

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13C-1384EC

IN THE MATTER OF ALLEGED VIOLATIONS OF COLORADO REVISED STATUTES AND COMMISSION RULES RELATING TO THE NON-PAYMENT OF THE CIVIL PENALTIES ASSESSED TO DENVER LINCOLN LIMOUSINE INC., OWNER OF LUXURY LIMOUSINE REGISTRATION NO. LL-0139.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
REVOKING LUXURY LIMOUSINE
REGISTRATION PURSUANT TO COMPLAINT**

Mailed Date: March 7, 2014

TABLE OF CONTENTS

I. STATEMENT.....	2
II. <u>FINDINGS OF FACT, discussion, and conclusions</u>	3
A. Respondent	3
B. The Complaint	4
C. Civil Penalties.....	4
D. Ms. Black and Mr. Poppenberg.....	5
E. Respondent’s Motion.....	9
F. Legal Standards and Conclusions.....	10
1. Respondent’s Affirmative Defense	12
III. ORDER.....	18
A. The Commission Orders That:	18

I. STATEMENT

1. This proceeding was instituted by a Complaint and Notice of Hearing (Complaint) issued by the Commission Director against Denver Lincoln Limousine Inc. (Respondent). Hearing Exhibit 1.

2. The Complaint seeks to revoke Respondent's luxury limousine registration number LL-0139 pursuant to § 40-10.1-112(1), C.R.S., for failing to pay civil penalties the Commission assessed against Respondent. Hearing Exhibit 1.

3. The Complaint provided notice of the nature of the Complaint, as well as the date, time, and location of the hearing regarding the Complaint. *Id.*

4. At the designated date, time, and location, December 13, 2013 at 10:00 a.m., the undersigned Administrative Law Judge (ALJ) convened the hearing in a Commission Hearing Room, at 1560 Broadway, Suite 250, Denver, Colorado. *Id.* Respondent's sole owner and operator, Mr. Arnold Poppenberg III, appeared on behalf of Respondent. Assistant Attorney General Michael Axlerad represented Commission trial Staff (Staff) at the hearing. Commission Staff members Ms. Vanessa Condra and Ms. Catherine Lopez testified on behalf of Staff. Mr. Poppenberg and Ms. Kimberly Black testified on behalf of Respondent.

5. Hearing Exhibits 1, 4, 5, 6, 7, 8, 9, 10, 11, and 13 were identified, offered, and admitted into evidence during the hearing. Hearing Exhibits 2 and 3 were not identified, offered or admitted into evidence. Hearing Exhibit 12 was identified and offered. For the reasons stated in the record, it was not admitted into evidence.

6. During closing remarks at the evidentiary hearing in this proceeding, Staff moved to amend the Complaint to include a charge that Respondent has violated Commission Rule 6009, 4 CCR 723-6, by failing to purchase stamps from the Commission on an

annual basis. Staff made the request based upon the evidence presented during the hearing. The ALJ denied Staff's request, finding that amendment of the Complaint after the close of the evidentiary record presented due process concerns.

7. On December 19, 2013, Respondent filed a "Motion to Admit Complainant's Exhibit #2 by Respondent" (Motion). Staff objected to the Motion on January 2, 2014. The ALJ will address the Motion below.

8. Pursuant to § 40-6-109, C.R.S., the ALJ transmits to the Commission the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order.

II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

A. Respondent

9. Respondent is a luxury limousine carrier operating with Commission-issued Registration LL-0139.¹ Hearing Exhibit 10. Respondent's Commission issued registration authorizes Respondent to provide luxury limousine service, as defined in § 40-10.1-301(8), C.R.S., and applicable Commission rules.

10. Mr. Arnold Poppenberg, III, a non-attorney, is Respondent's president and sole owner. At the Hearing, Mr. Poppenberg requested consent to represent Respondent. The ALJ permitted Mr. Poppenberg to represent Respondent pursuant to Rule 1201(b)(II) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, and § 13-1-127, C.R.S.²

¹ As defined in § 40-10.1-101(14), C.R.S., the term "registration" includes an authority issued to a motor carrier under part 3 of article 10.1 of title 40, C.R.S. Part 3 includes authority to operate luxury limousine service.

² Respondent is a closely-held entity, having less than three owners. Less than \$15,000 is in controversy in the proceeding. Respondent presented satisfactory evidence that Mr. Poppenberg, its sole owner, has authority to represent Respondent.

B. The Complaint

11. The Complaint was served on Respondent by United States mail at Respondent's most recent address on file with the Commission on October 22, 2013. Hearing Exhibit 1. Service was proper.

12. The Complaint notifies Respondent that the Commission will hold a hearing to determine whether Respondent's luxury limousine registration number LL-0139 should be revoked for failing to pay civil penalties assessed against it by Decision Nos. R12-1387 and R13-0825. *Id.*

13. The Complaint is based upon the Commission's authority under § 40-10.1-112(1), C.R.S., and Rule 6008 of the Commission's Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. *Id.*

C. Civil Penalties

14. The Commission assessed Respondent the first civil penalty at issue here after an ALJ held an evidentiary hearing and found that Respondent violated Rule 6005(c)(I),³ 4 CCR 723-6, by failing to make records and vehicles available for inspection. Decision No. R12-1387 in Proceeding No. 12G-968EC issued December 3, 2012; Hearing Exhibit 4, ¶ 63. Mr. Poppenberg appeared and testified on behalf of Respondent at the evidentiary hearing in that civil penalty proceeding. Hearing Exhibit 4.

15. After the evidentiary hearing, the ALJ issued Decision No. R12-1387, which assessed Respondent a total civil penalty of \$2,117.50, including a surcharge. *Id.* The Decision became a final Commission Decision on December 24, 2012. Respondent was ordered to pay

³ This Rule was relocated to Rule 6005(b)(I), effective February 14, 2014.

the civil penalty by January 23, 2013. *Id.* Respondent did not file exceptions or otherwise appeal that Decision.

16. Less than a year later, the Commission assessed Respondent a second civil penalty of \$9,460.00, including a surcharge. Decision No. R13-0825 in Proceeding No. 13C-0134EC issued July 5, 2013; Hearing Exhibit 5. In that proceeding, Respondent was assessed the penalty after an evidentiary hearing was held and the ALJ found that Respondent committed ten separate violations of the following Commission rules and federal regulations: Rules 6102(a)(I) and 6103(d)(II)(C), 4 CCR 723-1; 49 *Code of Federal Regulations* (C.F.R.) 391.45(a); 49 C.F.R. 396.17(a). Hearing Exhibit 5. Decision No. R13-0825 found that Respondent was properly served with the civil penalty assessment notice in that proceeding. *Id.*

¶ 18. Respondent did not appear at the evidentiary hearing. *Id.*

17. Decision No. R13-0825 became a final Commission Decision on July 25, 2013. Hearing Exhibit 5. Respondent was ordered to pay the penalty in full by August 4, 2013. *Id.* Respondent did not file exceptions or otherwise appeal the Recommended Decision.

18. It is undisputed that Respondent failed to make any payments toward either of the civil penalties.

D. Ms. Black and Mr. Poppenberg

19. Ms. Kimberly Black has worked for Respondent for 14 years and was engaged to marry Respondent's president and owner, Mr. Poppenberg. Ms. Black testified that Respondent was granted a "federal authority" in 2001. No documentary evidence was submitted showing the nature or extent of the referenced federal authority.

20. During direct examination, Mr. Poppenberg asked Ms. Black, "during the time that you are working in the office in a given month, if we do 200 trips, what percentage of those

trips are booked over the internet either from a third-party booker outside the state of Colorado or are e-mailed to our office to be entered into our system that we provide service for?” Ms. Black responded “about 98 percent, 95.” She later attempted to clarify her answer, by stating that “1 out of 50 are entered in without being e-mailed through the internet.” This testimony is unclear. In particular, it is unclear whether: (a) the majority of Respondent’s reservations are a combination of e-mail reservations, and out-of-state third-party bookings made over the internet, or (b) whether the majority of Respondent’s reservations are e-mailed reservations. The ALJ will not rely upon this unclear testimony.

21. Mr. Poppenberg’s testimony focused on providing an explanation for Respondent’s failure to pay the civil penalties.

22. Mr. Poppenberg testified that in 2001, Respondent provided transportation from Colorado to Wyoming. At that time, the Wyoming State Patrol threatened to seize and impound Respondent’s vehicles for failing to have a federal authority. As a result, Respondent obtained a “number” from the United States Department of Transportation (U.S. DOT). Respondent later registered as a motor carrier under the Unified Carrier Registration (UCR) Act. The ALJ presumes that Mr. Poppenberg’s testimony regarding the UCR relates to the Unified Carrier Registration Act of 2005, 49 U.S.C. § 14504a. Mr. Poppenberg testified that Respondent’s U.S. DOT number is proof of its federal authority to operate in interstate commerce.

23. Mr. Poppenberg testified and argued that under the authority provided by *East West Resort Transportation, LLC et al. v. Ron Binz et al.*, 494 F.Supp.2d 1197 (U.S. Dist. Colo. 2007), the Commission lacks jurisdiction to regulate Respondent. He argued that the federal government has exclusive jurisdiction to regulate Respondent.

Mr. Poppenberg testified that because the Commission lacks jurisdiction to regulate Respondent, Respondent is not required to pay the civil penalties the Commission assessed.

24. In addition, Mr. Poppenberg testified that it is Respondent's position that its Commission-issued registration is invalid and useless. He argued that because the civil penalties are based upon an invalid authority, Respondent should not be required to pay those civil penalties.

25. Curiously, Mr. Poppenberg also testified that Respondent's registration should not be revoked, despite the fact that Respondent believes the registration is of no legal consequence. In support, Mr. Poppenberg testified that the internet may fail at some point, and that therefore, Respondent may not be able to arrange its transportation through the internet. According to Mr. Poppenberg, if that happens, Respondent will require the Commission's registration in order to operate its luxury limousine service.

26. Mr. Poppenberg testified that for a number of years, Respondent has not been purchasing stamps from the Commission. The ALJ construes Respondent's testimony concerning Commission stamps to be a reference to Rule 6009, 4 CCR 723-6. That rule requires motor carriers to annually purchase stamps from the Commission for each motor vehicle it operates, controls, or manages within Colorado as set forth in § 40-10.1-111, C.R.S. Respondent argued that the fact that it does not purchase Commission stamps supports its position that it is not regulated by the Commission.

27. Mr. Poppenberg testified that Mr. Robert Laws, a former Commission employee, informed him in a March 1, 2010 e-mail that the Commission does not regulate Respondent's operation. Hearing Exhibit 13. However, nowhere in the e-mail does Mr. Laws make such a statement. Instead, Mr. Laws states that for the years 2007, 2008, and 2009, Respondent paid a

fee to the UCR for each of its covered vehicles, and that Respondent is not subject to paying an annual stamp fee to the Commission. *Id.*

28. Mr. Poppenberg admitted that the \$9,460.00 civil penalty assessed by Decision No. R13-0825 could have a profound impact on his business, but had no explanation for failing to appeal the Decision. Mr. Poppenberg also admitted that Respondent did not appeal the \$2,117.50 civil penalty assessed by Decision No. R12-1387. Respondent provided no explanation for this failure.

29. For the reasons set forth below, the ALJ finds that Mr. Poppenberg's testimony is not credible. This is not the first time that the Commission has found Mr. Poppenberg's testimony not credible. Hearing Exhibit 4, ¶ 49.⁴

30. Mr. Poppenberg testified that Respondent's reasons for failing to pay the penalties should be mitigating factors in this proceeding. In particular, Mr. Poppenberg testified that Respondent has not paid the civil penalties because it is Respondent's position that the Commission lacks regulatory authority over Respondent to issue the penalties. Setting aside the validity of that argument, the ALJ finds this testimony disingenuous for several reasons. Foremost, Respondent did not make this argument to the Commission in either of the underlying civil penalty assessment proceedings. Hearing Exhibits 4 and 5. Mr. Poppenberg represented Respondent at the evidentiary hearing in the first civil penalty proceeding. He also testified during that evidentiary hearing. Nevertheless, he did not argue that Respondent should not be assessed the civil penalty because the Commission lacks regulatory authority over Respondent. *See* Hearing Exhibit 4. Nor did Respondent appeal either of the Decisions at all. This is telling.

⁴ ALJ Garvey found Mr. Poppenberg's testimony not credible.

If Mr. Poppenberg genuinely believed that the Commission has no jurisdiction over Respondent, he would have raised this issue when the Commission assessed the civil penalties, or, at the latest, during the course of an appeal of those Decisions. This is the third formal Commission proceeding against Respondent since 2012. Yet, it is the first time Respondent raised this issue.

31. The ALJ concludes that Respondent did not present credible evidence of mitigation.

E. Respondent's Motion

32. On December 19, 2014, Respondent filed a "Motion to Admit Complainants Exhibit #2 by the Respondent" (Motion). The Motion seeks to admit into evidence Hearing Exhibit 2. During the evidentiary hearing, Staff provided Hearing Exhibit 2 to Respondent. However, Staff did not offer, identify, or move to admit Hearing Exhibit 2. Respondent asks that Hearing Exhibit 2 be admitted after the close of evidence on the grounds that Respondent believes that Ms. Condra, a Staff witness, gave false testimony regarding issues relating to Hearing Exhibit 2. The Motion states that Mr. Poppenberg questioned Ms. Condra regarding her knowledge regarding Respondent's history purchasing (or not purchasing) stamps from the Commission. The Motion further states that Ms. Condra falsely denied having any such knowledge. Motion, ¶1.

33. The ALJ finds that Respondent's Motion lacks merit. Notably, Mr. Poppenberg did not pose any questions to Ms. Condra during the hearing. When given the opportunity to examine Ms. Condra, Mr. Poppenberg stated he had no questions for her. Thus, Respondent's argument that Ms. Condra gave false testimony in response to Mr. Poppenberg's questions is without merit.

34. The ALJ can only presume that Respondent intended to reference his examination of Ms. Lopez during the evidentiary hearing. Ms. Lopez did testify that she has no knowledge relating to Respondent's history purchasing (or not purchasing) Commission stamps. Respondent did not raise grounds to admit Hearing Exhibit 2 on the basis of Ms. Lopez's testimony.

35. The evidentiary record closed at the conclusion of the evidentiary hearing in this proceeding. At the end of the hearing, the ALJ reviewed each of the exhibits with the parties, clearly identifying in the record the exhibits that were admitted and those that were not. At no point did Respondent make any request regarding Hearing Exhibit 2. Respondent had ample opportunity to review Hearing Exhibit 2 during the course of the hearing. Respondent also had the opportunity to examine Ms. Condra concerning the issues relating to Hearing Exhibit 2, yet Respondent chose not to ask her any questions.

36. The ALJ will not admit new evidence into the record. To do so would raise due process concerns because the evidentiary record closed at the conclusion of the hearing.⁵ The ALJ will deny the Motion.

F. Legal Standards and Conclusions

37. Under § 40-10.1-112(1)(c), C.R.S., the Commission may revoke a registration if the holder of the registration has violated or refused to observe any proper Commission orders or rules. Under this statute, a registration may only be revoked upon notice to the registration holder, after a hearing, and upon proof of violation. *Id.*

⁵ Indeed, the ALJ denied Staff's verbal motion to add a charge to the Complaint after the close of the evidentiary record in this proceeding, based upon due process concerns. *Supra*, ¶ 6.

38. Staff carries the burden of proof under § 40-10.1-112(1)(c), C.R.S., to show by a preponderance of the evidence that Respondent violated or refused to follow the Commission's proper orders. §§ 13-25-127(1) and 24-4-105(7), C.R.S.; Rule 1500, 4 CCR 723-1.

39. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.

40. The ALJ finds that Staff met its burden of proof. In particular, Staff established by a preponderance of the evidence that the Commission assessed two civil penalties against Respondent, by Decision Nos. R12-1387 and R13-0825, totaling \$11,577.50. *Supra*, ¶¶ 14-17; Hearing Exhibits 4 and 5. The evidence was undisputed that Respondent has not paid either of the civil penalties assessed by the referenced Decisions.

41. Neither Decision was appealed or otherwise challenged. The ALJ finds that Decision Nos. R12-1387 and R13-0825 are entitled to a presumption of validity and regularity and will accord the Decisions those presumptions. *State Bd. Of Chiropractic Examiners, v. Stjernholm*, 935 P.2d 959, 972 (Colo. 1997) (agency actions have a presumption of validity and regularity); *see Public Utilities Comm'n v. District Court of County of Arapahoe*, 431 P.2d 773, 777 (Colo. 1967). Moreover, in this collateral proceeding, the Decisions are final and conclusive. § 40-6-112(2), C.R.S.

42. Thus, the ALJ finds and concludes that Staff has met its burden to show by a preponderance of the evidence that Respondent did not abide by proper Commission Decisions Decision Nos. R12-1387 and R13-0825.

1. Respondent's Affirmative Defense

43. In response to the Complaint, Respondent argues that its registration should not be revoked for failing to pay the assessed civil penalties because the Commission's regulatory authority over it is preempted by the federal government, and therefore, the civil penalties were assessed without authority. Assuming *arguendo* that Respondent may dispute the Commission's authority to assess civil penalties at this late stage, the ALJ construes that argument as an affirmative defense to the Complaint.⁶ The burden of proving an affirmative defense rests on the party asserting the defense; that party must prove the affirmative defense by the preponderance of the evidence. *Western Distributing Co. v. Diodoso*, 841 P.2d 1053, 1057 (Colo. 1992); *Sure-Shock Elec., Inc. v. Diamond Lofts Venture, LLC*, 259 P.3d 546, 550 (Colo. App. 2010); see e.g., Decision No. R07-0931 issued November 7, 2007 in Proceeding No. 07F-347TO; Decision No. R03-0270-I issued March 12, 2003 in Proceeding No. 02A-601CP.; Decision No. R01-1020 issued October 1, 2001 in Proceeding No. 01G-219CP.

44. The ALJ finds that Respondent has failed to meet its burden to prove its affirmative defense by a preponderance of the evidence.

45. In particular, Respondent's affirmative defense fails because Respondent did not produce evidence establishing it is operating in interstate commerce at all. Without an initial showing that Respondent is operating in interstate commerce, it is not possible to evaluate the various applicable legal standards that govern whether the Commission's jurisdiction could be

⁶ The ALJ *does not* conclude that Respondent is entitled to make such an argument at this stage; the argument may be an impermissible collateral attack on final and conclusive Commission Decisions, in violation of § 40-6-112(2), C.R.S. The ALJ has considered Respondent's argument to ensure that Respondent is clear that the Commission has determined it has regulatory authority over Respondent.

preempted. *See e.g., Trans Shuttle, Inc. v. Pub. Utils. Comm'n.*, 89 P.3d 398, 405 (Colo. 2004)⁷ (federal law preempts state regulation only if interstate transportation of passengers under a federal grant of authority meets specific criteria, including that the interstate traffic: (a) must be a regularly scheduled service; (b) must be actual; (c) must be *bona fide*; (d) must involve service in more than one State; and, (e) must be substantial.); *Airporter of Colo., Inc., v. Interstate Commerce Comm'n.*, 866 F.2d 1238, 1240 (10th Cir. 1989); *Funbus Systems, Inc.*, ICC Nos. MC-C-10917, MC-153325 (Sub-No. 2), MC-C-10943, 1987 WL 100200 at *9 (Dec. 30, 1987)) (not published).

46. Respondent did not produce a copy of its federal authority. Instead, Respondent produced evidence showing that it has a U.S. DOT number and argued that is proof that Respondent has a federal grant of authority to operate in interstate commerce. Hearing Exhibit 9. Even so, a U.S. DOT number does not establish that Respondent is operating in interstate commerce. Nor does it establish any facts at all about Respondent's commerce.

47. Indeed, in *Trans Shuttle, Inc.*, the Colorado Supreme Court made it clear that the "mere possession of an FMCSA certificate does not divest the [Commission] of all jurisdiction over those who possess the certificate. The strong public interest in [Commission] regulation of common carriers counsels against such a result." *Trans Shuttle, Inc.* at 406, (citing, *McKay v. Pub. Utils. Comm'n.*, 104 Colo. 402, 413, 91 P.2d 965, 970-71 (1939)). Thus, assuming that the U.S. DOT number establishes that Respondent has a federal authority to operate in interstate

⁷ Congress in 1987 enacted amendments which dropped the prior requirement that carriers provide "substantial" interstate transportation. The new language provides only that carriers using a federal certificate must "provide(s) regularly scheduled interstate transportation service on the route." *Surface Transportation and Uniform Relocation Assistance Act of 1987*, Pub.L. No. 100-17, § 340, 101 Stat. 132 (1987). While some Circuits no longer include the finding that the interstate service must be "substantial," the 10th Circuit still requires such a finding.

commerce, the existence of that number does not automatically divest the Commission of regulatory authority over Respondent.

48. Respondent argued that because the majority of its reservations are booked over the internet, that Respondent operates in interstate commerce. Even if the ALJ accepted this as true, it does not establish that Respondent is operating in interstate commerce.⁸

49. For example, Rule 6309(a), 4 CCR 723-6 mandates that Respondent's luxury limousine service be prearranged. It may be commonplace that individuals prearrange transportation service through the internet; that does not establish that the transportation service being provided is interstate in nature. To the contrary, it is entirely possible that out-of-state parties and in-state parties prearrange transportation through the internet that is wholly intrastate in nature. Respondent failed to produce evidence concerning the nature of the transportation service being provided to those persons arranging transportation through the internet.

50. Respondent relies upon *East West Resort Transportation, LLC et al. v. Ron Binz et al.*, 494 F. Supp. 2d 1197 (U.S. Dist. Colo. 2007). At the hearing, Respondent produced a printed copy of the *East West Resort* decision as evidence that Respondent relied upon that authority when it decided not to pay the civil penalties. Hearing Exhibit 11. In this federal case, the district court analyzed the same *Funbus* five-part test discussed in *Trans Shuttle, Inc.* to determine whether the Commission had jurisdiction. *Id.*, at 1200-1205, referring to *Funbus Systems, Inc.—Intrastate Operations—Petition for Declaratory Order*, Nos. MC-C-10917, MC-153325 (Sub. No. 2), MC-C-10943, 1987 WL 100200 (Decided December 30, 1987); *supra*,

⁸ Respondent presented no documentary evidence of this fact; one witness gave unclear testimony on this subject; as previously held, the ALJ will not rely upon that testimony. *Supra*, ¶ 20.

¶45. Although Mr. Poppenberg clearly had the *East West Resort* decision at his fingertips, he made no effort to present evidence addressing the numerous factors the court relied upon in that case in finding that the Commission lacked regulatory authority.

51. Respondent argued that, based upon a 2010 email from a former Commission employee informing Mr. Poppenberg that Respondent was not required to purchase Commission stamps, the Commission does not have regulatory authority over Respondent. Hearing Exhibit 13. The email is dated March 1, 2010 and appears to be based upon information that a former Commission employee obtained from Respondent. *Id.* There was no evidence illuminating the facts which formed the basis for the email. The nature of Respondent's transportation service may not be the same currently or at the time the penalties were assessed as they were when the March 1, 2010 e-mail was sent. Therefore, the e-mail holds little value for the issues at hand.

52. Nevertheless, taking the email at face value does not reach the conclusion that Respondent urges. The email may simply be a reference to Rule 6009(h)(I), 4 CCR723-6, which exempts certain UCR registrants from purchasing Commission stamps. The Rule does not exempt those same UCR carriers from the Commission's regulatory authority. It simply states that certain UCR carriers are not required to pay annually for Commission stamps. This is primarily because they have paid a federal fee already. *See* Rule 6009, 4 CCR 723-6.

53. Nothing in Rule 6009, or in the Rules directly related to UCR registrants, Rule 6400, *et seq.*, automatically exempts Respondent or other UCR registrants from the Commission's regulatory authority. Instead, the question of the Commission's jurisdiction turns upon the many factors referenced in *East West Resort Transportation, LLC et al. v. Ron Binz et al.*, 494 F. Supp. 2d 1197 (U.S. Dist. Colo. 2007) and *Trans Shuttle, Inc. v. Pub. Utils.*

Comm'n., 89 P.3d 398, 405 (Colo. 2004). And, because Respondent failed to produce evidence relating to those factors, *e.g.*, that it is engaging in interstate commerce, Respondent's argument must fail.

54. For the foregoing reasons and authorities, the ALJ rejects Respondent's affirmative defense that the Commission lacked jurisdiction to issue the civil penalty assessments.

55. As previously stated, the ALJ accords Decision Nos. R12-1387 and R13-0825 the presumption of validity that they are entitled under the law; the ALJ concludes the Decisions are final, conclusive, and proper Commission Decisions. *Supra*, ¶ 41; § 40-6-112(2), C.R.S.; *see L.G. Everist, Inc. v. Water Quality Control Com. of Colorado Department of Health*, 714 P.2d 1349, 1352 (Colo. 1986); *Dolan v. Rust*, 195 Colo. 173, 576 P.2d 560 (1978). As stated above, the ALJ finds that Staff established by a preponderance of the evidence that Respondent has failed to abide by and observe the Commission's proper orders to pay the assessed civil penalties in Decision Nos. R12-1387 and R13-0825. *Supra*, ¶ 42.

56. Decision No. R12-1387 ordered Respondent to pay the \$2,117.50 civil penalty it assessed by December 24, 2012; Decision No. R13-0825 ordered Respondent to pay the \$9,460.00 penalty it assessed by August 4, 2013. Hearing Exhibits 4 and 5. Thus, the deadlines to abide by Decision Nos. R12-1387 and R13-0825 have long expired. *Id.* Having brought the Complaint to a hearing approximately four months after the last penalty was due, the Commission has given Respondent ample time to pay the civil penalties. Respondent made no effort to pay any portion of the civil penalties.

57. There was no credible evidence of mitigation.⁹

58. Respondent has an established history of violating Commission Rules. *See* Hearing Exhibits 4 and 5. And, as Respondent's owner, Mr. Poppenberg made it clear that Respondent has a continuing and substantial contempt for the Commission's authority. The ALJ finds that if Respondent were given another opportunity to pay the civil penalties in order to avoid revocation of its registration, that it is highly unlikely Respondent would pay the civil penalties. Moreover, the ALJ questions whether Respondent will abide by the Commission's rules and the related Colorado statutes if it were to continue to operate under a valid Commission authority. The ALJ finds that the only appropriate remedy is to revoke Respondent's luxury limousine registration.

59. The ALJ finds revoking Respondent's registration achieves the following purposes: (a) deterring future violations of Commission rules and orders, whether by other similarly situated carriers and by Respondent; (b) motivating Respondent to come into compliance with Commission Decisions and rules; and (c) punishing Respondent for its past illegal behavior and failure to abide by Commission Decisions.

60. For the foregoing reasons and authorities, Respondent's luxury limousine registration no. LL-0139 should be revoked.

61. Pursuant to § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

⁹ Respondent argued that its belief that the Commission lacks authority to regulate Respondent mitigates Respondent's failure to pay the penalties. For the reasons stated in ¶¶ 29-30 above, the ALJ has already found that this is not credible evidence of mitigation. *Supra* ¶¶ 29-31.

III. ORDER**A. The Commission Orders That:**

1. Consistent with the discussion above, Denver Lincoln Limousine Inc.'s (Respondent) "Motion to Admit Complainant's Exhibit #2 by Respondent" is denied.

2. Public Utilities Commission Luxury Limousine Registration No. LL-0139 owned by Respondent is revoked as of the effective date of this Decision.

3. 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.

4. 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 stayed 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 stipulation 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.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown registrations this limit to be exceeded.

(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