

Decision No. R04-0260-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-061EC

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

LAWRENCE TORREZ, D/B/A ABSOLUTELY DEVINE LIMOUSINES,

RESPONDENT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
GRANTING MOTION FOR PRESENTATION
OF TESTIMONY BY TELEPHONE**

Mailed Date: March 12, 2004

I. STATEMENT

1. On March 1, 2004, the Staff of the Colorado Public Utilities Commission (Staff) filed a Motion for Presentation of Testimony by Telephone and for Partial Waiver of C.R.C.P. Rule 43(i) (Motion) in the captioned matter.

2. On March 2, 2004, the response period to the Motion was shortened to March 10, 2004. *See*, Decision No. R04-0214-I. The Respondent, Lawrence Torrez, doing business as Absolutely Devine Limousines (Torrez), did not file a response to the Motion.

3. The Motion seeks permission to solicit testimony via telephone from Ms. Donna Fink, an employee of American and Foreign Insurance Company (American/Foreign) located in Charlotte, North Carolina. In the civil penalty assessment (CPAN) that is the subject

of this Complaint, Staff alleges that on January 5 and 31, 2004, Torrez operated as an intrastate transportation provider without maintaining the insurance coverage required by § 40-6-104, C.R.S. Staff alleges in the Motion that Torrez filed a Form E with the Commission on February 17, 2004, purportedly establishing that he had the proper insurance coverage in place on the dates in question through a policy issued by American/Foreign. Staff states in its Motion that Ms. Fink will testify that American/Foreign has no record of ever issuing an insurance policy to Torrez. Thus, Staff submits that Ms. Fink's testimony is indispensable in that it is expected to rebut Torrez' apparent claim that he had insurance in place during the period of time encompassed by the CPAN.

4. The Commission does not have a specific rule concerning the receipt of testimony via telephone. However, the Administrative Procedures Act grants the administrative law judge (ALJ) authority to regulate the manner in which evidence is to be received at hearing. *See*, § 24-4-105(4), C.R.S. In the past, the Commission and the ALJ have allowed testimony to be presented by telephone in order to accommodate witnesses that were unable to appear at a hearing personally. *See, for example*, Decision No. R03-0255-I. In addition, the courts have sanctioned the use of telephone testimony by administrative agencies. *See, Colorado State Board of Medical Examiners v. Thompson*, 944 P.2d 547 (Colo. App. 1996).

5. Rule 43(i) of the Colorado Rules of Civil Procedure (CRCP) provides some guidance in deciding the Motion. That rule authorizes telephone testimony and lists eight factors designed to assist in determining whether "in the interest of justice" such testimony should be allowed. Application of those factors to the present circumstances supports authorizing Ms. Fink's testimony by telephone. Her testimony is critical to the issues involved in this matter and there is no indication that her credibility is in question or that Torrez could not effectively

cross-examine her over the telephone. The case will be tried before an ALJ as opposed to a lay jury. The cost and inconvenience associated with having Ms. Fink appear in Colorado are no doubt significant and the Commission has appropriate equipment with which to accommodate her testimony via telephone. Finally, it is not anticipated that Ms. Fink will need to refer to documents when providing her testimony.

6. In addition to the above, Torrez has effectively confessed the Motion by virtue of his failure to respond in opposition to the same. *See*, CRCP 43(i)(2) (a party's failure to object to the taking of testimony by telephone within seven days of a motion requesting such relief may be deemed a confession of the motion).

7. The Motion also requests the partial waiver of the requirement contained in CRCP 43(i) requiring that requests to allow telephone testimony be submitted at least 21 days prior to hearing. In this regard, it is noted that the Commission's procedural rules do not formally adopt the provisions of CRCP 43(i). *See*, 4 *Code of Colorado Regulations* 723-1-4(a)(5) (CRCP shall apply to Commission proceedings to the extent provided by a specific statutory provision or Commission procedural rule). Therefore, it is doubtful that a waiver of that portion of CRCP 43(i) is necessary. Even so, the Motion establishes good cause for granting such a waiver.

8. For all the foregoing reasons, the Motion will be granted.

II. ORDER

A. It Is Ordered That:

1. The Motion for Presentation of Testimony by Telephone and for Partial Waiver of C.R.C.P. Rule 43(i) filed in this matter by the Staff of the Colorado Public Utilities Commission is granted.

2. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge