.45(a) (one violation); (e) 49 CFR § 391.51(a) (one violation); (f) Rule 4 CCR 723-6-6015(g)(I) of the 2009-10 Part 6 Rules (one violation); (g) 49 CFR § 395.8 (one violation); (h) 49 CFR § 396.3(b)(1) (one violation); (i) 49 CFR § 396.3(b)(2) (one violation); (j) 49 CFR § 396.3(b)(3) (one violation); and (k) 49 CFR § 396.17(a) (one violation). Hearing Exhibit No. 5 at 2-3.

49. The cited federal regulations (as revised on October 1, 2007) are not in evidence in this Proceeding.

50. Rule 4 CCR 723-6-6015(g)(I) as contained in the 2009-10 Part 6 Rules is not in evidence in this Proceeding.

51. As part of his investigation of Respondent and preparatory to conducting the 2014 SCR, Staff witness Riley reviewed Commission records and found that, in 2010, the Commission issued a Civil Penalty Assessment or Notice of Complaint to Appear (2010 CPAN) to Respondent. Staff witness Riley testified that the 2010 CPAN was based on noncompliance with (unspecified) operational requirements. The record contains no further information about the 2010 CPAN.

[12] The ALJ takes administrative notice of this fact.
[13] The ALJ takes administrative notice of these facts.

52. When Staff witness Riley scheduled the 2014 SCR, he sent Respondent an electronic mail on January 10, 2014.[14] The electronic correspondence is addressed to Mr. Gardner, who is Timothy Gardner, Respondent's President and Respondent's registered agent. Attached to that electronic correspondence was a letter that, among other things: (a) informed Respondent of the purpose of the SCR; and (b) listed the records that Respondent was to make available during the 2014 SCR. In addition, the electronic correspondence "strongly encouraged [Respondent] to review the Final Report from [Respondent's] last Safety & Compliance Review, which took place on 06/09/10. A copy of this report can be provided, upon request." Hearing Exhibit No. 4 at 1.

53. Staff witness Riley conducted the 2014 SCR on February 7, 2014 at Respondent's business location in Fairplay, Colorado. At the time of the 2014 SCR, Respondent had one driver and one vehicle that it used to provide luxury limousine service. During the 2014 SCR, Staff witness Riley audited Respondent's records pertaining to its driver and vehicle and inspected Respondent's vehicle.

54. Respondent's one driver was Timothy W. Gardner. Hearing Exhibit No. 6 at 3, 9, and 10.

55. The one vehicle used by Respondent to provide luxury limousine service and inspected during the 2014 SCR was a 2006 Ford. Hearing Exhibit No. 6 at 11. The evidentiary records contains no additional information (*e.g.*, seating capacity, Gross Vehicle Weight Rating) about this vehicle.

[14] Hearing Exhibit No. 4 is the January 10, 2014 correspondence and its attachment.

56. Staff witness Riley prepared a Transportation Safety and Compliance Review Final Report for the 2014 SCR (2014 SCR Final Report).[15]

57. The 2014 SCR Final Report contains a list of violations of applicable federal regulations that Staff witness Riley identified during his audit of Respondent's records. Hearing Exhibit No. 6 at 3.

58. The 2014 SCR Final Report contains a list of requirements, some of which are directed toward the violations listed in the 2014 SCR Final Report at 3. In the Additional Remarks section, the 2014 SCR Final Report states: "The carrier was educated on applicable rules and regulations, including how to resolve any violations noted on this report. Carrier was advised of possible penalties associated with operating without a PUC permit." Hearing Exhibit No. 6 at 5.

59. The 2014 SCR Final Report states: "**The Commission may assess civil penalties for any violation noted above in this report. Please take remedial action to correct all deficiencies.**" Hearing Exhibit No. 6 at 5 (bolding and underlining in original). The reference is to the violations listed in the 2014 SCR Final Report (Hearing Exhibit No. 6) at 3.

60. Lastly, the 2014 SCR Final Report states: "**This review determines your compliance only with the regulations of the Colorado Public Utilities Commission. You may also be subject to other state and/or federal regulations. It is your responsibility to ensure compliance will [*sic*] all applicable regulations.**" Hearing Exhibit No. 6 at 5 (bolding in original). Following this statement are the signature of Timothy Gardner, who is the President of All Access, and this statement: "**I have received a copy of this report and the noted violations have been explained to me.**" *Id*. (bolding in original).

[15] Hearing Exhibit No. 6 and Confidential Hearing Exhibit No. 6A are the 2014 SCR Final Report.

61. The violations listed in the 2014 SCR are: (a) 49 CFR § 391.21(a) (one violation); (b) 49 CFR § 391.51(a) (one violation); (c) 49 CFR § 395.8(a) (31 violations); (d) 49 CFR § 396.3(b)(1) (one violation); and (e) 49 CFR § 396.3(b)(2) (one violation). Hearing Exhibit No. 6 at 3.

62. The cited federal regulations (as revised on October 1, 2010) are not in evidence in this Proceeding.

63. Rule 4 CCR 723-6-6103(d)(III)(C) is not listed in the 2014 SCR Final Report as a Rule that Respondent violated.

64. In Staff witness Riley's opinion, every violation listed in the 2014 SCR Final Report is found in the violations listed in the 2010 SCR Final Report. Staff witness Riley determined that it was appropriate to issue to Respondent a CPAN based on the repeated violations because, by failing to obtain and to maintain the identified records, Respondent violated important safety-related regulations pertaining to Respondent's driver and the vehicle Respondent uses to provide luxury limousine service.

65. Staff witness Riley prepared, issued, and mailed the CPAN. Respondent received the CPAN on March 1, 2014.[16] On March 18, 2014, Respondent requested an evidentiary hearing. By doing so, Respondent acknowledged receipt of the CPAN and entered a general appearance in this Proceeding.

66. Additional findings of fact are found elsewhere in this Decision.

[16] Hearing Exhibits No. 10 and No.11 are the receipts that establish that Respondent was served. Timothy Gardner signed the return receipt on behalf of Respondent.

III. DISCUSSION AND CONCLUSION

67. The record establishes that the Commission has subject matter jurisdiction in this Proceeding and *in personam* jurisdiction over Respondent.

68. Staff bears the burden of proof by a preponderance of the evidence. Section 40-7-116(1), C.R.S.; § 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500. A party has met the preponderance of the evidence burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

69. Each count of the CPAN is discussed below.

A. Count 1 of the CPAN (49 CFR § 391.21(a)).

70. Count 1 alleges that, on February 7, 2014, Respondent violated 49 CFR § 391.21(a), as made applicable in Colorado by Rule 4 CCR 723-6-6102(a)(I). To meet its burden of proof with respect to Count 1, Staff must prove both of these elements: (a) on February 7, 2014, Respondent violated 49 CFR § 391.21(a) (as revised on October 1, 2010); and (b) the February 7, 2014 violation was intentional.

71. Section 40-7-113(1)(g), C.R.S., as relevant here, provides that a "person who intentionally violates ... any rule promulgated by the commission pursuant to [title 40 of the Colorado Revised Statutes], ... may be assessed a civil penalty[.]"[17] A violation is intentional within the meaning of § 40-7-113(1)(g), C.R.S., when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction.

[17] Section 40-7-113(2), C.R.S., provides that the Commission, by rule, "shall set the amount of the civil penalties to be assessed" for violations of § 40-7-113(1), C.R.S.

72. If Staff proves that, on February 7, 2014, Respondent intentionally violated 49 CFR § 391.21(a) (as revised on October 1, 2010), the maximum civil penalty that can be assessed is $ 250. Rule 4 CCR 723-6-6106(g) (maximum civil penalty for each violation of any rule not specified in Rules 4 CCR 723-6-6106(a) through 723-6-6106(f) is $ 250).[18]

73. In the 2010 SCR Final Report, Respondent was cited for violation of 49 CFR § 391.21(a). The 2010 SCR Final Report described this violation as: Respondent has "failed to require your drivers to furnish [Respondent] with an employment application." Hearing Exhibit No. 5 at 2.

74. In the 2014 SCR Final Report, Respondent was cited for violation of 49 CFR § 391.21(a). The 2014 SCR Final Report described this violation as: Respondent has "failed to require your drivers to furnish [Respondent] with an employment application." Hearing Exhibit No. 6 at 3.

75. In the CPAN, Count 1 alleges that Respondent violated 49 CFR § 391.21(a). Count 1 describes the nature of this violation as: Respondent "[f]ailed to furnish carrier [*i.e.*, Respondent] with a driver employment application[.]" Hearing Exhibit No. 8 at 1. The Respondent in this Proceeding is All Access, which holds PUC Authority No. LL-01796.

76. The description of the violation contained in the 2010 SCR Final Report and in the 2014 SCR Final Report is inconsistent with the description of the violation contained in the CPAN. The description in the 2010 SCR Final Report and the 2014 SCR Final Report states that *Respondent* has the obligation to require each of its drivers to submit an employment application.

[18] By Rule 4 CCR 723-6-6106, the Commission established the maximum civil penalties to be assessed. The ALJ takes administrative notice of this fact.

The description in the CPAN states that *someone other than Respondent* failed to furnish Respondent with a driver employment application.

77. The ALJ finds that the descriptions are irreconcilable both as to the person[19] on whom the obligation falls and as to what that person is obligated to do (that is, either Respondent has the obligation to require an employment application or someone other than Respondent has the obligation to provide an employment application). The ALJ also finds that the substance of the violation (*i.e.*, the person on whom the obligation falls and what the motor carrier is obligated to do) must be established before the ALJ can make a finding on the issue of whether, on February 7, 2014, Respondent violated 49 CFR § 391.21(a).

78. Section 391.21(a) of 49 CFR (as revised on October 1, 2010) is not in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR § 391.21(a) (as revised on October 1, 2010). Thus, there is no record evidence on the substance of the federal regulation that Respondent is alleged to have violated. Without the information, the ALJ does not know the substance of 49 CFR § 391.21(a) (as revised on October 1, 2010) and, thus, cannot make a finding that Respondent is the person on whom the obligation falls and that Respondent violated that federal regulation on February 7, 2014. The ALJ finds that Staff has not established that, on February 7, 2014, Respondent violated 49 CFR § 391.21(a) (as revised on October 1, 2010).

[19] For purposes of article 10.1 of title 40, C.R.S., as relevant here, § 40-10.1-101(15), C.R.S., defines "person" as "any individual, firm, partnership, corporation, company, association, joint stock association, or other legal entity[.]" Unless the context indicates otherwise, reference to person in this Decision means person as defined in § 40-10.1-101(15), C.R.S.

79. Even if there were record evidence that established that Respondent is the person on whom the obligation falls and that Respondent violated 49 CFR § 391.21(a) on February 7, 2014 (there is no such evidence), this would be insufficient to prove the required elements. To assess a civil penalty against Respondent for the alleged violation of 49 CFR § 391.21(a), the ALJ also must find that Respondent's February 7, 2014 violation was intentional.

80. The record is clear that the substance of 49 CFR § 391.21(a) was explained to Respondent at the time of the 2010 SCR and at the time of the 2014 SCR. This is insufficient, standing alone, to establish an intentional violation. In order for the ALJ to make a finding that a violation was intentional, the record must establish that the substance of the cited federal regulation was the same in 2007 and in 2010. If the substance of the two versions of the cited federal regulation was not the same, there is insufficient evidence to support a finding of Respondent's intentional violation of 49 CFR § 391.21(a).

81. Neither 49 CFR § 391.21(a) (as revised on October 1, 2007) nor 49 CFR § 391.21(a) (as revised on October 1, 2010) is in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR § 391.21(a) (as revised on October 1, 2007) and of 49 CFR § 391.21(a) (as revised on October 1, 2010). Finally, because there is a reasonable possibility that the federal agency made changes in the language of the cited federal regulation between October 2007 and October 2010,

the ALJ finds that there is insufficient evidence from which to draw a reasonable conclusion that the language of the cited regulation was the same on October 1, 2007 and on October 1, 2010.[20]

82. For these reasons, there is insufficient record evidence to support a finding: (a) on the substance of the alleged violation of 49 CFR § 391.21(a) (as revised on October 1, 2010) (*i.e.*, the person on whom the obligation falls and what the motor carrier is obligated to do) and that Respondent violated 49 CFR § 391.21(a) on February 7, 2014; and (b) assuming that the record evidence proves that, on February 7, 2014, Respondent violated 49 CFR § 391.21(a) (this record evidence does not exist), that, on February 7, 2014, Respondent intentionally violated 49 CFR § 391.21(a) (as revised on October 1, 2010). As a result, the ALJ finds that Staff has failed to sustain its burden of proof with respect to Count 1 of the CPAN.

83. The ALJ will dismiss with prejudice Count 1 of the CPAN.

B. Count 2 of the CPAN (49 CFR § 391.51(a)).

84. Count 2 alleges that, on February 7, 2014, Respondent violated 49 CFR § 391.51(a), as made applicable in Colorado by Rule 4 CCR 723-6-6102(a)(I). To meet its burden of proof with respect to Count 2, Staff must prove both of these elements: (a) on February 7, 2014, Respondent violated 49 CFR § 391.51(a) (as revised on October 1, 2010); and (b) the February 7, 2014 violation was intentional.

[20] The fact that Staff used the same language to describe the cited federal regulation's substance is insufficient to support a finding that the cited federal regulation's substance was, in fact, the same in 2007 and in 2010.

First, the description appears to be Staff's shorthand description. There is no evidence that the Staff's description is a quote from the cited federal regulation. In addition, there is no evidence that ties Staff's description to the requirements or substance of the cited federal regulation.

Second, as discussed *infra*, during the 2014 SCR, Staff witness Riley noted 31 violations of 49 CFR § 395.8(a) and discussed with Respondent remedial action based on the substance of that federal regulation even though, in January 2014 and on February 7, 2014, 49 CFR § 395.8(a) did not apply to Respondent. This calls into question the 2014 SCR Final Report and its citation to federal regulations, including the Staff's shorthand descriptions of the cited federal regulation.

85. Section 40-7-113(1)(g), C.R.S., as relevant here, provides that a "person who intentionally violates ... any rule promulgated by the commission pursuant to [title 40 of the Colorado Revised Statutes], ... may be assessed a civil penalty[.]"[21] A violation is intentional within the meaning of § 40-7-113(1)(g), C.R.S., when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction.

86. If Staff proves that, on February 7, 2014, Respondent intentionally violated 49 CFR § 391.51(a) (as revised on October 1, 2010), the maximum civil penalty that can be assessed is $ 250. Rule 4 CCR 723-6-6106(g) (maximum civil penalty for each violation of any rule not specified in Rules 4 CCR 723-6-6106(a) through 723-6-6106(f) is $ 250).[22]

87. In the 2010 SCR Final Report, Respondent was cited for violation of 49 CFR § 391.51(a). The 2010 SCR Final Report described this violation as: Respondent has "failed to maintain a driver qualification file for [its] drivers." Hearing Exhibit No. 5 at 2.

88. In the 2014 SCR Final Report, Respondent was cited for violation of 49 CFR § 391.51(a). The 2014 SCR Final Report described this violation as: Respondent has "failed to maintain a driver qualification file for [its] drivers." Hearing Exhibit No. 6 at 3.

89. In the CPAN, Count 2 alleges that Respondent violated 49 CFR § 391.51(a). Count 2 describes the nature of this violation as: Respondent "[f]ailed to maintain a driver qualification file[.]" Hearing Exhibit No. 8 at 1.

[21] Section 40-7-113(2), C.R.S., provides that the Commission, by rule, "shall set the amount of the civil penalties to be assessed" for violations of § 40-7-113(1), C.R.S.

[22] By Rule 4 CCR 723-6-6106, the Commission established the maximum civil penalties to be assessed. The ALJ takes administrative notice of this fact.

90. The 2014 SCR Final Report is sufficient to support a finding that on February 7, 2014, Respondent failed to maintain a driver qualification file for its one driver: Timothy W. Gardner. The ALJ finds that, on February 7, 2014, Respondent violated 49 CFR § 391.51(a) (as revised on October 1, 2010). This meets one element of Staff's proof as to Count 2 of the CPAN.

91. To assess a civil penalty against Respondent for the alleged violation of 49 CFR § 391.51(a), the ALJ also must find that Respondent's February 7, 2014 violation was intentional. This is the other element of Staff's proof.

92. The record is clear that the substance of 49 CFR § 391.51(a) was explained to Respondent at the time of the 2010 SCR and at the time of the 2014 SCR. This is insufficient, standing alone, to establish an intentional violation. In order for the ALJ to make a finding that a violation was intentional, the record must establish that the substance of the cited federal regulation was the same in 2007 and in 2010. If the substance of the two versions of the cited federal regulation was not the same, there is insufficient evidence to support a finding of Respondent's intentional violation of 49 CFR § 391.51(a).

93. Neither 49 CFR § 391.51(a) (as revised on October 1, 2007) nor 49 CFR § 391.51(a) (as revised on October 1, 2010) is in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR § 391.51(a) (as revised on October 1, 2007) and of 49 CFR § 391.51(a) (as revised on October 1, 2010). Finally, because there is a reasonable possibility that the federal agency made changes in the language of the cited federal regulation between October 2007 and October 2010 and for the reasons set out in footnote 20, *supra*, the ALJ finds that there is insufficient evidence from which to draw a reasonable conclusion that the language of the cited regulation was the same on October 1, 2007 and on October 1, 2010.

94. There is insufficient record evidence to support a finding that, on February 7, 2014, Respondent intentionally violated 49 CFR § 391.51(a) (as revised on October 1, 2010). As a result, the ALJ finds that Staff has failed to sustain its burden of proof with respect to Count 2 of the CPAN.

95. The ALJ will dismiss with prejudice Count 2 of the CPAN.

C. Count 3 of the CPAN (49 CFR § 396.3(b)).

96. Count 3 alleges that, on February 7, 2014, Respondent violated 49 CFR § 396.3(b), as made applicable in Colorado by Rule 4 CCR 723-6-6102(a)(I). During the hearing, Staff witness Riley testified that Count 3 alleges an undifferentiated violation of both 49 CFR § 396.3(b)(1) and 49 CFR § 396.3(b)(2). To meet its burden of proof with respect to Count 3, then, Staff must prove both of these elements: (a) on February 7, 2014, Respondent violated *both* 49 CFR § 396.3(b)(1) *and* 49 CFR § 396.3(b)(2) (as revised on October 1, 2010); and (b) the February 7, 2014 violation of those federal regulations was intentional.

97. Section 40-7-113(1)(g), C.R.S., as relevant here, provides that a "person who intentionally violates ... any rule promulgated by the commission pursuant to [title 40 of the Colorado Revised Statutes], ... may be assessed a civil penalty[.]"[23] A violation is intentional within the meaning of § 40-7-113(1)(g), C.R.S., when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction.

98. If Staff proves that, on February 7, 2014, Respondent intentionally violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010), the maximum civil

[23] Section 40-7-113(2), C.R.S., provides that the Commission, by rule, "shall set the amount of the civil penalties to be assessed" for violations of § 40-7-113(1), C.R.S.

penalty that can be assessed is $ 500. Rule 4 CCR 723-6-6106(d) (maximum civil penalty for violation of 49 CFR § 396.3(b) is $ 500).[24]

99. In the 2010 SCR Final Report, Respondent was cited for violation of 49 CFR §§ 396.3(b)(1), 396.3(b)(2), and 396.3(b)(3). The 2010 SCR Final Report described the violation of 49 CFR § 396.3(b)(1) as: Respondent has "failed to maintain an appropriate identification for [its] vehicles." Hearing Exhibit No. 5 at 3. The 2010 SCR Final Report described the violation of 49 CFR § 396.3(b)(2) as: Respondent has "failed to maintain, for [its] vehicles, a means to indicate the nature and due date of the various inspection and maintenance operations to be performed." *Id*. The 2010 SCR Final Report described the violation of 49 CFR § 396.3(b)(3) as: Respondent has "failed to maintain, for [its] vehicles, a record of inspection, repairs, and maintenance." *Id*.

100. In the 2014 SCR Final Report, Respondent was cited for violation of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2). The 2014 SCR Final Report described the violation of 49 CFR § 396.3(b)(1) as: Respondent has "failed to maintain an appropriate identification for [its] vehicles." Hearing Exhibit No. 6 at 3. The 2014 SCR Final Report described the violation of 49 CFR § 396.3(b)(2) as: Respondent has "failed to maintain, for [its] vehicles, a means to indicate the nature and due date of the various inspection and maintenance operations to be performed." *Id*.

101. In the CPAN, Count 3 alleges that Respondent violated 49 CFR § 396.3(b). Count 3 describes the nature of this violation as: Respondent "[f]ailed to keep minimum records

[24] By Rule 4 CCR 723-6-6106, the Commission established the maximum civil penalties to be assessed. The ALJ takes administrative notice of this fact.

of inspection and vehicle maintenance[.]" Hearing Exhibit No. 8 at 1. The CPAN contains no further discussion or explanation of this allegation.

102. The description of the violations contained in the 2010 SCR Final Report and in the 2014 SCR Final Report differs from the description of the violations contained in the CPAN. The descriptions in the 2010 SCR Final Report and in the 2014 SCR Final Report are narrower and more detailed than the more inclusive and generic description in the CPAN. The ALJ finds that the substance of the violation (*i.e.*, what the motor carrier is obligated to do) must be established before the ALJ can make a finding on the issue of whether Respondent violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010).[25]

103. Sections 396.3(b)(1) and 396.3(b)(2) of 49 CFR (as revised on October 1, 2010) are not in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010). Thus, there is no record evidence on the substance of the federal regulations that Respondent is alleged to have violated. Without this information, the ALJ does not know the substance of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010) and, thus, cannot make a finding that Respondent violated those federal regulations on February 7, 2014. The ALJ finds that Staff has not established that, on February 7, 2014, Respondent violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010).

104. Even if there were record evidence that established that Respondent violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) on February 7, 2014 (there is no such evidence),

[25] As discussed *supra*, Staff must establish that Respondent violated both subsections in order for Staff to prove the allegation in Count 3 of the CPAN.

this would be insufficient to prove the required elements. To assess a civil penalty against Respondent for the alleged violation of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2), the ALJ also must find that Respondent's February 7, 2014 violation was intentional.

105. The record is clear that the substance of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) was explained to Respondent at the time of the 2010 SCR and at the time of the 2014 SCR. This is insufficient, standing alone, to establish an intentional violation. In order for the ALJ to make a finding that a violation was intentional, the record must establish that the substance of the cited federal regulations was the same in 2007 and in 2010. If the substance of the two versions of the cited federal regulations was not the same, there is insufficient evidence to support a finding of Respondent's intentional violation of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2).

106. Neither 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2007) nor 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010) are in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2007) and of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010). Finally, because there is a reasonable possibility that the federal agency made changes in the language of the cited federal regulations between October 2007 and October 2010 and for the reasons discussed in footnote 20 *supra*, the ALJ finds that there is insufficient evidence from which to draw a reasonable conclusion that the language of the cited regulations was the same on October 1, 2007 and on October 1, 2010.

107. For these reasons, there is insufficient record evidence to support a finding: (a) on the substance of the alleged violation of 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010) (*i.e.*, what the motor carrier is obligated to do) and that Respondent violated

49 CFR §§ 396.3(b)(1) and 396.3(b)(2) on February 7, 2014; and (b) assuming that the record evidence proves that Respondent violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) on February 7, 2014 (this record evidence does not exist), that, on February 7, 2014, Respondent intentionally violated 49 CFR §§ 396.3(b)(1) and 396.3(b)(2) (as revised on October 1, 2010). As a result, the ALJ finds that Staff has failed to sustain its burden of proof with respect to Count 3 of the CPAN.

108. The ALJ will dismiss with prejudice Count 3 of the CPAN.

D. Counts 4 through 13 of the CPAN (Rule 4 CCR 723-6-6103(d)(II)(C)).

109. Counts 4 through 13 allege that, on each day between and including January 22 and January 31, 2014, Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C). To meet its burden of proof with respect to Counts 4 through 13, Staff must prove both of these elements: (a) on each date, Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C); and (b) on each date, the violation of Rule 4 CCR 723-6-6103(d)(II)(C) was intentional.

110. Section 40-7-113(1)(g), C.R.S., as relevant here, provides that a "person who intentionally violates ... any rule promulgated by the commission pursuant to [title 40 of the Colorado Revised Statutes], ... may be assessed a civil penalty[.]"[26] A violation is intentional within the meaning of § 40-7-113(1)(g), C.R.S., when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction.

111. If Staff proves that, on a listed date, Respondent intentionally violated Rule 4 CCR 723-6-6103(d)(II)(C), the maximum civil penalty that can be assessed for

[26] Section 40-7-113(2), C.R.S., provides that the Commission, by rule, "shall set the amount of the civil penalties to be assessed" for violations of § 40-7-113(1), C.R.S.

that violation is $ 500. Rule 4 CCR 723-6-6106(d) (maximum civil penalty for violation of Rule 4 CCR 723-6-6103(d)(II)(C) is $ 500).[27]

112. In the 2010 SCR Final Report, Respondent was cited for violation of 49 CFR § 395.8(a). The 2010 SCR Final Report described the violation of 49 CFR § 395.8(a) as: Respondent has "failed to require [its] drivers to prepare a record of duty status." Hearing Exhibit No. 5 at 2.

113. In the 2014 SCR Final Report, Respondent was cited for 31 violations of 49 CFR § 395.8(a). The 2014 SCR Final Report described each violation of 49 CFR § 395.8(a) as: Respondent has "failed to require [its] drivers to prepare a record of duty status." Hearing Exhibit No. 6 at 3.

114. In the CPAN, Counts 4 through 13 allege that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) one time on each of the ten listed dates. Counts 4 through 13 state that, on each listed date, Respondent "[f]ailed to maintain accurate and true time records[.]" Hearing Exhibit No. 8 at 1. The CPAN contains no further discussion or explanation of these allegations.

115. The description of the violation contained in the 2010 SCR Final Report and in the 2014 SCR Final Report appears to bear little or no relationship to the description of the violations contained in the CPAN at Counts 4 through 13. The violation in the 2010 SCR Final Report and the violation in the 2014 SCR Final Report are based on 49 CFR § 395.8(a), and the violations alleged in the CPAN at Counts 4 through 13 are based on Rule 4 CCR 723-6-6103(d)(II)(C). The ALJ finds that the substance of the violation (*i.e.*, what the motor carrier is obligated to do) must be established before the ALJ can make a finding on the issue of

[27] By Rule 4 CCR 723-6-6106, the Commission established the maximum civil penalties to be assessed. The ALJ takes administrative notice of this fact.

whether Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) on one or more of the dates alleged in Counts 4 through 13 of the CPAN.

116. Rule 4 CCR 723-6-6103(d)(II)(C) is not in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of Rule 4 CCR 723-6-6103(d)(II)(C). Thus, there is no record evidence on the substance of the Rule that Respondent is alleged to have violated. Without this information, the ALJ does not know the substance of Rule 4 CCR 723-6-6103(d)(II)(C) and, thus, cannot make a finding that Respondent violated that Rule on any one of the days as alleged in Counts 4 through 13 of the CPAN. The ALJ finds that Staff has not established that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) on any of the ten days alleged in Counts 4 through 13.

117. Even if there were record evidence that established that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) on one or more of the ten days as alleged in Counts 4 through 13 (there is no such evidence), this would be insufficient to prove the required elements. To assess a civil penalty against Respondent for one or more alleged violations of Rule 4 CCR 723-6-6103(d)(II)(C), the ALJ also must find that each violation was intentional.

118. First, the ALJ notes that, as in effect in January 2014, Rule 4 CCR 723-6-6103(d)(II) stated in pertinent part: "For a motor carrier of passengers operating a motor vehicle having a seating capacity of 15 or less *and* GVWR [Gross Vehicle Weight Rating] ... of less than 10,001 pounds, *the requirements of 49 C.F.R. § ... 395.8(a) shall not apply*."[28] (Emphasis supplied.) The record contains no information about the type of Ford used by

[28] The ALJ takes administrative notice of this fact.

Respondent in its luxury limousine service, the weight of that vehicle, or the seating capacity of that vehicle. Thus, for the period August 1, 2012 through February 13, 2014 (including January 2014 and the date of the 2014 SCR), there is a question with respect to whether 49 CFR § 395.8(a) applied to Respondent.

119. The information obtained during the 2014 SCR is the basis of the violations alleged in the CPAN. During the 2014 SCR, Staff witness Riley identified a 2006 Ford as the only vehicle used by Respondent to provide its luxury limousine service. Staff witness Riley had the opportunity to observe and to inspect the vehicle. In addition, as quoted above, Rule 4 CCR 723-6-6103(d)(II) specifies the circumstances under which 49 CFR § 395.8(a) does not apply to a motor carrier (such as Respondent). Finally, Staff witness Riley -- based on his personal observation and inspection of the 2006 Ford used by Respondent to provide its luxury limousine service -- prepared the CPAN that cited Respondent for ten violations of Rule 4 CCR 723-6-6103(d)(II)(C). Staff witness Riley did not cite Respondent for any violation of 49 CFR § 395.8(a). From this, it is reasonable to conclude that the vehicle met the criteria set out in Rule 4 CCR 723-6-6102(d)(II). Based on this evidence, the ALJ finds that, given the vehicle used by Respondent to provide luxury limousine service, 49 CFR § 395.8(a) did not apply to Respondent in January 2014 and did not apply to Respondent at the time of the 2014 SCR.

120. Thus, any discussion during the 2014 SCR between Staff witness Riley and Respondent about 49 CFR § 395.8(a) is irrelevant to this Proceeding. In addition, the substance of 49 CFR § 395.8(a) (as revised on October 1, 2010) is irrelevant to this Proceeding. This leaves, as the basis for finding an intentional violation, the 2010 SCR.

121. Second, the record is clear that the substance of 49 CFR § 395.8(a) (as revised on October 1, 2007) was explained to Respondent at the time of the 2010 SCR. This is insufficient,

standing alone, to establish intentional violations of Rule 4 CCR 723-6-6103(d)(II)(C). In order to make a finding that a violation was intentional, the record must establish that the substance of 49 CFR § 395.8(a) (as revised on October 1, 2007) and the substance of Rule 4 CCR 723-6-6103(d)(II)(C) are the same. If the substance of the cited federal regulation and the substance of the Commission Rule are not the same, there is insufficient evidence to support a finding of Respondent's intentional violation of Rule 4 CCR 723-6-6103(d)(II)(C) on any of the ten days alleged in Counts 4 through 13.

122. Neither 49 CFR § 395.8(a) (as revised on October 1, 2007) nor Rule 4 CCR 723-6-6103(d)(II)(C) is in the evidentiary record in this Proceeding. In addition, the evidentiary record contains no testimonial evidence with respect to the substance of 49 CFR § 395.8(a) (as revised on October 1, 2007) or the substance of Rule 4 CCR 723-6-6103(d)(II)(C).

123. For these reasons, there is insufficient record evidence to support a finding with respect to any of the violations alleged in Counts 4 through 13 because there is no evidence: (a) establishing the substance of Rule 4 CCR 723-6-6103(d)(II)(C) (that is, what the motor carrier must do to comply) and that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) on one or more of the dates alleged in Counts 4 through 13; and (b) assuming that the record evidence proves that Respondent violated Rule 4 CCR 723-6-6103(d)(II)(C) on one or more of the dates alleged in Counts 4 through 13 (this record evidence does not exist), establishing that one or more of the violations was intentional. As a result, the ALJ finds that Staff has failed to sustain its burden of proof with respect to Counts 4 through 13 of the CPAN.

124. The ALJ will dismiss with prejudice Counts 4 through 13 of the CPAN.

125. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, Civil Penalty Assessment or Notice of Complaint to Appear No. 108832 is dismissed in its entirety with prejudice.

2. Consistent with the discussion above, the Administrative Law Judge takes administrative notice of the identified facts as stated in this Decision.

3. Consistent with the discussion above and for purposes of this Decision with respect to the facts administratively-noticed only, the Administrative Law Judge waives the following language of Rule 4 *Code of Colorado Regulations* 723-1-1501(c): "Every party shall have the opportunity on the record and by evidence, to controvert evidence admitted by administrative notice."

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)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director