

Decision No. R14-0941-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
SCHEDULING HEARING AND
ESTABLISHING DEADLINES**

Mailed Date: August 5, 2014

I. STATEMENT

1. On March 5, 2014, Commission 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) seeking to assess civil penalties against Respondent in the amount of \$36,300.00, (including 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. On March 28, 2014, by Decision No. R14-0340-I, the ALJ scheduled this matter for a hearing on the CPAN for May 22, 2014, and established deadlines for the parties to disclose and file the evidence the parties will present at the hearing.

5. 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. The ALJ vacated the hearing and rescheduled it for June 12, 2014. Decision No. R14-0350-I. The same Decision also set new deadlines for the parties to file and serve witness and exhibit lists.

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

7. On June 3, 2014, Staff filed a "Motion to Supplement Exhibits for Hearing" (Motion to Supplement). The Motion to Supplement sought to add exhibits which had not been filed by the deadlines set forth in Decision No. R14-0350-I.

8. On June 9, 2014, Respondent objected to the Motion to Supplement on the grounds that Respondent would not have enough time to review the documents and prepare for the June 12, 2014 hearing.

9. On June 11, 2014, by Decision No. R14-0625-I, the ALJ granted the Motion to Supplement. The ALJ continued the June 12, 2014 hearing to July 17, 2014 to ensure Respondent had ample time to review the supplemental exhibits and prepare for hearing. The same Decision also allowed all parties to file supplemental exhibits and witness lists.

10. The deadline for Respondent to file his exhibit and witness lists and exhibits was on July 2, 2014. Decision No. R14-0625-I. Respondent did not make any filing.

11. On July 7, 2014, Respondent's counsel filed an "Entry of Appearance" and "Unopposed Motion to Continue" (Motion to Continue). The Motion to Continue asked that the July 17, 2014 hearing be continued to allow counsel time to review evidence just provided to him by Respondent and to prepare for hearing. The Motion to Continue also requested that Respondent be given an additional opportunity to file and serve exhibit and witness lists and exhibits.

12. On July 9, 2014, Respondent filed and served a list of witnesses and exhibits, along with copies of his exhibits.

13. Because Staff did not object to the continuance sought by the Motion to Continue, and for good cause shown, the ALJ continued the July 17, 2014 hearing. Decision No. R14-0619-I, issued July 9, 2014. That same Decision informed the parties that a new hearing date would be established by a separate decision, and that the ALJ will rule upon Respondent's request for a new deadline for him to file and serve disclosures by a separate Decision, after giving Staff the full 14 days permitted by Rule 1400(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, to respond to that request.

14. On July 21, 2014, Staff timely filed its "Response to Respondent's Motion to Continue." Staff objects to Respondent's request that a new deadline be set for him to make the referenced disclosures on the grounds that Respondent has had many opportunities to make the disclosures, and that his failure to obtain counsel sooner or to make disclosures by the deadline is unexcused.

15. Staff did not object to a continuance of the July 17, 2014 hearing. The continuance was granted. This Decision schedules a new hearing date for October 27 and 28, 2014.¹ Since Respondent made disclosures on July 9, 2014 (seven days after they were due), and the hearing will be held more than three months after those disclosures were made, Staff has more than an ample opportunity to review the evidence and properly prepare for the hearing. The ALJ finds that Staff is not prejudiced by accepting Respondent's late-filed disclosures. To the contrary, Respondent would be prejudiced by refusing to accept his late-filed disclosures. While the ALJ does not condone Respondent's neglect in this proceeding, the ALJ finds that, under the circumstances, that neglect does not warrant disallowing use of the late disclosures at hearing. Moreover, the ALJ gave Staff similar latitude in accepting its late-filed supplemental exhibits. The ALJ did so in order to afford Staff a fair opportunity to present its evidence. To give Staff that opportunity and deny Respondent the same opportunity under similar circumstances would be unreasonable.²

16. In addition, given that the evidentiary hearing will be held more than three months from the date of this Decision, the ALJ will allow the parties to make additional disclosures of evidence to be presented at hearing. If the parties wish to supplement disclosures already made, they must file complete exhibit and witness lists that encompass all of the witnesses and exhibits the party intends to introduce at the evidentiary hearing.³

¹ The ALJ informally contacted counsel for the parties to clear a new hearing date on July 25, 2014. As of the date this Decision is issued, the ALJ has not heard back from the parties.

² Not unlike the circumstances here, the ALJ accepted Staff's late-filed supplemental exhibits even though Staff provided scant justification for filing them late. The ALJ crafted an equitable resolution by continuing the hearing so that Respondent would have an opportunity to prepare for hearing in light of the late-filed exhibits. The ALJ is treating the parties equally by accepting Respondent's late disclosures, continuing the hearing, thereby giving Staff the opportunity to prepare for hearing in light of the late-filed exhibits.

³ It is inadequate to file a supplement to a prior witness or exhibit list if that supplement does not list *all the* witnesses and exhibits the party intends to present, including those already disclosed.

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

18. 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 applicable case law and statutory authority. The ALJ expects the parties to comply with the Rules of Practice and Procedure. Both sets of rules are available on the Commission's website (www.dora.colorado.gov/puc) and in hard copy from the Commission.

II. ORDER

A. It Is Ordered That:

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

DATES: October 27 and 28, 2014
TIMES: 9:30 a.m. each day
PLACE: Commission Hearing Room
1560 Broadway, 2nd Floor
Denver, Colorado

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

3. The request by Michael Leach, doing business as Ace Towing (Respondent) made in his "Motion to Continue" filed on July 7, 2014 for a new deadline to file and serve exhibit and witness lists and exhibits is granted. Respondent's exhibit and witness lists and exhibits filed on July 9, 2014 are accepted.

4. Should Commission trial Staff (Staff) wish to present witnesses and exhibits in addition those already disclosed, Staff shall file and serve **complete** exhibit and witness lists on

or by 5:00 p.m. on September 15, 2014. Such filings shall include disclosure of exhibits not previously filed and served; but, Staff need not re-file and re-serve exhibits which have already been filed and served.

5. Should Respondent wish to present witnesses and exhibits in addition to those already disclosed, he shall file and serve **complete** exhibit and witness lists on or by 5:00 p.m. on September 29, 2014. Such filings shall include disclosure of exhibits not previously filed and served; but, Respondent need not re-file and re-serve exhibits which have already been filed and served. If Mr. Leach will be his only witness, no witness list is required. However, if Respondent wishes for any other person to testify on his behalf, Respondent must file a witness list as required by this paragraph.

6. 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.

7. At the hearing, the parties shall bring an original and three copies of each exhibit they intend to introduce, along with a completed exhibit list in the format set forth in Appendix A to this Decision.

8. 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.

9. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge