

Decision No. R14-1036

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0433CP

COLORADO PUBLIC UTILITIES COMMISSION

COMPLAINANT,

V.

MKBS LLC DOING BUSINESS AS METRO TAXI &/OR TAXIS FIESTA,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
ACCEPTING SETTLEMENT UPON
FURTHER CONDITION AND ASSESSING
AND SUSPENDING CIVIL PENALTY**

Mailed Date: August 26, 2014

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I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, MKBS, LLC, doing business as Metro Taxi &/or Taxis Fiesta (Metro Taxi).

2. On May 5, 2014, Staff issued Civil Penalty Assessment Notice (CPAN) No. 109385 to Metro Taxi alleging 129 violations of Rule 6103(d)(II)(D), 4 *Code of Colorado Regulations* 723-6 and seeking civil penalties of \$354,750 (or \$177,375 if paid within ten days). The CPAN was served on Respondent by hand delivery on May 6, 2014.

3. Staff and Metro Taxi are the only parties to this proceeding.

4. The Commission referred this matter to an administrative law judge for resolution during its weekly meeting held May 28, 2014.

5. On May 13, 2014, Staff's Notice of Settlement in Principle and Unopposed Motion to Stay was filed. Based upon the parties reaching a settlement in principle, Staff requests that the proceeding be stayed, including any setting of a hearing date or related prehearing deadlines.

6. On May 22, 2014, the Joint Motion to Approve Stipulation and Settlement Agreement (Joint Motion) and to Waive Response Time was filed by Staff and Metro Taxi (collectively, the Parties). The Parties request that the Commission approve the Stipulation and Settlement Agreement (Settlement Agreement) filed on the same date, a copy of which is attached hereto as Attachment A.

7. On May 30, 2014, by Decision No. R14-0579-I, the proceeding was otherwise stayed pending a ruling on the Joint Motion and the Joint Motion was set for hearing. The undersigned also informed the parties of several questions regarding the Settlement Agreement. Parties were encouraged to file a written response to the questions to supplement the Settlement Agreement. If they chose to do so, the undersigned would reconsider the need to conduct the hearing.

8. The joint movants contend that approval of the Settlement Agreement is in the public interest. The parties reached a comprehensive settlement in the spirit of compromise and in light of the uncertainties of trial. The Settlement Agreement avoids the costly expense of litigation and promotes administrative efficiency by avoiding the time and expense that would be necessarily devoted to hearing this matter.

9. As part of the Settlement Agreement, Respondent admits liability to all the violations in the CPAN and agrees to comply with all Colorado and federal statutes and rules, including the rules with regard to hours of service of drivers.

10. Although the full penalty amount stated in the CPAN will be assessed, the entire penalty amount will also be conditionally suspended for 12 months before being permanently suspended. In agreeing to a suspension of the penalty, Staff considered those mitigating factors specified in ¶3 of the Settlement Agreement.

11. By Decision No. R14-0579-I, the undersigned ALJ informed the Parties of questions regarding the Settlement Agreement:

- a) While acknowledging that approval of any settlement has no precedential affect upon other Commission matters, are the parties aware of circumstances in other proceedings where the Commission approved suspension of the entire civil penalty imposed in such proceeding?
- b) The Settlement Agreement addresses a safety and compliance audit in 2011. With regard thereto, what “frequency of violations” was found by Staff in such audit? Did Staff issue a CPAN as a result of such audit? If so, was a civil penalty imposed with regard thereto? What violations were found by the Commission? If there were violations of drivers’ hours of service exceeding 80 hours in any rolling 8 consecutive day period found, how many violations were found?
- c) The Settlement Agreement states: “Respondent will be combining the Automated Vehicle Identification ("AVI") dispatch records with Respondent's own records onto one sheet, which will eliminate any miscalculation of hours.” Regarding this provision, what geographic locations are included in AVI dispatch records? How are dispatches

recorded? What is a dispatch? How are AVI dispatch records accessed? What is the “one sheet” referred to?

- d) How does a driver being inactive for more than 30 days affect historical hours of service violations?
- e) The parties request suspension of the entire civil penalty proposed to be assessed under the Settlement Agreement. Paragraph 4 of the Settlement Agreement establishes the conditions of the suspension. In part, it describes “violations of the same nature.” The agreement appears to define the same nature as violations greater than 6 percent of the audited drivers. With regard to this provision:
 - i. Provide more detail as to what 6 percent refers to. Does 6 percent refer to the number of drivers audited, number of days audited by any number of audited drivers, hours worked in violation of hours audited, or otherwise?
 - ii. Is the intent of the phrase “violations of the same nature” that the civil penalty remain suspended if Staff finds the same level of compliance within the next 12 months that was found in the audit that led to issuance of the CPAN?
 - iii. Do the violations alleged in the CPAN equate to “six percent of the audited drivers’ hours of service exceed[ing] 80 hours in any 8 day period” found in the safety and compliance audit that led to this proceeding? If not, what percent was found according to Staff?
 - iv. Does Staff consider a 6 percent margin of error to be an acceptable level of compliance with Commission rules?
- a) If “violations of the same nature” are found “within that twelve-month period” will this trigger only the violation of this settlement agreement or could the violations result in issuance of an additional CPAN?
- b) When does the 12-month timeframe discussed in the settlement agreement begin and end?
- c) The CPAN alleged 129 violations of 4 *Code of Colorado Regulations* (CCR) 723-6-6103(d)(II)(D). How do the violations alleged relate to the level of compliance found by Staff during the safety and compliance audit that led to this proceeding?

Decision No. R14-0579-I ¶6.

12. On June 5, 2014, the Joint Response to Decision No. R14-0579 was filed by Staff and Metro Taxi. The Parties supplemented the stipulation:

- (a) With respect to other proceedings where the Commission approved suspension of the entire civil penalty imposed, there is not a mechanism by which Staff can compile such information. Staff is not aware of any specific proceedings. Nonetheless, the circumstances in this case are unprecedented in the level of cooperation and compliance by Respondent, including substantial gains in reducing hours violations and moving toward eliminating future violations. Staff submits that Respondent's demonstrated compliance is an appropriate circumstance to stay the entire penalty.
- (b) Regarding the 2011 Safety and Compliance Review ("SCR"), if the ALJ's question regarding the frequency of violations found refers to violations of drivers' hours of service exceeding 80 hours in [an] 8-day period, the frequency was 159 drivers out of 391 checked. This equates to 40%. As a result of the 2011 SCR, Staff issued a CPAN assessing a total civil penalty of \$147,400.00 including an additional 10 percent surcharge (or \$73,700 if paid within 10 days). Respondent paid the reduced amount within 10 days. The violations found by the Commission in the 2011 CPAN proceeding included: drivers' hours of service exceeding 80 hours in an 8-day period, failure to have periodic inspection of vehicles, and failure to maintain inspection records.
- (c) With respect to the Automated Vehicle Identification ("AVI") records, the concept has to do with keeping track of drivers' hours – specifically where transportation to Denver International Airport ("DIA") is involved – through a combination of records generated by Respondent and by DIA. In essence, DIA captures a vehicle's entry on and exit from Pena Boulevard and additional locations throughout DIA (e.g., commercial vehicle holding lot and locations at terminal) in its AVI records. Respondent has set up a system to capture the identical data of the DIA AVI records via its own system. The vehicle location is recorded by GPS. A dispatch is a record generated by Respondent's computer system in coordination with its GPS system, documenting all calls a taxi is dispatched to, the location, time dispatched, time completed, etc. DIA's AVI records are accessed by requesting the information from Ground Transportation by vehicle number or license plate number. Respondent's AVI dispatch records are accessed by Respondent's computer system. The "one sheet" refers to a record Respondent creates that combines records generated by Respondent (including Respondent's AVI and Respondent's dispatch records) together with the AVI records generated by DIA, into one "snapshot" of total hours. Respondent represents this method will eliminate violations of hours of service exceeding 80 hours in an 8-day period.

- (d) To the extent Respondent will require a driver that is inactive for more than 30 days to reapply, this shows the extent to which Respondent is monitoring drivers. It does not affect the historical hours of service violations, per se, but it does demonstrate Respondent's commitment to diligently monitoring drivers. As part of the re-application process, the driver is advised of hours of service rules.
- (e)
 - (i) During Staff's audit, the selected drivers' hours are audited for each day they drove in the given month. Specifically, the 6% refers to the number of days audited by any number of audited drivers: for every day those hours exceed 80 hours in the rolling eight-day period, a violation is assessed. The cumulative number of violations must be less than 6% of the total driver days. By way of example, if Staff audits five drivers for a month that contains thirty days, there would be a total of 150 driver days audited. Less than 9 violations would be considered within the bounds of the settlement terms. Nine violations could correspond to one of the five drivers in violation on nine different days, or three drivers with three days in violation, etc.
 - (ii) Staff intends that the civil penalty remain stayed should Staff find Respondent's pattern of increased compliance continues over the next twelve months. Staff found 40% violations in the 2011 SCR and 12.6% violations in the 2014 SCR. The settlement terms contemplate an even more stringent level of 94% compliance (less than 6% violations). The less than 6% is a target to promote ongoing compliance, with the ultimate goal of 100% compliance, while recognizing that practically speaking violations may still occur – however, in such small number that Staff can be confident Respondent is moving toward complete compliance.
 - (iii) The violations alleged in the CPAN (129 of 1026 days) equate to 12.6% violations of drivers' hours of service exceeding 80 hours in any 8 day period.
 - (iv) Staff views the more than 94% compliance (less than 6% margin of error) to be the next substantial reduction in violations as discussed in (e)(i) above, toward the goal of 0% violations.
- a) If "violations of the same nature" are found within the twelve-month period following the date of the Commission's final order approving the Agreement, then under the terms of the Agreement, Respondent will be liable for the full penalty amount. Staff reserves the right to issue an additional CPAN, if warranted.
- b) The twelve-month timeframe discussed in the Agreement begins on the date of the Commission's final order approving the Agreement and ends twelve months after that date.

- c) The CPAN alleged 129 violations of 4 Code of Colorado Regulations 723-6-6103(d)(II)(D). These violations correspond to 12.6% instances of violation out of the total driver days surveyed during the 2014 SCR. All 129 violations found in the 2014 SCR were cited in the CPAN in this proceeding.

Joint Response to Decision No. R14-0579-I.

13. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

14. The agreement was reached in the spirit of compromise and in consideration of the hazards of litigation. Approval of the settlement reached will minimize expenses of litigation and promote administrative efficiency.

15. Approval of the settlement will not have a precedential affect upon other Commission matters. *See Colorado Ute Elec. Ass'n, Inc. v. PUC*, 602 P.2d 861, 865 (Colo. 1979); *B & M Serv., Inc. v. PUC*, 429 P.2d 293, 296 (Colo. 1967).

16. Metro Taxi admits liability for all counts of the CPAN.

17. Even though not precedential, the undersigned has concerns regarding the agreement presented and circumstances not seen before. Staff can point to no other proceeding where 100 percent of a civil penalty assessment was suspended. One initially wonders why the matter was pursued.

18. In sum, the obligation of the Respondent to obtain permanent suspension is to do what it is already obliged to do -- comply with the Commission rule previously violated for a period of 12 months.

19. The Parties define the nature of the violation in this proceeding to be: “of the driver files audited, less than six percent of the audited drivers' hours of service exceed 80 hours in any 8 day period.”

20. If there is no violation of the defined nature found by an audit of the 12-month period following the final Commission decision approving the Settlement Agreement, the civil penalty will be permanently suspended.

21. With future compliance already required, what is the consequence of 129 violations of the Commission rule admitted in this proceeding? The undersigned sees some potentially significant outcomes. Metro Taxi must improve compliance and failure to demonstrate such in a future audit would result in lifting of the suspension of the entire penalty without reduction. Additionally, further civil penalties for future violations during the suspension period are potentially subject to Rule 6017(f)(I).

22. Concern regarding two aspects jeopardizes even these benefits. First, the defined nature does not even require Metro Taxi to comply with Commission rules to obtain permanent suspension. Metro Taxi is obliged to comply with the Commission's rules 100 percent of the time. Why is 94 percent sufficient to warrant suspension?

23. Generally, Staff exercises prosecutorial discretion when conducting an SCR based upon a totality of unique facts and circumstances. While they could choose not to not prosecute an audited 6 percent error rate in a particular circumstance, such a situation does not equate to 94 percent compliance being satisfactory. It is less than clear why 94 percent compliance warrants suspension of the civil penalty in this proceeding and it is concerning that Staff describes compliance with Commission rules as “goal.”

24. Secondly, there is no certainty under the Settlement Agreement that Staff will conduct any audit during the period of suspension. Thus, in absence of audit, suspension would otherwise be permanent without any further demonstration of compliance.

25. Although there are numerous violations, only one rule is violated in the counts of the CPAN. It appears that the underlying circumstances point to a systematic failure in Metro Taxi's business practices not cured following the 2011 SCR.

26. Staff conducted an SCR at Metro Taxi in 2011. Metro Taxi admitted liability and paid a reduced civil penalty of \$73,700, including an additional 10 percent surcharge, because it was paid within ten days. The penalty resulted from a 40 percent failure rate of audited drivers' hours of service exceeding 80 hours in an 8-day period.

27. During 2014, an SCR was conducted at Metro Taxi resulting in an admitted 12.6 percent failure rate. In order to permanently suspend the civil penalty assessed herein, the Settlement Agreement, as supplemented, requires Metro Taxi to demonstrate less than a 6 percent failure rate if Staff audits during the suspension period. Staff characterizes this as "the next substantial reduction in violations."

28. As of March 2014, Metro Taxi implemented GPS technology along with other improvements, which it believes should eliminate future violations. Personnel are specifically assigned to review hours of service records on a daily basis. These additional sources of information combined with termination of any driver violating hours of service requirements will incent drivers to comply and eliminate future violations. Finally, by prohibiting use of credit card systems outside of that maintained by Metro Taxi, drivers' ability to operate outside of the information reported to Metro Taxi will be limited.

29. The Commission appreciates that Metro Taxi has made investments to fulfil its obligations. As supplemented, the stipulation makes it clear that material improvements in compliance have occurred over the past few years. Additionally, under the terms of the Settlement Agreement, further improvement must be demonstrated, if audited, to continue suspension of the penalty.

30. The undersigned questions why compliance is not the condition of suspension. However, it is also notable that the undersigned cannot fully evaluate the hazards of litigation known only to the respective parties. Based upon this uncertainty and in consideration of the entirety of matters presented, the undersigned is convinced by the slightest margin that the settlement should not be upset over the defined nature of violation alone. Of material consideration in reaching this result, improvement falling short of full compliance may subject Metro Taxi to heightened future penalty (*e.g.*, even though the suspension would continue).

31. Turning to the provision for audit during the suspension period, the undersigned cannot accept the possibility that compliance will not be audited during the suspension period. An audit will ensure the purposes of this settlement are achieved and the public interest is furthered. Timely audit will also ensure consequences if Metro Taxi fails to comply with Commission rules.

32. Paragraph 3(e) of the Settlement Agreement requires Respondent's support for and cooperation with random audits. While there is no limit on the number of audits Staff may choose to conduct, the Settlement Agreement does not obligate Staff to audit at all.

33. In approving the settlement and conditions of suspension, it is the Commission's discretion that is exercised. As a condition of accepting the Settlement Agreement and as a further condition of the suspension: (1) Staff must conduct at least one audit described in the

settlement for drivers' hours of service on or before December 12, 2014; and (2) Within 30 days following completion, Staff must file a report of the number of drivers checked, number of days checked for each driver, and frequency of violations of drivers' hours of service exceeding 80 hours in any rolling 8 consecutive day period found during any and all audits conducted during the suspension period.

34. Characterizing the circumstances as unprecedented in the level of cooperation and compliance, Staff is obviously impressed with the effort undertaken by Metro Taxi in response to the SCR. Imposition of these additional conditions ensures that the effectiveness of those efforts are measured and that permanent suspension is justified.

35. Metro Taxi acknowledges wrongdoing and admits culpability for all violations in the CPAN. Metro Taxi cooperated with Staff and is investing in ensuring future compliance and ongoing monitoring. The parties agree that a civil penalty of \$354,750, permanently suspended upon condition, is sufficient to motivate Metro Taxi to remain in compliance with the Public Utilities Law and the Commission's rules in the future.

36. The Settlement Agreement, as supported and supplemented by the Parties and as modified by this Recommended Decision, shows that the Stipulation should be accepted and the Settlement Agreement approved.

II. ORDER

A. The Commission Orders That:

1. The Joint Motion to Approve Stipulation and Settlement Agreement is granted in part.
2. The Stipulation and Settlement Agreement (Settlement Agreement) filed May 22, 2014, a copy of which is attached hereto as Appendix A, as supplemented, is approved.

3. To the extent not inconsistent with this Decision, the Settlement Agreement is incorporated by reference in addition to the supplement above and made an order of the Commission as if fully set forth herein. All parties shall comply with all terms of the Settlement Agreement, except as modified or superseded by the remainder of this Decision.

37. MKBS, LLC, doing business as Metro Taxi &/or Taxis Fiesta (Metro Taxi) is assessed a penalty of \$354,750 for 129 violations of 4 *Code of Colorado Regulations* 723-6-6103(d)(II)(D). However, \$354,750 of the civil penalty assessed is suspended on the conditions stated in the Settlement Agreement and: (1) Commission Staff (Staff) must conduct at least one audit described in the Settlement Agreement for drivers' hours of service on or before December 12, 2014; and (2) Within 30 days following completion, Staff must file a report of the number of drivers checked, number of days checked for each driver, and frequency of violations of drivers' hours of service exceeding 80 hours in any rolling 8 consecutive day period found during any and all audits conducted during the suspension period. Upon satisfaction of the conditional suspension, such amount shall be permanently suspended.

4. If any part of the conditions for the suspension of the civil penalty fail, the suspension shall immediately expire and any remaining balance of the total assessed penalty shall be due and payable to the Commission within 90 days thereof.

5. This 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.

6. As provided by § 40-6-109, 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 decision is suspended 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 basic findings 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 Settlement Agreement 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.

7. 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)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge