

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03R-554TR

IN THE MATTER OF THE PROPOSED REPEAL & REENACTMENT OF ALL RULES
REGULATING TRANSPORTATION BY MOTOR VEHICLE, AS FOUND IN 4 CCR 723-6,
9, 15, 23, 31, 33, AND 35.

**COMMISSION ORDER DENYING APPLICATION FOR
REHEARING REARGUMENT OR RECONSIDERATION**

Mailed Date: October 5, 2005
Adopted Date: September 29, 2005

I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of an application for rehearing, reargument or reconsideration (RRR) of Decision No. C05-1037 filed by Harvey V. Mabis on September 19, 2005. That decision denied exceptions to Recommended Decision No. R05-0450, and set forth proposed rules for the regulation of transportation by motor vehicle as found in 4 *Code of Colorado Regulations* (CCR) 723-6, 9, 15, 23, 31, 33, and 35. We find nothing unjust or unwarranted in Decision No. C05-1037, and deny the application for RRR.

B. History

2. This docket is part of the Commission's overall effort to repeal and reenact its entire body of rules. This docket was opened by Decision No. C03-1454 in which the Commission issued its Notice of Proposed Rulemaking (NOPR). The NOPR was subsequently published in the February 10, 2004 issue of *The Colorado Register*. Public hearings were held in this matter on March 22 and 23, 2004, September 13 and 14, 2004 and on March 15, 2005. The Administrative Law Judge took the comments under advisement, and issued Recommended

Decision No. R05-0450 on April 20, 2005. By Decision No. C05-0562, we extended the time to file exceptions until May 24, 2005. Alpine Taxi and Mr. Mabis filed exceptions by the deadline, and Black Diamond and CME submitted replies. The Commission denied the exceptions in Decision No. C05-1037, mailed on August 30, 2005. Mr. Mabis filed the only application for RRR on September 19, 2005. The application for RRR focuses on our proposed towing rules.

C. Discussion

3. Some of the issues broached by Mr. Mabis were raised in his exceptions to Decision No. R05-0450. First, Mr. Mabis objects to the manner in which the Commission applies its rules. Mr. Mabis would have proposed rule 6000, which sets forth the applicability of the towing rules, state that the towing rules apply only to those tow carriers for whom towing is a primary business. Mr. Mabis would have the Commission make the rules inapplicable to those tow carriers for whom towing is allegedly “secondary” to their “primary” business, which might be, for example, an auto repair business. We decline to do so. This would exempt many tow carriers from Commission regulation without respect for the clear legislative intent of the statute. In § 40-13-101, C.R.S., the Legislature defines towing carrier as a person “...*one of whose primary functions* consists of commercially offering services on the public ways of the state whereby motor vehicles are towed or otherwise moved by use of a truck or other vehicle designed for or adapted to that purpose...” (emphasis added). Clearly, the statute already implies that the Commission has no jurisdiction over a person whose towing services are merely incidental to the person’s primary function. It would be inappropriate, however, for this Commission to go even further and exempt persons from the statutory definition solely because towing is not the person’s *only* primary function. Mr. Mabis seeks an opportunity to address the Commission directly with respect to this rule because Commission Advisory Counsel supported

the transportation staff as well as the Commission. In this rulemaking docket, which is a quasi-legislative proceeding, all Commission staff serve as advisory staff, and we see no conflict. We see no reason for additional hearings and decline this request. Mr. Mabis has submitted comments in this proceeding that have been helpful to this Commission, has appeared before an administrative law judge to make oral presentations, has submitted exceptions, and has now filed an application for RRR. There has been sufficient opportunity for Mr. Mabis to offer suggestions and arguments.

4. Mr. Mabis also objects to the definitions set forth in proposed rules 6001 and 6501. He believes the rules and definitions to be difficult to understand, and proposes substitutions. He also believes that the Commission's rules should not incorporate statutes or other rules by reference. We understand that it may be frustrating for a reader to be referred to a statute by a rule, but we believe that incorporation by reference is the most efficient manner in which to promulgate our rules, and we believe our proposed rules are clearer than those proposed by Mr. Mabis. Were we to adopt Mr. Mabis' approach, we would be put in the position of holding rulemaking proceedings whenever the Legislature made a change to a statute used by the Commission in its rules. By incorporating statutes by reference, we automatically include the latest amendments made by the Legislature without needing to conduct a new rulemaking. Furthermore, statutes themselves also incorporate other statutes by reference, and it is quite possible that including the statutory language in our rules as suggested by Mr. Mabis would not solve the problem. We therefore deny his application for RRR to these rules. To the extent that the rules are difficult to understand, Commission transportation staff is available to assist tow carriers seeking advice on compliance.

5. We deny Mr. Mabis' application for RRR with respect to proposed rule 6500(b). Mr. Mabis suggests that we summarily disregarded his arguments. This is not the case. As stated in Decision No. C05-1037, state law specifically provides municipalities with the power to contract for the removal, storage, or disposal of abandoned motor vehicles within the area of municipal authority, and with the power to pass ordinances governing the procedures for the removal of abandoned or illegally parked vehicles on public property. This Commission has no jurisdiction to countermand municipal authority with respect to the issues addressed by Mr. Mabis. If Mr. Mabis believes he has been treated in some illegal fashion by the municipalities in this state, his remedy will not be found with this Commission.

6. Mr. Mabis again suggests that the municipalities are somehow improperly influencing Commission staff with respect to this rule. We believe that this serious allegation is completely without merit and have confidence in the integrity of our staff. Furthermore, Commission staff will not decide which rules to adopt, reject, or modify; the Commission makes these decisions, and we believe that our Staff's interpretation of the law, in this instance, is correct.

7. Mr. Mabis also objects to proposed rule 6507(a). He argues that the one-hour notification period is not reasonable, and that providing notification to the police should be the only required notification. We believe a one-hour requirement is very reasonable, and protects the public. We emphasize that a tow carrier is not required to notify all of the entities listed in the rule, but rather either the police, the owner of the private property, or the owner or agent of the owner of the vehicle. If notification of local law enforcement is the most efficient or only viable option for a tow carrier, that would fulfill the requirement of the rule.

8. Proposed rules 6507(d) and (e) relate to storage of towed motor vehicles. Mr. Mabis makes a blanket statement that 6507(d) and (e) have no statutory foundation and that the Commission may not enforce them. We disagree because, as noted in our Decision No. C05-1037, we believe we have a duty to regulate storage as set forth in § 40-13-107, C.R.S. We deny Mr. Mabis' application for RRR to these subsections of proposed rule 6507.

9. Mr. Mabis also applies for RRR with respect to proposed rule 6508(b) and (c) arguing that the Commission is preempted by federal law from regulating the agency relationship between the tow carrier and the property owner. We disagree for the reasons set forth in Decision No. C05-1037. Pursuant to federal law, 49 U.S.C. § 14501(c)(2)(C), we are allowed to pass regulations relating to the price of non-consensual tows. We believe this regulation is related to the price of a tow because it prevents tow carriers from charging a fee by fraudulently asserting that a tow was authorized. We also note that, contrary to Mr. Mabis' assertions in his application for RRR, the Transportation Equity Act was signed by the President on August 10, 2005. Section 4105 of that Act specifically allows states to require prior written authorization from the property owner or that the owner be present, or both. To the extent there is any lack of certainty regarding this Commission's authority to regulate this area, the recently signed federal law makes the Commission's authority clear. Here too, Mr. Mabis sets forth a desire to address the Commission. We decline this offer because again we believe that Mr. Mabis has had ample opportunity to present his arguments. We also note that no other tow carriers have asserted that the Commission has no authority in the area. It seems quite reasonable to require written evidence of permission to tow. This guarantees that the property owner does indeed want a vehicle towed, and protects the public from accidental or fraudulent tows.

10. Mr. Mabis also objects to the term “drop charge” as used in proposed rule 6511. We disagree that it is too ambiguous, believe it is a term of art well understood in the towing industry, and note that the term is defined by rule 6511. Mr. Mabis also suggests that we adopt other state approaches to setting rates by categorizing the areas of Colorado and applying an averaging system. We decline to adopt Mr. Mabis’ proposal because we believe the current system is fair, and provides an equitable fee structure. We also disagree with Mr. Mabis’ proposed use of bailment law. Section 40-13-107, C.R.S., creates a Commission obligation to enact rules governing the storage of motor vehicles, thereby rendering any conflicting questions regarding bailment law moot. We deny Mr. Mabis’ application for RRR on this rule.

11. Mr. Mabis’ arguments in his application for RRR to proposed rule 6513 are similarly unavailing, for the same reasons set forth in our previous decision. We believe that the rules governing civil penalties are set forth in a manner that guarantees due process for participants. Mr. Mabis wants “all” aspects of the civil penalty process to be set forth. This would be impossible because each civil penalty case is unique. We deny Mr. Mabis’ application for RRR on this rule.

D. Conclusions

12. We find Decision No. C05-1037 to be just and reasonable. The application for RRR filed by Harvey V. Mabis is denied in its entirety.

13. We note that the effective date of the transportation rules at issue in this docket shall be April 1, 2006.

II. ORDER

A. The Commission Orders That:

1. The application for rehearing reargument or reconsideration of Decision No. C05-1037 filed by Harvey V. Mabis is denied.

2. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 29, 2005**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners