

Decision No. R14-0364-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13G-1329TO

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

PARKING AUTHORITY LLC,

RESPONDENT.

PROCEEDING NO. 13G-1346TO

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

PARKING AUTHORITY LLC,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ADDRESSING MOTIONS AND
MODIFYING PROCEDURAL SCHEDULE**

Mailed Date: April 7, 2014

I. STATEMENT

1. On December 13, 2013, the Commission served, by certified mail (return receipt requested), Civil Penalty Assessment Notice or Notice of Complaint (CPAN) No. 107699 on

Parking Authority LLC (Parking Authority or Respondent). That CPAN commenced *Proceeding No. 13G-1329TO*.

2. On December 26, 2013, Respondent requested an evidentiary hearing in Proceeding No. 13G-1329TO. By filing this request, Respondent entered a general appearance in that Proceeding.

3. On January 8, 2014, by Minute Order, the Commission assigned Proceeding No. 13G-1329TO to the undersigned Administrative Law Judge (ALJ).

4. On January 9, 2014, counsel for Trial Staff of the Commission (Staff) entered his appearance in Proceeding No. 13G-1329TO. In that filing and pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1007(a),¹ Staff counsel identified the trial Staff and the advisory Staff in Proceeding No. 13G-1329TO.

5. On December 19, 2013, the Commission served, by certified mail (return receipt requested), CPAN No. 108156 on Parking Authority. That CPAN commenced *Proceeding No. 13G-1346TO*.

6. On December 31, 2013, Respondent requested an evidentiary hearing in Proceeding No. 13G-1346TO. By filing this request, Respondent entered a general appearance in that Proceeding.

7. On January 10, 2014, counsel for Staff entered his appearance in Proceeding No. 13G-1346TO. In that filing and pursuant to Rule 4 CCR 723-1-1007(a), Staff counsel identified the trial Staff and the advisory Staff in Proceeding No. 13G-1346TO.

¹ This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

8. On January 15, 2014, by Minute Order, the Commission assigned Proceeding No. 13G-1346TO to ALJ Mirbaba.

9. On January 28, 2014, by Decision No. R14-0107-I and among other things, the ALJ granted Staff's Motion to Consolidate Proceeding Nos. 13G-1329TO and 13G-1346TO (Consolidated Proceeding). The Consolidated Proceeding is assigned to the undersigned ALJ.

10. Staff and Parking Authority, collectively, are the Parties in the Consolidated Proceeding. Staff is represented by legal counsel. By Decision No. R14-0107-I, the ALJ permitted Respondent to be represented by Mr. Jon L. Florey, who is not an attorney.²

11. On March 3, 2014, by Decision No. R14-0230-I, the ALJ scheduled the evidentiary hearing in this matter for May 8, 2014 and established the procedural schedule in this Proceeding.

12. Pursuant to the procedural schedule, Staff was to file, not later than Friday, March 21, 2014, its list of witnesses³ and complete copies of the exhibits that it will offer in its direct case. Staff did not make that filing.

13. On Monday, March 24, 2014, Respondent filed (in one document) a Motion *in Limine*, Motion to Dismiss,⁴ and Request to Shorten Response Time.⁵ On Monday, March 24, 2014, Staff filed (in one document) a Motion for Leave to File Exhibit and Witness Lists

² In that Interim Decision, the ALJ set out the conditions under which Mr. Florey represents Respondent.

³ The list of witnesses must contain the information specified in Decision No. R14-0230-I at ¶ 20.

⁴ On March 24, 2014, Respondent filed an amendment to its Motion *in Limine* and Motion to Dismiss (Respondent's Amendment). Reference in this Interim Decision to the Motion *in Limine* or to the Motion to Dismiss is to the motions as amended.

⁵ By electronic mail dated March 28, 2014, the ALJ granted the request and shortened response time to April 2, 2014. This Interim Decision memorializes that ruling and shortens, *nunc pro tunc*, the response time.

Out of Time [Staff Motion] and Response to the Motion *in Limine* and the Motion to Dismiss [Staff Response].

14. On March 24, 2014, Staff filed the Staff Motion. On April 1, 2014, Respondent filed its Response to the Staff Motion (Respondent Response).

A. Motion for Leave to File Out of Time.

15. As good cause for granting the Staff Motion, Staff states: (a) “due to a large caseload and because of the press of business, [Staff] counsel simply did not make the [March 21, 2014] filing in time” (Staff Motion at ¶ 2); (b) Staff’s Exhibits and Witnesses for Hearing accompanies the Staff Motion; (c) assuming the ALJ grants the Staff Motion, Respondent will have Staff’s exhibits and list of witnesses one business day late (that is, on Monday, March 24, 2014 rather than on Friday, March 21, 2014); (d) any prejudice to Respondent from the late-filed witness list and exhibits can be remedied by granting Respondent “an equal extension of time to submit its own exhibits and witnesses” (Staff Motion at ¶ 2); and (e) “the fault is counsel’s, who asks that the judge accept [the late filed list of witnesses and copies of exhibits], so that Staff, who had no part in this [failure to file timely], is not penalized for this mistake” (*id.*).

16. Respondent opposes the Staff Motion. As the grounds for its opposition, Respondent states: (a) the Parties “have a right to rely on orders entered by the Commission and Administrative Law Judges (ALJ) in Commission proceedings[, and] it is the ALJ’s duty to enforce such orders” (Respondent Response at ¶ 1); (b) Staff does not address the fact that this is the second time that Staff has failed to make a filing as required by an Interim Decision issued in

this Proceeding;⁶ and (c) Staff could have filed a motion for an extension of time but failed to do so. Respondent asserts that

these events prejudice Respondent because of the time and effort it takes to respond administratively and thereby detracting valuable time in the orchestrating of Respondent's own case; the potential of holding one Party to different standards than another in reference to following rules and guidelines; and also the stated prejudices in

the Respondent's Motion *in Limine* and Motion to Dismiss (collectively, Respondent Motions). Respondent Response at ¶ 4.

17. The ALJ finds that the Staff Motion states good cause. The ALJ finds that prejudice to Respondent is slight given that Staff served its list of witnesses and copies of exhibits on Respondent, and filed its list of witnesses and copies of its exhibits with the Commission, less than one business day late. Finally, the ALJ finds that any prejudice to Respondent can be cured by modifying the procedural schedule to permit Respondent to file its list of witnesses and copies of its exhibits not later than April 14, 2014, which is one business day after the currently-scheduled filing date of April 11, 2014. The ALJ will grant the Staff Motion and will permit Staff to late-file its list of witnesses and copies of its exhibits.⁷

18. The ALJ finds that Respondent's argument that this is the second time that Staff has failed to make a required filing in this Proceeding is unpersuasive and that the

⁶ Respondent refers to Decision No. R14-0230-I at ¶ 17, which states (in full): "It is obvious that the Parties did not reach agreement with respect to either the proposed hearing dates or the number of days for which the hearing should be scheduled. As a result, the ALJ finds that Staff failed to make the filing required by Decision No. R14-0107-I."

In support of its assertion that this is the second time that Staff has failed to make a required filing, Respondent states: "In Decision No. R14-0230-I at paragraph 17 the [ALJ] found that '*... Staff failed to make the filing required by Decision No. R14-0107-I.*' (italics supplied)." Respondent's Amendment at 1. This use of selective quoting is discussed *infra*.

⁷ Staff made this filing on March 24, 2014.

incomplete quotation from Decision No. R14-0230-I is misleading.⁸ Decision No. R14-0107-I⁹ required Staff to file, not later than February 14, 2014, a list of three proposed hearing dates, each of which was acceptable to the Parties. As explained in detail in Decision No. R14-0203-I at

¶¶ 13-17, the reason that Staff did not make the filing required by Decision No. R14-0107-I is the inability of *the Parties* to reach agreement. *See* note 6, *supra*. Thus, as Decision No. R14-0230-I makes abundantly clear, *both Parties* are responsible for Staff's failure to make the filing required by Decision No. R14-0107-I.

19. The ALJ will modify the procedural schedule established in Decision No. R14-0230-I at ¶ 19 and Ordering Paragraph No. 2 as follows: not later than **April 14, 2014**, Respondent will file its list of witnesses and complete copies of the exhibits that it will offer in its case. Except as modified by this Interim Decision, Decision No. R14-0230-I remains in full effect.

20. The ALJ reminds the Parties that one should file a motion for enlargement of time when one finds that one cannot meet a filing date. One should file a motion for enlargement of time not later than the date on which the filing is due.

B. Motion *in Limine* and Motion to Dismiss.

21. The Respondent Motions are inter-related as the Motion to Dismiss assumes that the Motion *in Limine* is granted. The ALJ addresses both motions here.

⁸ As set out in note 6, *supra*, in Respondent's Amendment at 1, Respondent quotes a portion of the second sentence of ¶ 17 in Decision No. R14-0203-I and omits the first sentence of that paragraph. This selective quoting makes it appear that Staff alone is responsible for the failure to comply with Decision No. R14-0107-I when that is not what the Interim Decision says. The ALJ admonishes the Parties to refrain from the use of selective quoting that misleads or that may lead the reader to misunderstand a cited authority.

⁹ This Interim Decision was issued on January 28, 2014, in this Proceeding.

22. As the factual basis for the Motion *in Limine*, Respondent states: (a) as relevant here, Decision No. R14-0230-I is clear that no witness will be permitted to testify “unless the person is identified on the list of witnesses filed in accordance with ¶¶ 19 and 20” of that Interim Decision (Decision No. R14-0230-I at ¶ 21); (b) as relevant here, Decision No. R14-0230-I is clear that no document will be admitted into evidence “unless the document is filed in accordance with ¶¶ 19 and 22” of Decision No. R14-0230-I (Decision No. R14-0230-I at ¶ 23); (c) Decision No. R14-0230-I at ¶ 19 requires Staff to file, not later than March 21, 2014, its list of witnesses and complete copies of the exhibits that Staff will offer in its direct case; (d) although required to do so, Staff did not file, on or before March 24, 2014, its list of witnesses and complete copies of the exhibits that it will offer in its direct case; (e) this is the second time that Staff has failed to make a filing as required by an Interim Decision issued in this Proceeding;¹⁰ and (f) “the continued failure of Staff to file prejudices the Respondent in this proceeding” (Respondent’s Amendment at 1).

23. Based on these facts and as good cause for granting the Respondent Motions, Respondent asserts: (a) because Staff did not comply with Decision No. R14-0230-I (*i.e.*, did not make the March 21, 2014 filing), the ALJ should grant the Motion *in Limine* to preclude Staff from presenting either testimonial evidence or documentary evidence at the evidentiary hearing; (b) Staff has the burden of proof in this Proceeding; (c) if the Motion *in Limine* is granted, the ALJ should grant the Motion to Dismiss because Staff cannot meet its burden of proof in this Proceeding.

24. Staff opposes the Respondent Motions and responds to them as follows: (a) Staff admits that it did not meet the March 24, 2014 filing date; (b) “the short delay

¹⁰ This point is addressed *supra*.

occasioned by [Staff counsel's] error does not significantly prejudice Respondent” (Staff Response at ¶ 5); (c) “any prejudice that Respondent might suffer can be cured by granting it an equal extension of time to submit its own exhibits and witnesses” (Staff Response at ¶ 3); (d) the hearing is scheduled for May 8, 2014, which is over one month in the future; and (e) assuming the ALJ grants the Staff Motion, “the issues raised in [the Respondent Motions] will be rendered moot” (*id.* at ¶ 5).

25. Given that the Staff Motion is granted, the ALJ finds that the Respondent Motions are moot. The ALJ will deny as moot the Respondent Motions.

II. ORDER

A. It Is Ordered That:

1. The Motion for Leave to File Exhibit and Witness Lists Out of Time is granted.
2. Not later than March 24, 2014, Staff of the Commission (Staff) shall file the list of witnesses and copies of the exhibits that Staff will offer in its direct case.
3. The procedural schedule established in Decision No. R14-0230-I at ¶ 19 and Ordering Paragraph No. 2 is modified as follows: not later than April 14, 2014, Respondent will file its list of witnesses and complete copies of the exhibits that it will offer in its case.
4. Except as modified by this Interim Decision, Decision No. R14-0230-I remains in full effect.
5. The Motion *in Limine* filed on March 24, 2014 is denied as moot.
6. The Motion to Dismiss filed on March 24, 2014 is denied as moot.
7. The Request to Shorten Response Time to the Motion *in Limine* and the Motion to Dismiss is granted.

8. Response time to the Motion *in Limine* and the Motion to Dismiss is shortened, *nunc pro tunc*, to April 2, 2014.

9. The Parties are held to the advisements in the Interim Decisions issued in this Proceeding.

10. This Interim Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director