

Decision No. R22-0614-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0381TO

KEVIN MCCLUSKY,

COMPLAINANT,

V.

TOWING DONE RIGHT LLC,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
REGARDING DECEMBER 6, 2022
EVIDENTIARY HEARING**

Mailed Date: October 12, 2022

I. STATEMENT, SUMMARY, AND BACKGROUND

A. Summary

1. This Decision provides information relating to the manner in which the evidentiary hearing scheduled for December 6, 2022, will be held and establishes procedures to facilitate the hearing.

B. Procedural History¹

2. On September 1, 2022, Complainant Kevin McClusky filed a Complaint against Respondent Towing Done Right LLC (Towing Done Right) with the Colorado Public Utilities Commission (Commission), which Towing Done Right answered on September 19, 2022.

3. On September 6, 2022, the Commission's Director issued an Order Setting Hearing and Notice of Hearing (Order and Notice) for November 15, 2022 at 9:00 a.m. before an Administrative Law Judge (ALJ).² The Order and Notice states that the ALJ will establish the place and manner in which the hearing will be held by separate order, noting that the hearing may be held in person, fully remotely, or hybrid.³

4. On September 7, 2022, Towing Done Right made a filing stating that it wishes to offer to release the vehicle to its owner for \$1,000 to ensure a quick resolution to the matter for all parties.⁴

5. On September 14, 2022, the Commission referred this Proceeding to an ALJ for disposition by minute entry.

6. On September 29, 2022, the ALJ provided the parties with information about mediation; rescheduled the November 15, 2022 hearing for December 6, 2022; and ordered Towing Done Right to confer with Mr. McClusky about mediation and the manner in which the hearing should be held (fully remote, fully in-person, or hybrid), and make a filing by October 7, 2022 with the results of that conferral.

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

² Order and Notice at 1.

³ *Id.*

⁴ Towing Done Right's 9/7/22 filing.

7. On October 6, 2022, Towing Done Right filed a Status Report providing the results of its conferral with Mr. McClusky.

8. On October 11, 2022, Mr. McClusky filed an Update providing additional information about his position on mediation and his conferral with Towing Done Right.

II. FINDINGS AND CONCLUSIONS

A. The Parties' Conferral

9. In its Status Report, Towing Done Right states that Mr. McClusky declined to coordinate scheduling a mediation and “refuses to make a payment for the requested mediation.”⁵

10. Towing Done Right asks that the hearing be held remotely and states that counsel must appear from out of state for the hearing.⁶ It also states that Mr. McClusky prefers that the hearing be held in person and objects to the continued hearing date.⁷

11. In his Update, Mr. McClusky states that through emails and telephone calls with Towing Done Right, he was offered only one option for mediation which required him to immediately pay \$200.⁸ Mr. McClusky explains that he was under the impression that the Commission offers mediation at no cost, and that he would gladly participate in mediation if it is offered at no charge.⁹ Mr. McClusky also notes that he does not object to the change in hearing date, but only asked why it was changed because he has already lost his job due to the alleged illegal tow and still does not have access to a large majority of his tools and equipment that are in his vehicle.¹⁰

⁵ Status Report at 1.

⁶ *Id.*

⁷ *Id.*

⁸ Update at 1.

⁹ *Id.*

¹⁰ *Id.*

12. As noted in Decision No. R22-0585-I, the Commission offers free mediation to help parties resolve disputes before the Commission.¹¹ Given this, Towing Done Right's statement concerning "payment for the requested mediation" is perplexing.¹² The ALJ will not speculate about that but reiterates that Mr. McClusky and Towing Done Right are not required to make any payment to the Commission for the Commission's mediation services, should they wish to use them.

13. Both Mr. McClusky and Towing Done Right must voluntarily agree to mediate. Given the Status Report, the Update, and Towing Done Right's September 7, 2022 filing offering to settle the matter, it appears likely that the parties may both wish to use the Commission's free mediation services.¹³ The parties are not required to make any more filings in this Proceeding about whether they want to mediate. That process, if it moves forward at all, will do so on a parallel track that is separate from the formalities of this Proceeding.

14. Mr. McClusky should review Decision No. R22-0585-I for information as to why the initial hearing date was changed. In addition, due to scheduling difficulties, the ALJ is unable to accommodate a hearing date earlier than December 6, 2022 at this time.

15. Turning to the manner in which the hearing should be held, since Towing Done Right requests that the hearing be fully remote and Mr. McClusky requests that it be fully in person, the ALJ will schedule the hearing to be a hybrid hearing, meaning that any party, witness, or counsel that wishes to appear remotely may do so and anyone wishing to appear in person may do so. To accommodate a hybrid hearing, the ALJ will appear for the hearing in person at

¹¹ Decision No. R22-0585-I at 4 (mailed September 29, 2022).

¹² Status Report at 1.

¹³ The parties will be contacted by a staff member unconnected to this Proceeding to schedule mediation. The parties are not required to schedule a mediation.

the Commission's offices in Denver. Additional information about the procedures for the hybrid hearing are below and in Attachments A and B to this Decision. The parties must carefully review this information as it equally impacts those appearing remotely and in person.

16. Scheduling the hearing as a hybrid hearing ensures that the hearing can proceed without further delay given that Towing Done Right's counsel will be out of the state at the time of the hearing.

B. Procedures for Hybrid Evidentiary Hearing

17. Those participating in the hearing remotely will do so by video-conference using Zoom. To minimize the potential that the video-conference hearing may be disrupted by non-participants, the Zoom information to remotely attend the hearing will be provided to the parties and counsel approximately one week before the scheduled hearing at the email addresses on file for this Proceeding.¹⁴ For the same reason, the parties will be prohibited from distributing that information to anyone not participating in the hearing. The parties are responsible for ensuring that anyone participating in the hearing remotely has the necessary Zoom information to do so.

18. Attachment A hereto includes important technical information and requirements to facilitate remote hearing participation.

19. Because the hearing will accommodate remote participation, the parties are required to present their documentary evidence electronically. Attachment B includes

¹⁴ The parties must ensure that the Commission has their most current email address.

information and requirements to facilitate electronic evidentiary presentations at the hearing. The parties must pay special attention to Attachment B and follow all the requirements in that attachment; failing to do so will negatively impact the smooth progress of the evidentiary hearing.

20. *The parties are advised and on notice* that merely filing a document (e.g., the Complaint and attachments thereto) with the Commission does not amount to presenting evidence. Any party wishing to present documentary evidence for the ALJ to consider in deciding the issues in this Proceeding must prepare that evidence to be presented electronically at the hearing, and present that evidence during the hearing consistent with the requirements of Attachment B.

21. In addition to documentary evidence, the parties may offer witness testimony during the hearing.

22. As noted in Decision No. R22-0585-I, Mr. McClusky carries the burden to prove by a preponderance of the evidence that the relief sought in his Complaint should be granted.¹⁵ The preponderance standard requires the fact finder (here, the ALJ) to determine whether the existence of a contested fact is more probable than its non-existence.¹⁶ A party has met this burden of proof when the evidence, on the whole, and however slightly, tips in favor of that

¹⁵ §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1.

¹⁶ *Swain v. Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

party.¹⁷ But, the evidence must be substantial, defined as such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion.¹⁸

23. *The parties are advised and on notice* that they are expected to review and follow the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. An electronic copy of those rules may be found on the Commission's website at: <https://puc.colorado.gov/pucrulespractice>. The parties may also wish to review the Commission's Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, available at: <https://puc.colorado.gov/transportation-rules>.

III. **ORDER**

A. **It Is Ordered That:**

1. As discussed, the evidentiary hearing scheduled for December 6, 2022, will be held as a hybrid hearing, with those wishing to appear remotely doing so via Zoom, and everyone else appearing in person at a Commission hearing room in Denver, Colorado. The evidentiary hearing on the Complaint in this Proceeding is scheduled as follows:

DATE: December 6, 2022
TIME: 9:00 A.M.
PLACE: Hybrid: in-person or remote appearances.

In person:
Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

OR

¹⁷ *Schocke v. Department of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

¹⁸ *See City of Boulder v. Colorado Public Utilities Comm'n*, 996 P.3d 1270, 1278 (Colo. 2000).

Remote:
By video-conference using Zoom.

2. Attachments A and B are incorporated into this Decision as if fully set forth. The parties must comply with the requirements in Attachments A and B.
3. This Decision is effective immediately.

(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