

Decision No. R04-1555-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-458EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

MONUMENT LIMOUSINE SERVICE, L.L.C.,

RESPONDENT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION TO DISMISS
AND REQUIRING FILING REGARDING
PROPOSED HEARING DATES**

Mailed Date: December 27, 2004

I. STATEMENT

1. On September 3, 2004, Staff of the Commission (Staff) served on Monument Limousine Service, L.L.C. (Respondent), Civil Penalty Assessment Notice No. 71173 (CPAN) which alleges 29 violations of Rule 4 *Code of Colorado Regulations* (CCR) 723-15-2.1 by Respondent. That CPAN commenced this proceeding.

2. On September 14, 2004, Respondent acknowledged its liability with respect to seven of the alleged violations by paying a civil penalty of \$700. Respondent's failure to acknowledge liability for, and to pay a civil penalty with respect to, the remaining 22 alleged violations put those allegations at issue.

3. On September 24, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing. That Order established a hearing date of December 14, 2004. By Decision No. R04-1421-I the Administrative Law Judge (ALJ) vacated the hearing date.

4. Staff and Respondent are the only two parties in this proceeding. Staff is represented by counsel. *See* Entry of Appearance and Notice Pursuant to Rule 9(d), dated October 5, 2004 and mailed to Respondent on that date.

5. By Decision No. R04-1544-I the ALJ found that Respondent may be represented by Mr. Alex Malone, President of and an officer of Respondent.

6. On December 1, 2004, Respondent filed a Motion for Dismissal by Directed Verdict (Motion). In that filing Respondent asserts that, at all times relevant to this proceeding, it operated as, and was registered with the Commission as, a luxury limousine service. Respondent states that, on September 2, 2004, Commission personnel conducted a safety and compliance inspection of Respondent and that, as a result of that inspection, Commission personnel determined that, among other alleged violations, Respondent violated 49 *Code of Federal Regulations* (CFR) § 395.8(a) a total of 25 times. The alleged violations occurred between July 17, 2004 and August 10, 2004. As a result of the alleged violations found during the safety and compliance inspection and notwithstanding arguments made by Respondent at the time, Staff issued the CPAN.

7. In the Motion Respondent argues that dismissal of the 25 alleged violations of 49 CFR § 395.8(2) is required because, on July 16, 2004, the United States Court of Appeals for the District of Columbia Circuit vacated that rule, among others, and remanded the rules back to the issuing federal agency for further proceedings. *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004) (*Public Citizen*). Therefore, according to

Respondent, 49 CFR § 395.8(2) did not exist on the dates of the alleged violations in July and August 2004 and the Commission had not issued temporary or emergency rules “to enforce State Statutes or existing Commission Rules pertaining to 49 [CFR §§] 395.1 - 395.15.” Motion at ¶ 2.d Accordingly, Respondent moves to dismiss the alleged violations of 49 CFR § 395.8(a) because it asserts that the Commission had no jurisdiction on the dates of the alleged violations because there were no rules in effect which could be violated.

8. Staff filed its Response to the Motion (Response) on December 16, 2004. In that filing Staff opposes the Motion and argues that the *Public Citizen* decision vacated and remanded rules, including 49 CFR § 395.8(a), which the issuing agency had revised and amended and, therefore, that the decision did not address or affect the rules, including 49 CFR § 395.8(a), as they existed prior to the revision. Staff points out that these pre-revision rules were the rules adopted by the Commission and incorporated by reference into the *Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties*, 4 Code of Colorado Regulations 723-15 (*Safety Rules*), which Respondent is alleged to have violated. Thus, Staff asserts, the *Public Citizen* decision has no effect. In addition, Staff argues that, in any event, the Commission adopted 49 CFR Part 395 (including 49 CFR § 395.8(a)) as lawfully promulgated as of October 1, 1998. Rule 4 CCR 723-15-2.1 accomplished that incorporation by reference and contains the following explicit limitation: “No later amendments to or editions of the Code of Federal Regulations are incorporated into” the *Safety Rules*. Therefore, according to Staff, the decision in *Public Citizen* has no effect because the Commission had not incorporated by reference the version of 49 CFR § 395.8(a) vacated and remanded in that decision. Staff requests that the Commission deny the Motion.

9. Having reviewed the Motion, the Response, and the *Public Citizen* decision, the ALJ will deny the Motion. Staff is correct when it states that the *Public Citizen* decision has no impact on the present case because that decision did not affect in any way the 1998 version of 49 CFR § 395.8(a) which the Commission incorporated by reference into the *Safety Rules*. As Respondent is charged with 25 violations of the version of 49 CFR § 395.8(a) incorporated by reference into the *Safety Rules*, and as the decision in *Public Citizen* vacated a subsequent version of 49 CFR § 395.8(a), there was no need for the Commission to promulgate emergency rules following the *Public Citizen* decision because the Commission's *Safety Rules* were unaffected. Because the Motion rests solely on the assertion that the *Public Citizen* decision deprived the Commission of jurisdiction and because the ALJ finds that not to be the case, the Motion will be denied.¹

10. It is necessary to schedule a hearing in this matter. The parties will be ordered to confer and, on or before **January 7, 2005**, to make a filing which contains a total of three proposed hearing dates in January and/or February, 2005. The proposed dates must be acceptable to both parties and must be dates on which all witnesses are available. If possible, the ALJ will select one of the proposed dates. The hearing will be held at the Commission's offices in Denver, Colorado.

II. **ORDER**

A. **It Is Ordered That:**

1. The Motion for Dismissal by Directed Verdict, filed by Monument Limousine Service, L.L.C., on December 1, 2004, is denied.

¹ Denial of the Motion moots Respondent's request for a refund of a portion of the monies it paid when it admitted liability for seven of the alleged violations.

2. On or before January 7, 2005, the parties shall make a filing which contains a total of three proposed hearing dates in January and/or February, 2005 and which meets the requirements set out above.

3. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge