

Decision No. R14-0625-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0205TO

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

MICHAEL LEACH, DOING BUSINESS AS, ACE TOWING,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
VACATING AND RESCHEDULING
HEARING AND DEADLINES**

Mailed Date: June 11, 2014

TABLE OF CONTENTS

I.	STATEMENT, FINDINGS AND CONCLUSIONS	1
A.	Motion to Supplement Exhibits.....	2
B.	Motion to Amend CPAN.....	4
C.	Burden of Proof at Evidentiary Hearing.....	4
D.	Disclosure of Evidence to Be Offered at Hearing.....	5
II.	ORDER.....	7
A.	It Is Ordered That:	7

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. On March 5, 2014, Commission trial Staff (Staff) with the Public Utilities Commission (Commission) filed Civil Penalty Assessment Notice (CPAN) No. 108810 against

Michael Leach, doing business as Ace Towing (Respondent or Mr. Leach) seeking to assess civil penalties against Respondent in the amount of \$36,300.00, which includes a 10 percent surcharge for violation of Colorado statutes and Commission Rules.

2. On March 19, 2014, Staff filed an “Entry of Appearance and Notice Pursuant to Rule 1007(a).”

3. On March 26, 2014, the Commission referred the CPAN to an administrative law judge (ALJ) for disposition.

4. By Decision No. R14-0340-I, the ALJ scheduled this matter for a hearing on the CPAN, and established deadlines for the parties to disclose and file the evidence the parties will present at the hearing. On April 2, 2014, Staff filed a Motion to Continue Hearing Date (Motion). The Motion sought a continuance of the first hearing date because Staff’s primary witness was not available for the hearing. The Motion was unopposed. By Decision No. R14-0350-I, the ALJ vacated the hearing and rescheduled it for June 12, 2014. The same Decision also set deadlines for the parties to file and serve witness and exhibit lists.

5. On May 15, 2014, Staff timely filed its exhibits and witness list. Respondent did not file a witness list or exhibits.

A. Motion to Supplement Exhibits

6. On June 3, 2014, Staff filed a “Motion to Supplement Exhibits for Hearing” (Motion to Supplement). The Motion to Supplement seeks to add exhibits which had not been filed by the deadlines set forth in Decision R14-0350-I. The additional exhibits relate to a request for relief that Staff anticipates making at hearing, that is, that Respondent be required to refund fees collected pursuant to Rule 6508(c) of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6.

7. On June 9, 2014, Respondent filed a response to the Motion to Supplement (Response). The response objects to the additional exhibits on the grounds that Respondent will not have enough time to review the documents and prepare for the June 12, 2014 hearing. Respondent also states that he was not the owner of Ace Towing at the time the cited violations occurred.

8. Staff's cited purpose for adding the exhibits is valid. It is unclear as to when Staff was aware of or had access to the exhibits. In any event, because the exhibits appear to be relevant to the relief sought in this proceeding, the ALJ will grant Staff's Motion to Supplement. Staff will be permitted to offer the exhibits filed and served on June 9, 2014 at the evidentiary hearing in this matter.

9. However, the ALJ is concerned about the late disclosure of the additional exhibits. Here, the maximum civil penalty that may be assessed against Respondent is substantial. The additional exhibits were filed on June 3, 2014, nine days prior to the hearing. It is unclear exactly when Respondent received those, because, according to the certificate of service, they were mailed to Respondent. In some circumstances, this may be an adequate amount of time to review the disclosures and prepare for a hearing. In the circumstances here, the ALJ finds that this may not be an adequate amount of time. In an abundance of caution, the ALJ will continue the June 12, 2014 hearing to allow Respondent an adequate amount of time to review the exhibits and prepare for hearing. Respondent will also be given an opportunity to file and exhibit that he may wish to use at the evidentiary hearing in response to Staff's new exhibits. The new deadline will be set forth below. Because the new hearing will be on July 17, 2014, more than a month away, the ALJ will also allow Staff to supplement its witness and exhibit disclosures.

B. Motion to Amend CPAN

10. On June 9, 2014, Staff filed a “Motion to Amend CPAN and to Waive Response Time” (Motion to Amend). The Motion to Amend seeks to dismiss Count two of the CPAN, that is, violation of §40-10.1-401(1)(a), C.R.S., failure to maintain and file evidence of financial responsibility with the Commission. Staff argues the response time to the Motion to Amend should be waived because granting the Motion cannot prejudice Respondent’s rights, since the Motion seeks to dismiss a count of the CPAN. Moreover, dismissal of the count alleged will reduce the maximum civil penalty that may be assessed against Respondent.

11. The ALJ agrees with Staff that granting the Motion to Amend cannot prejudice Respondent’s rights in this proceeding. The possible civil penalty against Respondent will be reduced by \$12,100 by the dismissal of Count Two of the CPAN. The ALJ also agrees that under the circumstances here, it is appropriate to waive the response time to the Motion to Amend pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1. The ALJ will grant the Motion to Amend and will waive the response time to the Motion to Amend. Count two of the CPAN will be dismissed. Dismissal of Count Two means that Staff cannot pursue that charge against Respondent in this proceeding, and that Respondent need not prepare his defense to that count.

C. Burden of Proof at Evidentiary Hearing

12. As stated in Decision Nos. R14-0340-I and R14-350-I, at the evidentiary hearing on the CPAN, Staff will carry the burden to prove by a preponderance of the evidence that Mr. Leach committed the violations charged in the CPAN (except for Count 2, which is dismissed by this Decision).

13. Mr. Leach will have an opportunity to present evidence in his defense. This means that Mr. Leach will be given an opportunity to question any witness who testifies on behalf of Staff and will be able to present witnesses and evidence (in the form of exhibits).

14. Mr. Leach may have an attorney represent him in this proceeding, but he is responsible for hiring and paying for his own attorney.

15. Mr. Leach is advised that should he choose to represent himself in this proceeding, that he will be held to the same standards as an attorney.

D. Disclosure of Evidence to Be Offered at Hearing

16. In anticipation of the hearing, the ALJ will order the parties to make disclosures of the witnesses and exhibits that they intend to present at the hearing in support of their position. Staff has already filed exhibits and a witness list; Staff is not required to re-file those. Instead, Staff may supplement its filings should it seek to add any witnesses or exhibits.

17. Witness lists shall include a description of the witnesses' testimony and the witnesses' last known address, telephone number, and job title. Witnesses are those persons who will testify on behalf of a party. All witnesses shall be sworn in before commencing their testimony.

18. Mr. Michael Leach may testify without filing a witness list.¹ However, if Respondent wishes for any other person to testify on its behalf, Respondent must file a witness list as required by this Decision.

19. Whether Mr. Leach is required to file a witness list as stated above *does not* impact his responsibility to file and serve an exhibit list and exhibits.

¹ It is reasonable to presume that Mr. Leach will testify on his own behalf regarding his position on the CPAN.

20. An exhibit is any document or other tangible item the party wishes the ALJ to consider in reaching a decision in this matter.

21. As referenced in this Decision, serving a party with any document (*e.g.*, witness and exhibit lists and exhibits) means that the party is required to give the document to the other party to the proceeding. Service may be accomplished by United States Mail, or through the Commission's E-filing system, if the party being served is registered with the E-filing system.

22. Reference to filing a document means that the party shall provide the document to the Commission. The filing must include the proceeding name and number.

23. All parties are advised that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and the Colorado Rules of Evidence. The ALJ expects the parties to comply with the Rules of Practice and Procedure and the Colorado Rules of Evidence.

24. A free copy of the Colorado Rules of Evidence may be found at the following link, under "Colorado Court Rules": www.lexisnexis.com/hottopics/colorado. The Rules of Practice and Procedure and the Rules Regulating Transportation by Motor Vehicle are available on the Commission's website (www.dora.colorado.gov/puc) and in hard copy from the Commission.

25. The parties are advised that failure to comply with the requirements of this Decision may result in an order barring the offending party from presenting evidence at the hearing.

II. ORDER

A. It Is Ordered That:

1. The hearing scheduled in this matter for June 12, 2014 at 10:00 a.m. is vacated.

No hearing shall take place on that date.

2. A hearing on the merits of the Civil Penalty Assessment Notice in this matter will be held as follows:

DATE: July 17, 2014

TIME: 9:30 a.m.

PLACE: Commission Hearing Room
1560 Broadway, 2nd Floor
Denver, Colorado

3. At the above date, time, and place you will be given the opportunity to be heard if you so desire.

4. The deadlines for filing and serving exhibits set forth in Decision No. R14-0350-I are vacated. New deadlines are set forth below.

5. Should Commission Staff wish to supplement the exhibits and witness lists it has already filed and served, Staff shall file and serve those supplemental exhibit and witness lists and exhibits **on or by 5:00 p.m. on June 18, 2014.**

6. Michael Leach, doing business as Ace Towing shall file and serve exhibit and witness lists and exhibits **on or by 5:00 p.m. on July 2, 2014.** If Mr. Leach will be his only witness, he need not file a witness list. However, if Mr. Leach wishes for any other person to testify on its behalf, he must file a witness list as required by this Decision.

7. No party is required to file and serve exhibits to be used for impeachment or rebuttal.

8. Witness lists shall include a description of the witnesses' anticipated testimony, along with their most recent address, telephone number, and job title.

9. All exhibits shall be identified by sequential numbers (*e.g.*, Exhibit 1, Exhibit 2, Exhibit 3). The exhibits shall include the following information: exhibit number, proceeding number, name of the witness who will testify to the exhibit's foundation, and the date of the hearing. The parties may utilize the Commission's exhibit stamp to include this information on the exhibits; the parties are advised that they must have all their exhibits stamped prior to the time the hearing is scheduled to begin.

10. At the hearing, the parties shall bring an original and two copies of each exhibit they intend to offer, along with a completed exhibit list in the format set forth in Appendix A, which was provided with Decision No. R14-0340-I. Appendix A will not be provided again with this Decision.

11. If any exhibit is longer than two pages, the party offering the exhibit shall sequentially number each page of the exhibit. The parties shall comply with all mandates in this Decision.

12. 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