

Decision No. R20-0006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19G-0484EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

WISDOM LIMO LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DISMISSING CIVIL PENALTY ASSESSMENT NOTICE**

Mailed Date: January 7, 2020

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I. STATEMENT

A. Summary.

1. This Decision recommends that the Public Utilities Commission (Commission) dismiss Civil Penalty Assessment Notice No. 124702 (CPAN) filed in this proceeding. As explained, the Administrative Law Judge (ALJ) concludes that the CPAN should be dismissed for several reasons, including for failing to comply with § 40-7-116(b)(II) and (III), C.R.S., and due process notice requirements, and because Public Utilities Commission Trial Staff (Staff) failed to meet its burden of proof.

II. BACKGROUND

2. Commission enforcement staff initiated this proceeding on September 11, 2019 by filing the CPAN against Wisdom Limo LLC (Wisdom) with the Commission. On September 12, 2019, Wisdom filed a request for a hearing on the CPAN. After the Commission referred this matter to an ALJ for disposition, the undersigned ALJ scheduled an evidentiary hearing to address the merits of the CPAN for November 5, 2019 at 9:00 a.m. at the Commission's office. Decision No. R19-0808-I.

3. The ALJ called the matter for a hearing on November 5, 2019 as noticed. Staff and counsel, Assistant Attorney General Aaron Neptune, appeared. Mr. Wisdom Wormenor, a non-attorney, appeared on behalf of Wisdom. Mr. Wormenor, a non-attorney, explained that he wished to represent Wisdom in the proceeding. Before moving to the evidentiary portion of the hearing, the ALJ addressed this issue. Mr. Wormenor satisfactorily established that he is

Wisdom's sole owner, that he is authorized to represent the company in the proceeding, and that there is less than \$15,000 at issue in the proceeding. Based on this, the ALJ found that Mr. Wormenor may represent Wisdom in the proceeding, consistent with § 13-1-127(2), C.R.S. (2019), and Rule 1201(b)(II), of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. As such, the ALJ allowed Mr. Wormenor to represent Wisdom.

4. In addition, before taking evidence, the ALJ asked Staff to identify the specific paragraphs of the rule cited in the CPAN that Staff alleges Wisdom violated. Staff's counsel stated that Wisdom is alleged to have violated the entire rule, including all of its paragraphs.

5. Mr. Hubert Barton testified on behalf of Staff in its direct case and Mr. Michael Gullatte testified on behalf of Staff in its rebuttal case. Mr. Wormenor testified on behalf of Wisdom. During the course of the hearing the following exhibits were admitted into evidence: Hearing Exhibits 1 through 9; Hearing Exhibit 3C (confidential exhibit); and Hearing Exhibits 11 through 17.

III. FACTUAL FINDINGS

A. Staff's Evidence.

6. Mr. Barton is an investigator with the Commission; his duties include performing safety and compliance reviews, inspections, confirming motor carriers' compliance with Commission Rules, and collecting evidence. Mr. Barton issued the CPAN in this proceeding.

7. Wisdom owns Commission-issued luxury limousine permit number LL-02065. Hearing Exhibit 3 at 3. Wisdom was randomly selected for a safety and compliance review; Mr. Barton was assigned to perform that review. Mr. Barton explained that such a review is

essentially an audit of documents that motor carriers are required by Commission Rules to maintain, including service records, driver files, vehicle files, and medical certifications.

8. Mr. Barton began his safety and compliance review by contacting Wisdom on August 6, 2019 at email addresses on file with the Commission for Wisdom. Hearing Exhibit 1; and *see* Hearing Exhibit 3 at 2. Mr. Barton's August 6, 2019 email notifies Wisdom that Mr. Barton is performing a safety and compliance review, and asks Wisdom to "please review the information and attach the documentation listed below" by email to Mr. Barton by August 16, 2019. Hearing Exhibit 1. The August 6, 2019 email lists only one document to provide: "[a]s part of this review, please provide the following documentation: Please confirm if you have a required drug testing program in place, if applicable and provide all applicable records." *Id.* The email also states that Mr. Barton will set up a time "to come out and meet with you and to inspect your vehicle(s)." *Id.*

9. The email includes three attachments, and states: "[a]lso attached, is a carrier information packet that will help you establish your driver files and vehicle files for your convenience. Following these templates will greatly reduce any errors and will provide a solid foundation for future PUC Safety and Compliance Reviews." *Id.* The email does not state that Staff is requesting that Wisdom provide any of the records listed in the email's attachments. Instead, as explained above, the email asks that Wisdom provide the "documentation listed below." Nevertheless, one of the attachments requests records. Hearing Exhibit 2 at 1. Specifically, the first attachment requests that Wisdom provide seven different types of driver documents for each of its drivers, and ten different types of vehicle documents for each of its vehicles. *Id.* The remaining attachments to the August 6, 2019 email do not request records;

instead, they are primarily blank motor carrier forms or lists of documents without an explanation. *Id.* at 2-19. Given all of this, the records request was less than clear.

10. Mr. Barton received no response to the August 6, 2019 email, so on August 16, 2019, he called the telephone number on file for Wisdom, but was unable to reach anyone. On August 19, 2019, Mr. Barton went to Wisdom's address¹ on file with the Commission to discuss the records request. *See* Hearing Exhibits 1, 2, and 3 at 1. He spoke with Mr. Wormenor about the August 6, 2019 email, and his other attempts to reach Wisdom by telephone. Mr. Barton testified that Mr. Wormenor acknowledged receiving the email and messages, but said that he did not respond because he just returned from a trip to Iran. Mr. Barton then asked Mr. Wormenor to respond to the records request by August 23, 2019.

11. In an effort to follow-up on Mr. Wormenor's statement that he was out of the country, Mr. Barton issued a Colorado Open Records Request to Denver International Airport (DIA) seeking records of any license plate numbers, vehicles, and drivers associated with Wisdom, including dates and times of entry and exit to DIA from August 1, 2019 to September 3, 2019. Hearing Exhibit 6. In response, he received a log from DIA (DIA record) identifying dates and times that a vehicle using Wisdom's "AVI Tag Number" entered and exited DIA for the requested timeframe. Hearing Exhibit 7. DIA associates an AVI Tag Number with a motor carrier's DIA account number. DIA's record indicates that a vehicle using Wisdom's AVI Tag Number entered and exited DIA on multiple occasions from August 6 to 16, 2019. *Id.* at 2-3.

12. Mr. Barton explained that the Commission does not track motor carriers' AVI Tag Numbers. As a result, the Commission has no record of Wisdom's AVI Tag Number that can be

¹ Commission records indicate that Wisdom had one address on file at all relevant times, that is: 2380 Court Place, Apartment 207 Denver, Colorado. All references in this Decision to Wisdom's address are to that address. That address is Wisdom's mailing, operating, and physical address. *See* Hearing Exhibits 8, and 3 at 1-2.

used to verify that Wisdom's AVI Tag Number is the one reflected in the DIA record. Mr. Barton explained that he cannot determine who was driving Wisdom's vehicle when it entered and exited DIA from August 6 to 16, 2019, and that DIA's report does not identify the driver. *See* Hearing Exhibit 7.

13. Mr. Barton also researched the status of Mr. Wormenor's driver's license, and discovered that it had been suspended. The suspension was not the result of a driving or vehicle insurance infraction, but due to unpaid child support. On September 3, 2019, after learning that Mr. Wormenor's license was suspended, Mr. Barton called Wisdom, then went to Wisdom's address to tell Mr. Wormenor that Wisdom could not operate. No one answered the door. He came back about an hour later, but no one answered again.

14. Mr. Barton issued the CPAN on September 4, 2019. He testified that he issued the CPAN because Wisdom did not provide the requested records even though he extended the deadline by one week. He considered additional counts but did not include them based on a concern that would be punitive. Mr. Barton testified that the Commission typically issues warning letters before issuing a CPAN, when a motor carrier has been communicative about a records request. Mr. Barton testified that because Wisdom had not communicated with him about the records request, he did not believe this was an appropriate situation for a warning letter, so no such letter was sent. He also testified that a warning letter was not appropriate because he believes that the violation was egregious.

15. On September 4, 2019, Mr. Barton returned to Wisdom's address with the CPAN; no one answered the door. That same day, while at DIA on another matter, he looked for Wisdom's vehicle at DIA, but did not find it. So, he went back to Wisdom's address. Mr. Barton slid the CPAN under the door; he testified that someone pulled it inside. He asked for the person

to open the door, but no one did. Mr. Barton testified that he went around the back of the apartment building; he saw an open balcony door. He testified that he saw someone fitting Mr. Wormenor's description driving away. When asked for the description, he testified that the person was African American with short hair. Mr. Barton assumed that Mr. Wormenor jumped off his two-story balcony, and drove away to avoid him.

16. Mr. Barton testified that on September 4, 2019, he emailed CPAN to Wisdom. Hearing Exhibit 9. On September 5, 2019, Mr. Barton also sent the CPAN to Wisdom via certified United States mail, to the address and designated for Wisdom on file with the Commission. Hearing Exhibits 3 and 8. United States postal service records indicate that the CPAN was delivered on September 10, 2019. Hearing Exhibit 8 at 2. The mailing address that Mr. Barton used to send the CPAN to Wisdom match the address file with the Commission for Wisdom. *Compare* Hearing Exhibit 3 at 1-2 with Hearing Exhibit 8.

17. Mr. Barton explained that the CPAN alleges August 23, 2019 as the date of the violation because that was the second deadline for Wisdom to provide the requested records (which it failed to do).

18. The CPAN alleges that Wisdom violated Rule 6007, of the Rules Regulating Transportation by Motor Carrier, 4 CCR 723-6.² Hearing Exhibit 5. Mr. Barton testified it is difficult to identify which provisions of Rule 6007 have been violated when a carrier does not complete a safety and compliance review, but that most of the time, "they generally violate all of them." Mr. Barton testified that he believes Wisdom violated Rules 6007(a) and (b) by failing to produce the requested documents. Mr. Barton explained that because Wisdom failed to produce

² All references to Rule 6007 in this Decision are to Rule 6007 found at 4 CCR 723-6, effective May 15, 2019.

the requested documents, there is no evidence or indication that Wisdom has maintained the required records, and there is no way to confirm the accuracy of any records that Wisdom did maintain. Mr. Barton testified that Rule 6007(c) does not apply to Wisdom because it not a UCR registrant.

19. Mr. Barton initially testified that Wisdom violated Rule 6007(d) by failing to produce the requested documents because “basically” the August 6, 2019 email or attachments (Hearing Exhibits 1 and 2) request a copy of Wisdom’s permit or authority. After reviewing the email and attachments, Mr. Barton explained that he mistakenly believed the email and attachments request a copy of Wisdom’s permit or authority, but that they do not. A review of the email and attachments confirms this. Hearing Exhibits 1 and 2. Mr. Barton did not separately request that Wisdom produce a copy of its authority or permit.

20. Mr. Barton testified that a number of requirements fall under Rule 6007, but that the “main one” at issue here is Rule 6007(e), relating to “the production of documents as requested by an enforcement officer.” He believes that Wisdom’s failure to produce the documents requested in the August 6, 2019 email and attachments violates Rule 6007(e).

21. Mr. Barton testified that Wisdom violated Rule 6007(g) because it did not “grant us or offer us” access to its files, and did not produce the requested documents. Mr. Barton did not ask Wisdom for access to its facilities for inspection as permitted by Rule 6007(g).

22. Mr. Barton testified that Wisdom violated Rule 6007(h) and (i) by not responding to his repeated attempts to contact Wisdom; he believes that Wisdom’s failure to respond means that Wisdom did not make its vehicles available for inspection, or its personnel and drivers available for interview. Mr. Barton did not ask Wisdom for access to its vehicles for inspection,

nor did he ask to interview Wisdom's personnel and drivers. He testified that he "never had the opportunity to" request access to Wisdom's vehicles. Mr. Barton was clear that in all of his attempts to contact Wisdom, whether by phone or email, he only asked Wisdom "for the production of documents."

23. Mr. Barton believes that Wisdom violated Rule 6007(j) on August 19, 2019 when Mr. Wormenor told Mr. Barton that he had not responded to the records request because he was out of the country. He believes that DIA's AVI Tag Number records prove that this is a false statement since it shows Wisdom's AVI Tag Number entering and exiting DIA during the August 6 to 16 timeframe. *See* Hearing Exhibit 7.

24. As to Rule 6007(k), Mr. Barton testified that he has no way of verifying whether Wisdom knowingly falsified records because Wisdom did not provide the requested records. He also testified that based on Mr. Wormenor's statements that he was out of the country and the DIA record, there is an inconsistency. He testified that there are "possible fraudulent documents" if Wisdom's records do not address the inconsistency, or address them in an inaccurate way.

25. Mr. Barton testified that Wisdom violated Rule 6007(l) because it did not produce any records, so Wisdom's records cannot be substantiated as accurate or complete.

26. Mr. Barton testified that he learned from Uber and Lyft records that the last time Mr. Wormenor had a "known DOT card" was in 2017; he also testified that documents Mr. Wormenor submitted for his renewal application show that "he did not have the information." He did not explain this or point to any specific document (including any exhibits); the same holds true for his comments about a DOT card.

27. Staff requests that Wisdom be assessed the full penalty for the alleged violation. Mr. Barton testified that he believes that aggravating circumstances include: that he attempted

repeatedly to contact Wisdom in many different ways with no response; that he believes Mr. Wormenor continued to drive; and that he believes Mr. Wormenor drove on a suspended driver's license.³ He believes the full penalty should be assessed because he considers Wisdom's conduct a serious safety violation. Mr. Barton also believes that the full penalty should be assessed because Staff could have, but did not, charge Wisdom with more violations. Mr. Barton explained that when he first drafted the CPAN, he originally charged Wisdom with seven counts of the same charge (*i.e.*, violation of Rule 6007), based on the number of days that had passed during which Wisdom failed to provide records (excluding weekends). He believes that this also counsels in favor of assessing the full penalty.

28. Mr. Michael Gullatte is a supervisory criminal investigator with the Commission. Mr. Gullatte testified during Staff's rebuttal case in response to Mr. Wormenor's evidence. Mr. Gullatte testified that he met with Mr. Wormenor on October 18, 2019 at the Commission's office.⁴ When Mr. Wormenor initially arrived at the Commission's office, he spoke with a Commission employee at the front desk, who contacted Mr. Gullatte. Mr. Gullatte reviewed documentation that Mr. Wormenor brought with him and determined that at least some of those documents were related to this proceeding.⁵ He believes those documents are the same documents that Mr. Wormenor brought to the hearing as exhibits. *See* Hearing Exhibits 11 to 17. Mr. Gullatte did not accept the documents, and instead told Mr. Wormenor that he should bring those documents to the evidentiary hearing in this matter.

³ This Decision makes no finding that Mr. Wormenor drove while his license was suspended.

⁴ As discussed later, Mr. Wormenor testified that he came to the Commission's office on August 23, 2019, and again in October 2019 to provide the requested records. Mr. Gullatte's testimony was unclear as to whether he also met with Mr. Wormenor on August 23, 2019. But, he testified that the Commission may have been evacuated due to a fire alarm on August 23, 2019 (consistent with Mr. Wormenor's testimony, discussed later).

⁵ Mr. Gullatte explained that he also spoke with Mr. Wormenor about his request to renew his permit when he was at the Commission's office on October 18, 2019.

B. Wisdom's Evidence.

29. Mr. Wormenor is Wisdom's sole owner and operator. English is not his first language; he especially struggles with writing in English. He testified that because he has difficulties writing in English, he did not respond to the August 6, 2019 email in writing. Mr. Wormenor testified that instead of responding in writing, he called the Commission's office to attempt to make an appointment with Mr. Barton. He testified that he called several times, but that he only left a message for Mr. Barton on or around August 23, 2019 and that Mr. Barton did not call him back.

30. Mr. Wormenor testified that because he had not heard back from Mr. Barton, on August 23, 2019, he came to the Commission's office to attempt to meet with Mr. Barton about the records request. He testified that he brought records responsive to the request with him. Those documents were admitted into evidence as Hearing Exhibits 11 to 17. Mr. Wormenor testified that when he arrived at the Commission's office, that the Commission was in the process of evacuating due to a fire alarm.⁶ Mr. Wormenor testified that he spoke with an unidentified Commission employee, who told him that Mr. Barton was not there, that all of the Commission's staff was evacuating, and that he should come back later. Mr. Wormenor testified that based on this, he left. He planned to return with the requested documents at a later time. Mr. Wormenor testified that he returned to the Commission's office in mid-October 2019 with the requested documents. He testified that a Commission staff member told him that it was too late to provide those records and that he should bring them to the hearing in this matter. Mr. Wormenor did so.⁷

⁶ As noted, Mr. Gullatte acknowledged that the Commission's office may have been evacuated on August 23, 2019 due to a fire alarm.

⁷ The administrative record for this proceeding shows that on October 18, 2019, Wisdom filed all the documents that he brought to the hearing, Hearing Exhibits 11 to 17.

See Hearing Exhibits 11 to 17. Mr. Wormenor believes these records comply with Staff's records request.

31. Mr. Wormenor denied Mr. Barton's assertion that he drove while his license was suspended. He testified that since he could not drive due to his suspended license, he loaned Wisdom's vehicle to a friend and his friend's son, whose car broke down. Mr. Wormenor testified that he allowed them to use the vehicle from late July 2019 through mid-September 2019. He testified that he was not the person driving the vehicle to and from DIA, as noted in the DIA record, (Hearing Exhibit 7).

32. Mr. Wormenor explained that his driver's license was suspended from June to mid-September 2019 because he fell behind on child support payments. He said that he was unable to pay child support because he was paying for his mother's medical bills; his mother lives in Africa, and was very sick. He also testified that his daughter was diagnosed with lung cancer. Mr. Wormenor testified that when he received the records request, he was very distracted by his mother's and daughter's illnesses, and the issues surrounding child support, and that this slowed his response time to the records request.

33. Mr. Wormenor never testified that he was out of the country or out of town when the August 6, 2019 records request was issued; nor did he testify that he failed to respond to the request by the first deadline (August 16, 2019) because he was out of the country or out of town.⁸

IV. RELEVANT LAW, ANALYSIS, AND CONCLUSIONS

A. Authority to Issue Civil Penalty Assessments.

34. Commission investigative personnel have authority issue civil penalty assessments to any person required to comply with Commission rules promulgated per

⁸ Staff did not question Mr. Wormenor on this issue during cross-examination.

article 10.1 of title 40, Colorado Revised Statutes, who violates such rules. §§ 40-7-116(1)(a) and 40-7-113(1)(g), C.R.S. (2019). The CPAN alleges that Wisdom violated Rule 6007 of the Commission's Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. Hearing Exhibit 5. The Commission's Rules Regulating Transportation by Motor Vehicle were promulgated, at least in part, per §§ 40-10.1-101 to 705, C.R.S.⁹ Because Wisdom holds a Commission-issued luxury limousine permit, it is bound to comply with Rule 6007. Rules 6000 and 6001(vv), 4 CCR 723-6. Consequently, the ALJ concludes that the Commission investigative staff had authority to issue the CPAN in this proceeding and that the Commission has jurisdiction over this matter per §§ 40-7-101, 113 and 116, C.R.S.

B. Service Requirements.

35. Staff must serve a civil penalty assessment notice on the named respondent; this may be accomplished by certified mail. § 40-7-116(1)(b), C.R.S.; Rules 1205(a) and (d), 4 CCR 723-1. Staff may serve a CPAN on the carrier's designated agent, as on file with the Commission. Rules 1205(a) and (d), 4 CCR 723-1; and Rule 6006(a), 4 CCR 723-6. Service on a motor carrier's designated agent on file with the Commission is service upon the carrier. Rule 6006(c), 4 CCR 723-6.

36. The evidence concerning service was undisputed. Specifically, Staff served the CPAN in this proceeding on Wisdom by United States certified mail on September 5, 2019, to Wisdom's most recent designated agent and address on file with the Commission. Hearing Exhibits 3, 5, and 8. Wisdom received the certified mail on September 10, 2019. Hearing

⁹ The "Basis, Purpose, and Statutory Authority" for the Rules Regulating Transportation by Motor Carrier (4 CCR 723-6) states, "[t]he statutory authority for the promulgation of these rules can be found at §§ . . . 40-10.1-101 through 705" 4 CCR 723-6. A full copy of these rules is found at: <https://www.colorado.gov/pacific/dora/transportation-rules>.

Exhibit 8 at 2. Based on the foregoing, the ALJ concludes that Staff properly served the CPAN on Wisdom.

C. Burden of Proof.

37. Staff, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. Rule 1500, 4 CCR 723-1; *see also* §§ 24-4-105(7) and 13-25-127(1), C.R.S. The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party. *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986). Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000). The ALJ will address whether Staff met its burden later in this Decision.

D. Notice Requirements.

38. The content of a CPAN must provide adequate notice of the alleged violation. *See* §40-6-116(1), C.R.S.; *see also* § 24-4-105(2)(a), C.R.S. (administrative agency must provide notice of the matters of fact and law asserted). As relevant here, a CPAN must include, “[a] citation to the specific statute or rule alleged to have been violated.” § 40-7-116(1)(b)(II), C.R.S. The Commission has found that where a CPAN cites to a statute that “does not identify the elements of the carrier’s obligations or impose any specific statutory requirements,” the citation is not specific within the meaning of § 40-7-116(1)(b)(II), C.R.S. Decision

No. C14-1452, ¶ 16, issued December 3, 2014, Proceeding No. 14G-0359CP. Put differently, the Commission has found that the cited statute or rule must provide the respondent “with information about the statutory requirements she is alleged to have violated or the proof required.” *Id.* CPANs must also include “[a] brief description of the alleged violation, the date and approximate location of the alleged violation . . .” § 40-7-116(1)(b)(III), C.R.S. Sections 40-7-116(b)(II) and (III), C.R.S., operate together to provide a carrier with notice of the matters at issue, that is: the specific statute or rule the carrier is accused of violating; the carrier’s actions or failure to act which form the basis for the violation alleged; the date and location of the violation; and the possible penalty.

39. Procedural due process is at the heart of these notice requirements.¹⁰ *See e.g., Bourie v. Dep’t of Higher Educ.*, 929 P.2d 18, 22 (Colo. App. 1996); *Shaball v. State Compensation Ins. Authority*, 799 P.2d 399, 404 (Colo. App. 1990); *People in Interest of D.G.*, 733 P.2d 1199, 1202 (Colo. 1987). The purpose of notice under the due process clause, “is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.” *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978). Indeed, courts have held that due process requires adequate notice of the charges, a reasonable opportunity to prepare to meet the charges, a hearing, and fair and impartial decision. *Watson v. Board of Regents*, 512 P.2d 1162, 1165 (Colo. 1973). Failure to give notice violates the most rudimentary demands of due process of law. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988). But, the notice

¹⁰ The requirement of procedural due process comes from the guarantees of Fourteenth Amendment to the United States Constitution, that the government may not deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV, § 1. Colorado’s Constitution provides the same guarantee. Colo. Const., Art. II, § 25.

required in an administrative proceeding is not the equivalent of the formal, specific, and detailed notice required in a criminal proceeding. *Bourie*, 929 P.2d at 22.

40. The CPAN alleges that on August 23, 2019, Wisdom committed one violation of Rule 6007. Hearing Exhibit 5. Rule 6007 includes 12 numbered paragraphs, but the CPAN does not cite the specific paragraph or paragraphs of Rule 6007 that Wisdom is alleged to have violated. *Id.* At the onset of the hearing, Staff argued that Wisdom is alleged to have violated all of Rule 6007. Although the ALJ is skeptical of Staff's argument that the CPAN's citation to Rule 6007 is to the entire rule, the ALJ assumes *arguendo*, that the citation is intended to allege that Wisdom violated the entire Rule.¹¹

41. The ALJ turns to whether the citation to Rule 6007 is "specific" within the meaning of § 40-7-116(1)(b)(II), C.R.S. In doing so, the ALJ considers whether the general citation to Rule 6007 provides notice of the elements of the carrier's obligations, the regulatory requirements the carrier is alleged to have violated, or the proof required for the alleged violation for each paragraph in Rule 6007. *See* Decision No. C14-1452, ¶ 16, Proceeding No. 14G-0359CP.

42. Rule 6007(a) through (d), and (g) through (l) impose specific regulatory requirements on regulated motor carriers ranging from ensuring the accuracy of information it provides to the Commission, to making its vehicles and facilities available for inspection. Those paragraphs also identify the elements of the carrier's obligations, provide information about the

¹¹ Staff's argument is questionable for several reasons, including: the fact that the CPAN alleges only one count of violating Rule 6007 even though the rule contains numerous provisions which impose different obligations on carriers; and, by Mr. Barton's own testimony, Staff knew that Wisdom was not subject to the requirements of Rule 6007(c). Moreover, during closing argument, Staff's counsel argued that that majority of Rule 6007's paragraphs are not under consideration, but that Staff believes the evidence established violations of Rule 6007(a), (b), and (j), at a minimum. Staff did not seek to amend the CPAN or otherwise retract its original position that the CPAN charges Wisdom with violating all of Rule 6007.

regulatory requirements the carrier is alleged to have violated, including the proof required. Rule 6007(a)-(d) and (g)-(l). Thus, to the extent that the CPAN's general citation to Rule 6007 includes paragraphs (a) through (d), and (g) through (l), the ALJ finds that the citation is specific within the meaning of § 40-7-116(1)(b)(II), C.R.S.¹²

43. Rule 6007(e) and (f) state, in pertinent part:

(e) An Enforcement Official has the authority to interview personnel of a Motor Carrier and to inspect records, Motor Vehicles used in providing transportation service, and the facilities of a Motor Carrier as follows:

- (I) immediately for any records required to be maintained in a Motor Vehicle or with the Driver, including towing authorizations, Mover estimates for service, Mover contracts for service, or any records related to insurance or safety;
- (II) within two days for any records related to a complaint or investigation; or
- (III) within ten days for all other records.

(f) When a request under paragraph (e) of this rule meets multiple time periods, the shortest time period shall apply.

4 CCR 723-6. The ALJ finds that Rule 6007(e) and (f)'s language is plain and unambiguous; as a result, it must be applied as written. *Phillips v. Exec. Dir. Colo. Dep't of Corrections*, 251 P.3d 1176, 1178 (Colo. App. 2010) (courts apply the same rules of construction applicable to statutes to interpreting administrative regulations, first looking to the language's plain and ordinary meaning; if the language is clear and unambiguous, courts do not resort to other rules of construction); *see Heagney v. Schneider*, 677 P.2d 446, 447 (Colo. App. 1984) (where statutory language is plain and unambiguous, it must be applied as written).

57. Rule 6007(e) and (f) provide Commission enforcement officials authority to: interview carriers' personnel; inspect carriers' records, vehicles and facilities; and request to do so with stated timeframes. Nothing in the plain language of Rule 6007(e) and (f) imposes an

¹² The ALJ does not conclude that a CPAN meets due process mandates when it cites a rule that imposes multiple obligations without identifying the specific provisions of the rule alleged violated. It is not necessary to decide that issue in the circumstances.

obligation on regulated motor carriers. Indeed, paragraphs (e) and (f) contain no language directing or commanding motor carriers to act.¹³ Instead, the language focuses on providing enforcement officials authority to seek records. To find otherwise, the ALJ would have to read words into the rule that do not exist (*i.e.* motor carrier shall or must provide records). There is no question that when the Commission wishes to impose an obligation on carriers via rule, it uses language which does so. For example, Rule 6007(g) states: “[u]pon request of an Enforcement Official during business hours, *a Motor Carrier shall immediately make its facilities available for inspection.*” (Emphasis added), 4 CCR 723-6. This language plainly obligates motor carriers to act, whereas paragraphs (e) and (f) contain no similar language.

58. The ALJ concludes that Rule 6007(e) and (f) do not: identify the elements of carriers’ obligations; provide information about the requirements the carrier is alleged to have violated, or on the proof required. For the foregoing reasons, the ALJ finds that to the extent that the CPAN’s general citation to Rule 6007 includes paragraphs (e) and (f), the citation is not specific within the meaning of § 40-7-116(1)(b)(II), C.R.S.¹⁴ See Decision No. C14-1452, ¶ 16, Proceeding No. 14G-0359CP.

¹³ Because the ALJ finds Rule 6007(e) and (f) plain and unambiguous, it is unnecessary to consider the Rule’s history. *Phillips*, 251 P.3d 1178. Even so, the Rule’s history supports the ALJ’s conclusion because the prior version of the Rule, (former Rule 6005(b)) includes language obligating motor carriers to act, whereas the revised version does not. Former Rule 6005(b) provides in pertinent part: “An enforcement official has the authority to interview personnel and inspect records, motor vehicles used in providing a transportation service, and facilities of a motor carrier. (I) Upon request by an enforcement official . . . records *must be made available to the official* . . . Thereafter, the records *shall be made available* in the format maintained by the company. *Copies shall also be provided upon request.* Records or copies, as applicable, *must be made available within the following time periods:* (A) Immediately for any records required to be maintained in a motor vehicle or with the driver . . . ; (B) Within two days for any records related to a complaint investigation; or (C) Within ten days for all other records.” Rule 6005(b), 4 CCR 723-6 (2018) (emphasis added). Similar language did not survive the Commission’s significant rulemaking overhaul resulting in Rule 6007 (effective May 15, 2019). See Decision Nos. C19-0237 issued February 27, 2019 and C18-1150 issued December 24, 2018 in Proceeding No. 17R-0796TR; Attachments A and B to Notice of Proposed Rulemaking in Proceeding No. 17R-0796TR.

¹⁴ Even if the citation could pass muster under § 40-7-116(1)(b)(II), C.R.S., the ALJ finds that a charge of violating Rule 6007(e) and (f) cannot prevail as a matter of law since those provisions place no obligations or requirements on motor carriers. As a result, to the extent that the CPAN charges violation of Rule 6007(e) and (f), such charges fail as a matter of law.

59. The ALJ next turns to whether the CPAN complies with the statutory requirement in § 40-7-116(1)(b)(III), C.R.S., to provide a brief description of the nature of the violation alleged. That description is the CPAN's brief factual basis to support the CPAN's charges. *See* § 40-7-116(b)(II) and (III), C.R.S. Because the CPAN accuses Wisdom of violating all of Rule 6007, the ALJ reviews the CPAN's brief description of the nature of the violation to determine whether it implicates the paragraphs of Rule 6007 which remain at issue.¹⁵

60. The CPAN states: “**Nature of Violation:** Violation of record keeping rule or refusal to make records, facilities, personnel, or Drivers available for interview (Carrier failed to produce for review/inspection, all required and requested documents necessary for Safety and compliance review (SCR)).” (Emphasis in original). Hearing Exhibit 5. The CPAN asserts that the violation occurred on August 23, 2019 in Denver, Colorado. Combined with the CPAN's description of the nature of violation, this information is the sum total of the factual assertions in the CPAN. Hearing Exhibit 5.

61. The CPAN's assertion that Wisdom violated a “record keeping rule” implicates Rule 6007(b) and (c) because both require motor carriers to maintain records. Hearing Exhibit 5. The CPAN's assertion that Wisdom refused “to make . . . facilities, personnel, or Drivers available for interview” implicates Rule 6007(g) and (i) because those paragraphs require that upon request of an enforcement official, carriers must make their facilities available for inspection and their personnel and drivers available for interview. *Id.* The CPAN's assertion that Wisdom “failed to produce for review/inspection, all required and requested documents necessary for Safety and compliance review . . .” implicates Rule 6007(d) because that paragraph

¹⁵ As is the case here, when a CPAN cites to a general rule which includes multiple provisions that may be violated (without identifying which one was violated), the brief description of the nature of the violation becomes particularly critical as it helps identify which provisions of the rule or statute the carrier is accused of violating.

requires carriers to immediately produce evidence of their permit or authority upon request of an enforcement official.¹⁶ These descriptions are brief in the truest sense. But, when read alongside the alleged violation date and location, they provide notice of the nature of the alleged violation of Rule 6007(b), (c), (d), (g) and (i), consistent with § 40-6-117(1)(b)(III), C.R.S.

62. The CPAN's description of the alleged violation makes no assertions which implicate Rule 6007(a), (h), (j), (k), and (l), which provides, in pertinent part:

- (a) A Motor Carrier is obligated to ensure the accuracy of any information it provides to the Commission pursuant to these rules . . . (b) . . . (c) . . . (d) . . . (e) . . . (f) . . . (g) . . .
- (h) Upon request by an Enforcement Official, a Motor Carrier, including its Drivers, shall immediately make its Motor Vehicles available for inspection and shall assist, if requested, in the inspection of such equipment. . . . (i) . . .
- (j) No Motor Carrier shall make or cause to be made fraudulent or intentionally false statements or records to the Commission or Commission staff.
- (k) No Person shall knowingly falsify, destroy, mutilate, change, or cause falsification, destruction, mutilation, or change to any record subject to inspection by the Commission.
- (l) No Motor Carrier . . . shall produce or retain false records or records the Motor Carrier . . . knew or should have known to be false or inaccurate. The Motor Carrier shall be responsible for the accuracy of the records it retains and produces.

63. The CPAN's brief description contains no language suggesting that Wisdom: provided inaccurate information to the Commission (Rule 6007(a)); failed to make its vehicles available for inspection (Rule 6007(h)); made or caused to be made false or fraudulent statements or records to the Commission (Rule 6007(j)); knowingly falsified, destroyed, changed, mutilated, destroyed records subject to inspection or caused the same (Rule 6007(k)); produced or retained false records or records it knew or should have known to be false or

¹⁶ Likewise, the CPAN's statement, "refusal to make records . . . available" also potentially implicates Rule 6007(d), though the syntax is less than clear.

inaccurate (Rule 6007(l)); or violated its responsibility to ensure the records it retains and produces are accurate (Rule 6007(a) and (l)). As a result, the ALJ concludes that the CPAN does not provide a brief description of the nature of the violation of Rule 6007(a), (h), (j), (k), and (l), contrary to § 40-7-116(1)(b)(III), C.R.S.

64. The ALJ finds that in the circumstances here, the CPAN's failure to comply with § 40-7-116(b)(II) and (III), C.R.S., violates basic due process notice requirements, even in the context of this administrative proceeding. *See Watson*, 512 P.2d at 1165; *Bourie*, 929 P.2d at 22. That is because the CPAN's missing information deprives Wisdom of notice of the matters at issue and a reasonable opportunity to prepare to meet the charges. *See Memphis Light, Gas & Water Division*, 436 U.S. at 14; and *Watson*, 512 P.2d at 1165. For example, the CPAN does not assert that Wisdom made false statements or provided false records to Commission staff. Hearing Exhibit 5. Lacking that information, Wisdom is deprived of the ability to prepare to meet such a charge, which may require much different evidence than defending against allegations that Wisdom failed to provide requested records.

65. The CPAN's notice issues could have been avoided entirely. Even after the CPAN was issued, it could have been amended before the hearing, so long as such an amendment did not impact Wisdom's substantial rights. *See* § 40-7-116(2), C.R.S. But, Staff failed to ensure the CPAN met the relevant statutory and due process requirements, both when it was issued and after. For the foregoing reasons and authorities, the ALJ concludes that to the extent that the CPAN's general citation to Rule 6007 includes paragraphs (a), (e), (f), (h), (j), (k), and (l), such charges should be dismissed for failing to comply with § 40-7-116(1)(b)(II) and (III), C.R.S., and for the additional reason that the CPAN fails to meet basic due process notice requirements. *See Watson*, 512 P.2d at 1165.

E. CPAN's Remaining Issues.

66. Based on the above findings and conclusions, all that remains at issue is whether Staff met its burden to prove that Wisdom violated Rule 6007(b), (c), (d), (g), and (i).

67. Rule 6007(b) requires motor carriers to maintain records required by the Commission's rules, or as ordered by the Commission for three years, in electronic or original format. Staff presented no evidence showing that Wisdom has not maintained records required by Commission rules. Instead, Mr. Barton asserted that Wisdom violated Rule 6007(b) when it failed to produce the requested records because there is no evidence or indication that Wisdom has maintained the required records. This disregards Staff's burden of proof. Staff carries the burden to prove that Wisdom violated Rule 6007(b) by failing to maintain records required by the rules or orders for three years. Rule 1500, 4 CCR 723-1; *see also* §§ 13-25-127(1) and 24-4-105(7), C.R.S. Wisdom is not required to prove that it has complied with Rule 6007(b). The ALJ concludes that Staff failed to prove by a preponderance of the evidence that Wisdom violated Rule 6007(b).

68. Rule 6007(c) requires UCR registrants to maintain records upon which its annual registration in the UCR Agreement is based for a period of three years. Staff presented no evidence that Wisdom violated Rule 6007(c). In fact, Mr. Barton testified that Wisdom is not a UCR registrant, and is not obligated to meet the requirements of Rule 6007(c). The ALJ concludes that Staff failed to prove by a preponderance of the evidence that Wisdom violated Rule 6007(c).

69. Rule 6007(d) requires motor carriers to maintain evidence of their authority or permit at their principal place of business, and to produce it immediately when an enforcement official requests it. Although Mr. Barton met with Mr. Wormenor in person at Wisdom's operating address on August 19, 2019, Mr. Barton did not ask him to provide Wisdom's

authority or permit. The August 6, 2019 email and attachments do not request that Wisdom provide its authority or permit, and Mr. Barton never separately asked Wisdom to produce those records. Wisdom cannot fail to produce something it was never asked to produce in the first place. Indeed, Rule 6007(d) only requires a carrier to produce its permit or authority “upon request” of an enforcement official. In this case, such a request was not made. Based on the foregoing, the ALJ concludes that Staff failed to prove by a preponderance of the evidence that Wisdom violated Rule 6007(d).

70. Rule 6007(g) requires motor carriers to make their facilities immediately available for inspection “[u]pon request” of an enforcement official during business hours. Under the plain language of Rule 6007(g), Wisdom’s obligation to provide access to its facilities is not triggered unless an enforcement official requests such access. Mr. Barton asserted that Wisdom violated Rule 6007(g) because it did not grant or offer access to its files. But, Rule 6007(g) does not require a carrier to provide access to its files; instead, it requires a carrier to immediately provide access to its facilities for an inspection upon request. And, Staff provided no evidence indicating that enforcement officials requested that Wisdom make its facilities available for inspection. Notably, Mr. Barton testified that in the messages and emails to Wisdom, he only asked for the production of documents. Based on the foregoing, Staff failed to show by a preponderance of the evidence that it requested Wisdom to provide immediate access to its facilities for inspection. As a result, the ALJ finds that Staff failed to prove by a preponderance of the evidence that Wisdom violated Rule 6007(g).

71. Rule 6007(i) requires motor carriers to provide to make their personnel and drivers available for interview during business hours “[u]pon request” of an enforcement official. Thus, like Rule 6007(g), Rule 6007(i) triggers a carrier’s obligation only after a request is made.

Staff did not provide evidence indicating that enforcement officials requested that Wisdom make its personnel and drivers available for interview. Instead, Mr. Barton testified that Wisdom violated Rule 6007(i) because it failed to respond to his repeated attempts at contact. He views that failure to respond as refusing to make drivers and personnel available for an interview. And, as noted, Mr. Barton was clear that he only asked Wisdom to produce documents in his messages and email to Wisdom. The ALJ finds that Staff failed to show by a preponderance of the evidence that it requested Wisdom make its personnel and drivers available for interview. As a result, the ALJ finds that Staff failed to prove by a preponderance of the evidence that Wisdom violated Rule 6007(i).

F. Conclusions

72. As discussed in detail, to the extent that the CPAN's general citation to Rule 6007 includes paragraphs (a), (e), (f), (h), (j), (k), and (l) of the Rule, such charges fail because the CPAN does not meet the requirements in § 40-7-116(1)(b)(II) and (III), C.R.S., and for the additional reason that it fails to meet due process notice mandates. As explained above, Staff failed to meet its burden to show by a preponderance of the evidence that Wisdom violated Rule 6007(b), (c), (d), (g), and (i). No other paragraphs of Rule 6007 remain. As a result, the CPAN should be entirely dismissed.

73. Pursuant to § 40-6-109, C.R.S., the ALJ transmits the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order to the Commission.

V. ORDER**A. The Commission Orders That:**

1. Consistent with the above discussion, Civil Penalty Assessment Notice No. 124702 in this proceeding is dismissed.

2. This proceeding is closed.

3. The 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.

4. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

5. 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

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director