Decision No. R20-0767

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20G-0098TO

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

BIG DADDY TOWING AND RECOVERY LLC,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MELODY MIRBABA ASSESSING CIVIL PENALTY

Mailed Date: November 2, 2020

TABLE OF CONTENTS

I. STATEMENT AND BACKGROUND

A. Summary.

1. This Decision finds that Colorado Public Utilities Commission Staff (Staff) met its burden of proof as to Counts 1 through 5 of Civil Penalty Assessment Notice No. 123824 (CPAN) filed in this proceeding, and failed to meet its burden as to Counts 6 to 7 of the CPAN. As explained below, the Administrative Law Judge (ALJ) assesses civil penalties and surcharges against Big Daddy Towing and Recovery LLC (Big Daddy) for violating the rules alleged in Counts 1 through 5, requires Big Daddy to refund charges to a member of the public, and dismisses Counts 6 and 7.

B. Background.

2. Staff initiated this proceeding on March 6, 2020 by filing the CPAN against Big Daddy. CPAN No. 123824 alleges four counts of violating Rule 6508, two counts of violating Rule 6509, and one count of violating Rule 6511 of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6. The Commission referred this matter to an Administrative Law Judge (ALJ) for disposition on April 1, 2020.

3. On April 10, 2020, the ALJ scheduled an in-person hearing on the CPAN to take place at the Commission's Office on August 31, 2020. Decision No. R20-0237-I. The ALJ set the hearing for August to allow enough time to pass to increase the likelihood that public health orders and related executive orders related to the COVID-19 pandemic may not be in place, and that in-person gatherings may not present public health risks. *Id.* at ¶ 6. The ALJ noted that it is uncertain whether conditions will improve enough to allow for an in-person hearing as planned,

and that depending on how conditions develop, the ALJ may issue orders at a later date as necessary to manage the hearing and the forward movement of this proceeding.

4. On July 31, 2020, the ALJ converted the in-person hearing scheduled for August 31, 2020 to a remote video-conference hearing, and established procedures for holding the hearing remotely. Decision No. R20-0559-I. In doing so, the ALJ found that conditions relating to COVID-19 had not progressed to allow for in-person hearings, and that it is in the parties' and public interest to hold the hearing by video-conference. *Id.*

5. As noticed, the ALJ called the matter for a video-conference hearing on August 31, 2020. Staff appeared with counsel, Ms. Heather Whitman. Ms. Mercedes Branch and Mr. Joshua Moore appeared for Big Daddy. Mr. Moore, Big Daddy's owner, authorized Ms. Branch, Big Daddy's manager (a non-attorney), to represent Big Daddy in the proceeding. He also provided sufficient information establishing that Big Daddy meets the legal requirements to be represented by a non-attorney. § 13-1-127(2), C.R.S. (2020), and Rule 1201(b)(II), of the Commission's Rules of Practice and Procedure, 4CCR 723-1. As such, the ALJ allowed Ms. Branch to represent Big Daddy in this proceeding.

6. Mr. Hubert Barton testified on behalf of Staff; and Ms. Branch testified on behalf of Big Daddy. During the course of the hearing the following exhibits were admitted into evidence: Hearing Exhibits 1 through 9; and Hearing Exhibit 2C (confidential exhibit).

II. FACTUAL FINDINGS.

A. Staff's Evidence.

7. Big Daddy is a Colorado limited liability company. Hearing Exhibit 1 at 1. It has owned Commission Permit No. T-04583 since 2016. Hearing Exhibit 2 at 3.

8. Mr. Barton has been an investigator with the Commission for approximately four years. His duties include conducting investigations on complaints from the public against registered motor carriers, performing safety and compliance reviews and inspections, gathering evidence, and testifying at hearings. Mr. Barton issued the CPAN in this proceeding.

9. Mr. Barton initiated an investigation against Big Daddy based on a complaint that a member of the public filed with the Commission concerning a nonconsensual tow. *See* Hearing Exhibit 3 at 3. The complainant, Mr. James Lebert, asserted that Big Daddy improperly towed his white 1995 Lincoln Continental on March 17, 2019 for not having a valid vehicle registration. *Id.* Mr. Lebert stated that his vehicle displayed valid and current vehicle registration at the time of the tow, and that his registration did not expire until March 31, 2019. *Id.*

10. A Commission staff member in the Consumer Affairs Section e-mailed Big Daddy to inform it of the complaint, and asked Big Daddy to provide the Commission the following documents and information by April 17, 2019: a copy of the towing invoice showing the breakdown for all the charges for Mr. Lebert's March 17, 2019 tow; the name and phone number of the person who authorized the tow; an explanation of whether the person authorizing the tow is an employee of Big Daddy, or an agent of the property owner; and the contract allowing Big Daddy to tow from the location (if any). Hearing Exhibit 3 at 3-4.

11. On April 12, 2019, Big Daddy responded by e-mail, explaining that it towed Mr. Lebert's vehicle from the High Hollows condominium parking lot on March 17, 2019 for failing to have valid vehicle registration displayed, which is consistent with the towing agreement it has with the property manager (Colorado Property Management Group) for the High Hollows Homeowners Association (High Hollows). *Id.* at 1; Hearing Exhibit 4 at 1. Big Daddy provided photographs of Mr. Lebert's back license plate showing that it did not display

any vehicle registration. Hearing Exhibit 3 at 2. The photos also show that the vehicle had no front license plate displayed on the front of the vehicle, so the only license plate upon which vehicle registration stickers could be affixed is the back license plate. *Id.* at 3. In addition, Big Daddy provided the Commission with: a copy of its Agreement with High Hollows's agent to perform tows on the property (Agreement); a copy of Mr. Lebert's tow Invoice No. 0192 (Invoice); and a copy of Mr. Lebert's driver's license. *Id.;* Hearing Exhibits 4 and 5.

12. Based on the photos of Mr. Lebert's vehicle, Mr. Barton initially determined that the tow was authorized because Mr. Lebert's vehicle did not display any registration at all (let alone valid registration).

13. Big Daddy's Agreement with High Hollows's agent was signed on September 25, 2017, and, by its terms, automatically renews each year for an additional year unless it is cancelled. Hearing Exhibit 4 at 2. As relevant here, the Agreement authorizes Big Daddy to immediately tow vehicles on High Hollows's premises which do not have vehicle registration. *Id.* The Agreement identifies Big Daddy as "Big Daddy's Towing & Recovery." *Id.* at 1 and 2. The Agreement states that Big Daddy will impound towed vehicles at 5420 Monroe St. Lot 13A, Commerce City, CO 80216, but it also lists Big Daddy's address as 5420 "Monre" St. Lot 12A Commerce City, CO 80216. *Id.* at 2. The Agreement references several addendums, but only one document is attached. That document lists the type of issues warranting an immediate tow versus those which require a ticket and notice to High Hollows prior to towing, but is not marked as an addendum to the Agreement. *Id.* at 3.

14. Commission records list Big Daddy's name as "Big Daddy Towing and Recovery LLC." Hearing Exhibit 2 at 1. Commission records also show Big Daddy's name history or alias as "Big Daddy Towing & Recovery LLC" from January 11, 2016 to October 10, 2019. *Id.*

Commission records identify several addresses for Big Daddy, for several timeframes. Commission records show Big Daddy's physical and mailing address from September 25, 2017 to May 9, 2018 as "5146 Perth Ct Denver, CO" with two different zip codes (80216 and 20249). *Id.* at 2. From May 9, 2018 to May 24, 2019, Commission records list Big Daddy's physical address as "3970 N. Monaco Street, Unit B Denver, CO 80207." *Id.* at 2. For the same timeframe, Commission records list Big Daddy's mailing address as "3970 Monaco Street Parkway Unit B Denver, CO 80207." *Id.*

15. Big Daddy's Invoice to Mr. Lebert identifies Big Daddy's name as, "BIG DADDY'S TOWING" at the top of the invoice, and as "Big Daddy's Towing" at the bottom of the invoice. Hearing Exhibit 5. The invoice shows Big Daddy's address as 3970 Monaco Pkwy, Unit B, Denver, CO 80207, and informs Mr. Lebert that his vehicle was towed to "3970 Monaco St Pkwy Denver CO 80207." *Id.* The invoice lists the total storage charges as $60.00, the "hookup/drop" charge as $180.00, mileage charges as $30.00, and a "tow back" charge of $75.00, totaling $345.00. *Id.*

16. Based on all of the above, Mr. Barton identified multiple alleged rule violations. He asserts that those violations render Big Daddy's tow of Mr. Lebert's vehicle unauthorized in violation of Commission rules, thereby requiring Big Daddy to refund Mr. Lebert all charges for the tow. On February 6, 2020, Mr. Barton sent Big Daddy a letter identifying multiple alleged violations of Commission rules, and asking Big Daddy to refund Mr. Lebert $345.00 for the tow, within three days of receiving the letter (refund request letter). Hearing Exhibit 6 at 1-2. The refund request letter asks Big Daddy to send the refund check to the Commission. *Id.* The letter was sent by certified mail, and was delivered to Big Daddy on February 20, 2020. *Id.* at 6.

17. Mr. Barton testified that he never received a refund check from Big Daddy, although Ms. Branch (Big Daddy's manager), told him that a refund check was mailed. He testified that he followed up numerous times. He also testified that his supervisor at the time, Mr. Michael Gullatte, met with Ms. Branch in person, and that she did not provide him with a check either. Mr. Barton believes the Commission gave Big Daddy multiple opportunities to issue the refund check, and that its failure to do so is an indication that it simply would not issue the refund. After considering all the available options, on March 6, 2020, Mr. Barton issued the CPAN. Hearing Exhibit 7. Mr. Barton testified that the significant delay from commencing the investigation in March 2019 to issuing the CPAN in March 2020 was due to major staff reductions, and his need to be out of the office on family medical leave during that timeframe.

18. The CPAN alleges that Big Daddy violated: Rule 6508(a)(I)(A) (Count 1); Rule 6508(a)(I)(B) (Count 2); Rule 6508(a)(I)(C) (Count 3); Rule 6508(a)(I)(E) (Count 4); Rule 6509(a)(II) (Count 5); Rule 6509(a)(III) (Count 6); and Rule 6511(b)(IV) (Count 7). Hearing Exhibit 7. The CPAN assesses penalties and surcharges against Big Daddy, totaling $3,162.50. *Id.* at 2.

19. On March 6, 2020, Mr. Barton personally served the CPAN on Joshua Moore, Big Daddy's designated agent as on file with the Commission. Hearing Exhibit 8.

20. Mr. Barton believes the CPAN's full amount should be assessed because Big Daddy has been investigated and warned in the past about identical violations to those at issue here. Hearing Exhibit 9 is a summary of information in Commission files concerning prior

alleged rule violations against Big Daddy. As relevant here, it shows that PUC investigators issued violation warning letters to Big Daddy as follows:

- On October 16, 2017, for alleged violations of Rule 6509(a)(II) and (III), 4 CCR 723-6. Hearing Exhibit 9 at 1 and 4-6.
- On January 24, 2019, for alleged violations of Rules 6508(a)(I)(A), (B), (C) and (E) and 6511(b)(IV). *Id.* at 2 and 14.
- On January 10, 2019, for alleged violation of Rule 6511(b)(IV). *Id.* at 2 and 17-18.
- On November 5, 2019 for alleged violations of Rules 6509(a)(II) and 6511(b)(IV), 4 CCR 723-6. *Id.* at 2-3 and 20.

21. Mr. Barton did not know the disposition for any of the above violation warning letters.

22. Mr. Barton asks that Big Daddy be required to refund Mr. Lebert $345.00 in order to make Mr. Lebert whole, and that a cease and desist order be issued to prevent Big Daddy from engaging in the same activity that resulted in the CPAN.

23. Mr. Barton has not reviewed any documents that Big Daddy may have updated since the events surrounding the CPAN occurred because he does not do that in the normal course of business unless another complaint is filed.

B. Big Daddy's Evidence.

24. Ms. Mercedes Branch is Big Daddy's manager and has worked for Big Daddy for approximately two years. She manages the office and responds to emails. She responded to the Commission's April 2019 request for information concerning Mr. Lebert's tow. Hearing Exhibit 3. She explained that the "tow-back" charge reflected on Mr. Lebert's Invoice is a charge for a consensual tow that Big Daddy performed, per Mr. Lebert's request. Mr. Lebert appeared in person at Big Daddy's office, and asked that Big Daddy tow his vehicle back to the property where the tow originated. This charge is unrelated to the original non-consensual tow from High

Hollows to Big Daddy's property, but is reflected on the same Invoice for the non-consensual tow. She explained that customers often prefer to have all charges reflected in one place (on one invoice). She does not believe that Commission rules prohibit this practice. Nonetheless, based on this CPAN, Big Daddy has stopped doing this, and now writes up separate invoices so that charges for consensual tows are not included in the same invoice for charges for nonconsensual tows.

25. Ms. Branch explained that due to the timing of the events, the entire situation was confusing and frustrating. She responded quickly to the Commission's initial requests in April 2019, and provided everything that the Commission requested. *See* Hearing Exhibit 3. It has been her experience that after she provides everything that the Commission requests, that any necessary follow-up occurs within two to three weeks. Since she did not hear back, she thought the issues were resolved after she sent the Commission everything it sought in April 2019.

26. The first communication that Big Daddy received after responding to the Commission in April 2019 came in February 2020. At this point, almost a year had passed since Mr. Lebert's tow. She testified that at that point, everything was rushed. Mr. Barton demanded a refund check be provided immediately, even though she remained uncertain as to what Big Daddy did to justify this demand. Given the back and forth that occurred in 2019, and the amount of time that passed since her last communication with the Commission, she did not understand what Big Daddy did wrong. She was also unclear as to Mr. Barton's expectations of Big Daddy. She testified that she tried to learn more by discussions with Mr. Barton, but was unable to get a clear understanding. It seemed to her that Mr. Barton kept pushing her to "hurry up" to get this done, rather than taking the time to explain the violations, and why there was a significant delay since she last heard from the Commission on the issues. She testified that Big

Daddy never attempted to get out of issuing the refund, but simply wanted to understand what it did wrong.

27. She testified that in the past, this was not an issue because Big Daddy would receive a warning letter from the Commission identifying the alleged rule violations and the basic facts supporting those allegations. While she acknowledged receiving the Commission refund request letter on February 20, 2020, she still was unclear on what Big Daddy did wrong. *See* Hearing Exhibit 6 at 1-2 and 8. Nonetheless, Ms. Branch testified that in response to the refund request letter, Big Daddy mailed a refund check to the Commission several days after receiving that letter. Big Daddy has sent refunds for vehicle owners to the Commission on several occasions in the past, and the Commission has received those checks without any issues. Ms. Branch testified that the check she sent was not cashed and that it was not returned in the mail to Big Daddy. She does not know what happened to it.

28. Feeling that additional discussions with Mr. Barton would not be helpful, she asked to speak with his supervisor, Mr. Michael Gullatte. She met with him in person at the Commission's office sometime in late February 2020, and brought a blank check with her so that she could provide a refund on the spot. She explained to Mr. Gullatte that the $75.00 tow-back charge was for a consensual tow that Mr. Lebert requested. She testified that Mr. Gullatte told her not to submit the check because it was not yet clear as to whether the $75.00 tow-back charge should be refunded. She testified that Mr. Gullatte told her that this issue has come up with a number of other tow companies, and that he would follow-up with Mr. Lebert to confirm that he did consent to the second tow. She testified that Mr. Gullatte promised to follow-up with her on whether that charge should be included in her refund check. She promised to personally hand-deliver a refund check to the Commission after hearing back from Mr. Gullatte so that there

would be no further delay in resolving the matter. She never heard back from Mr. Gullatte. Instead, a few days later, Mr. Barton served the CPAN.

29. Because the CPAN was issued, Big Daddy assumed a hearing would move forward, so it did not follow-up any further.

30. Ms. Branch understands that Big Daddy must update its information on file with the Commission, and ensure that its contracts comply with Commission requirements. She testified that Big Daddy has updated its contracts and invoices to address the types of issues raised in this proceeding. She explained that the State changed the name of the street that Big Daddy operates from Monaco Street to North Monaco Street Parkway approximately eight months to a year ago. She was not initially aware that a change like that would also require everything to be updated, but after learning this is necessary, she did ensure that relevant documents have been appropriately updated.

III. RELEVANT LAW, DISCUSSION, AND ANALYSIS.

A. Authority to Issue Civil Penalty Assessment Notices.

31. Commission investigative personnel have authority to issue civil penalty assessments to any person required to comply with Commission rules promulgated per article 10.1 of title 40, Colorado Revised Statutes, who violates such rules. §§ 40-7-116(1)(a) and 40-7-113(1)(g), C.R.S. (2020). The Commission's Rules Regulating Transportation by Motor Vehicle were promulgated, at least in part, per §§ 40-10.1-101 to 705, C.R.S.[1] Thus, Commission investigative personnel have authority issue civil penalty assessments for violation of those rules.

[1] The "Basis, Purpose, and Statutory Authority" for the Rules Regulating Transportation by Motor Vehicle (4 CCR 723-6) states, "[t]he statutory authority for the promulgation of these rules can be found at §§ . . . 40-10.1-101 through 705 . . . ." 4 CCR 723-6. A full copy of these rules is found at: https://www.colorado.gov/pacific/dora/transportation-rules.

32. It is undisputed that Big Daddy is a regulated motor carrier who is bound to follow applicable Commission Rules. Because the CPAN alleges violations of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6 against a motor carrier bound to those rules, the ALJ concludes that Staff acted within its authority in issuing the CPAN in this proceeding. §§ 40-7-116(1)(a) and 40-7-113(1)(g), C.R.S. (2020); §§ 40-10.1-101 to 705, C.R.S. (2020); Hearing Exhibits 2 and 7.

B. Service and Notice Requirements.

33. Staff must serve a civil penalty assessment notice on the named respondent; this may be accomplished by certified mail or by personal service. § 40-7-116(1)(b), C.R.S.; Rules 1205(a) and (d), 4 CCR 723-1. Staff may serve a CPAN on the carrier's designated agent, as on file with the Commission. Rules 1205(a) and (d), 4 CCR 723-1; and Rule 6006(a), 4 CCR 723-6. Service on a motor carrier's designated agent on file with the Commission is service upon the carrier. Rule 6006(c), 4 CCR 723-6.

34. The content of a CPAN must provide adequate notice of the alleged violation. *See* § 40-6-116(1), C.R.S.; *see also* § 24-4-105(2)(a), C.R.S. (administrative agency must provide notice of the matters of fact and law asserted). As relevant here, a CPAN must include, "[a] citation to the specific statute or rule alleged to have been violated." § 40-7-116(1)(b)(II), C.R.S. CPANs must also include "[a] brief description of the alleged violation, the date and approximate location of the alleged violation . . ." § 40-7-116(1)(b)(III), C.R.S. Sections 40-7-116(1)(b)(II) and (III), C.R.S., operate together to provide a carrier with notice of the matters at issue, that is: the specific statute or rule the carrier is accused of violating; the carrier's actions or failure to act which form the basis for the violation alleged; the date and location of the violation; and the possible penalty.

35. The evidence concerning service was undisputed. Staff personally served the CPAN in this proceeding on Big Daddy by handing it to Big Daddy's designated agent, Mr. Joshua Moore on March 6, 2020. Hearing Exhibits 2 at 3, and 8. Based on the foregoing, the ALJ concludes that Staff properly served the CPAN on Big Daddy, consistent with § 40-7-116(1)(b), C.R.S.; Rules 1205(a) and (d), 4 CCR 723-1; Rule 6006(a) and (c), 4 CCR 723-6.

36. The ALJ finds that the CPAN identifies the specific rules alleged to have been violated, alleges facts in support of each count, and identifies the date of the alleged violations (March 17, 2019). For these reasons, the ALJ concludes that the CPAN provides proper notice of the alleged violations, consistent with § 40-7-116(1)(b)(II) and (III), C.R.S.

C. Burden of Proof.

37. Staff bears the burden of proving the violations alleged in the CPAN by a preponderance of the evidence. § 40-7-116(1)(d)(II), C.R.S.; Rule 6018(C), 4 CCR 723-6; *see* Rule 1500, 4 CCR 723-1; *see also* §§ 24-4-105(7) and 13-25-127(1), C.R.S. (2020). The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party. *Schocke v. Dep't of Revenue,* 719 P.2d 361, 363 (Colo. App. 1986). Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of

fact for the jury. *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000). The ALJ will address whether Staff met its burden later in this Decision.

38. Below, the ALJ considers each alleged count to determine if Staff met its burden of proof.

D. CPAN's Alleged Rule Violations.

39. The CPAN alleges seven counts of violating the Commission's Rules Regulating Transportation by Motor Vehicle. Hearing Exhibit 7. The first four Counts of the CPAN allege violation of different paragraphs of Rule 6508(a)(I), each relating to the information that a towing carrier must include in its contracts with property owners or their agents in order to be an authorized agent to perform tows from their property. Rule 6508(a)(I), 4 CCR 723-6; Hearing Exhibit 7.

40. Counts 1 and 4 allege that Big Daddy violated Rule 6508(a)(I)(A) and (E) because the Agreement's address for Big Daddy and Big Daddy's storage facility address (*i.e.,* where vehicles are towed and stored) do not match an address on file with the Commission. Hearing Exhibit 7 at 1. The ALJ construes Counts 1 and 4 as asserting that Big Daddy violated Rule 6508(a)(I)(A) and (E) by providing an inaccurate physical address and an inaccurate storage facility address in the Agreement, based upon the conflict between the addresses in the Agreement and those on file with the Commission.

41. Towing carriers must provide the Commission with their physical address, and their storage facility's address. Rules 6005(b) and (c) and 6006(a), 4 CCR 723-6. They must notify the Commission within two days of a change in their physical address and are obligated to ensure that the information they provide to the Commission is accurate. Rules 6005(b) and

6007(a), 4 CCR 723-6. The information that a carrier provides to the Commission is presumed accurate until the motor carrier changes it. Rule 6007(a), 4 CCR 723-6.

42. Rule 6508(a)(I)(A) and (E) provides that a towing carrier may act as the authorized agent for the property owner in order to perform tows from a property if its written agreement with the property owner or the owner's agent contains, "(A) the name, physical address, telephone number, email address (if applicable), and PUC Towing Permit number of the towing carrier . . . [and] (E) the address and phone number of the storage facility where the vehicle owner may retrieve the vehicle."[2] 4 CCR 723-6.

43. The evidence was undisputed that the addresses listed in the Agreement for Big Daddy and its storage facility are different than the addresses on file for Big Daddy at the time it signed the Agreement on September 25, 2017. *Compare* Hearing Exhibit 2 at 2 *with* Hearing Exhibit 4 at 1-2. The Commission is required to presume that the addresses a towing carrier provides to the Commission are accurate until changed. *See* Rule 6007(a), 4 CCR 723-6. Thus, the ALJ presumes that the addresses for Big Daddy on file with the Commission are accurate. There was no evidence rebutting this presumption. And, Big Daddy did not change its physical address or storage facility address on file with the Commission to match the addresses listed in the Agreement, and there was no other evidence indicating that the addresses in the Agreement are accurate. For all these reasons, the ALJ concludes that the preponderance of the evidence establishes that Big Daddy's physical address and storage facility address in the Agreement are inaccurate. As such, the ALJ concludes that Staff met its burden to show by a preponderance of

[2] As discussed later, Rule 6508(a)(I) includes many other items that must be included in a towing carrier's contract with a property owner or manager.

the evidence that Big Daddy violated Rule 6508(a)(I)(A) and (E), 4 CCR 723-6.[3] Counts 1 and 4 are sustained.

44. Counts 2 and 3 allege violations of Rule 6508(a)(I)(B) and (C) because the Agreement does not include the property owner's address and telephone number, or the address from which tows will originate. Hearing Exhibit 7. Rule 6508(a)(I)(B) requires a towing carrier's contract with a property owner to include the property owner's address and telephone number. Rule 4 CCR 723-6. Rule 6508(a)(I)(C) requires the contract to include the address from which tows will originate. *Id*. The evidence was undisputed that the Agreement does not include: (1) the property owner's address; (2) the property owner's telephone number; and (3) the address from which tows will originate. Hearing Exhibit 4. As such, the ALJ concludes that Staff met its burden to show by a preponderance of the evidence that Big Daddy violated Rule 6508(a)(I)(B) and (C), 4 CCR 723-6. Counts 2 and 3 are sustained.

45. Count 5 alleges violation of Rule 6509(a)(II) because Big Daddy's Invoice lists its name as "BIG DADDY'S TOWING" rather than its PUC registered name of "Big Daddy Towing and Recovery LLC" and because Big Daddy's street address on the Invoice does not match the address on file with the Commission. Hearing Exhibit 7 at 1-2.

46. Rule 6509(a)(II) requires that invoices for nonconsensual tows contain the towing carrier's "name, address, permit number, and telephone number." 4 CCR 723-6. Commission

[3] In reaching this conclusion, the ALJ explicitly does not find that Rule 6508(a)(I)(A) and (E) requires that towing carriers' contracts with property owners may only list addresses that match addresses on file with the Commission. Nothing in the plain language of that Rule requires this and the ALJ will not read language into the Rule which does not exist. *See Anderson v. Longmont Toyota, Inc.,* 102 P.3d 232, 327 (Colo. 2004); *Farmers Group, Inc., v. Williams,* 805 P.2d 419, 422 (Colo. 1991); *Safeway Inc., v. Industrial Claim Appeals Office,* 186 P.3d 103, 105 (Colo. App. 2008). Instead, the ALJ finds that Rule 6508(a)(I)(A) and (E) require carriers to use *accurate* addresses in its contracts. Because Rule 6007(a) requires the Commission to deem the information a carrier provides accurate, and there was no evidence rebutting this presumption as to the pertinent addresses, the preponderance of the evidence establishes that Big Daddy violated Rule 6508(a)(I)(A) and (E) by failing to include an accurate physical address and storage facility address in its Agreement with High Hollows's property manager.

records establish that "Big Daddy Towing and Recovery LLC" is the entity authorized to perform tows by Commission Permit No. T-04583. Hearing Exhibit 2 at 1 and 5. The Invoice does not include that name. Hearing Exhibits 2, and 5. As such, the ALJ finds that Staff met its burden to prove by a preponderance of the evidence that Big Daddy violated Rule 6509(a)(II), 4 CCR 723-6. Count 5 is sustained.[4]

47. Count 6 alleges that Big Daddy violated Rule 6509(a)(III) because the address for storage in Mr. Lebert's Invoice is inconsistent with the storage facility address in the Agreement, and addresses on file with the Commission. Hearing Exhibit 7 at 2. The ALJ construes Count 6 as asserting that Big Daddy violated Rule 6509(a)(III) by providing an inaccurate facility storage address on the Invoice, based upon conflicts between that address and the facility storage address in the Agreement and those on file with the Commission.

48. Rule 6509(a)(III) requires that invoices for nonconsensual tows contain the address of the storage facility. 4 CCR 723-6.

49. The Invoice lists "3970 Monaco Street Pkwy Denver, CO 80207" as the address where the vehicle will be stored and can be retrieved. Hearing Exhibit 5. The Commission has multiple addresses on file for Big Daddy. For the time of the tow, one of the addresses in Commission files is: "3970 Monaco Street Parkway Unit B, Denver, CO 80207." Hearing Exhibit 2 at 2. The only difference between this address and the one in the Invoice is the addition of "Unit B." *Id.* The Agreement lists an entirely different address for the storage facility. Hearing Exhibit 4.

[4] Staff alleges two independent factual bases for Big Daddy's violation of Rule 6509(a)(II), but does not charge Big Daddy with two separate counts of violating that Rule. Thus, because the ALJ finds that Staff met its burden based on one of the independent factual bases, there is no need to determine if the second independent factual basis establishes a violation of Rule 5609(a)(II), 4 CCR 723-6. As such, the ALJ does not do so.

50. As discussed, Rule 6007(a), 4 CCR 723-6, requires the Commission to presume that the addresses on file with the Commission are correct. As to Count 6, the evidence rebutted this presumption. Specifically, the evidence showed that Mr. Lebert was able to retrieve his vehicle based on the information in the Invoice. And, while Mr. Lebert complained that Big Daddy should not have towed his vehicle, he raised no issues relating to the storage facility, including its location. Indeed, he never complained that his vehicle was not stored at the address listed in the Invoice or that he had any difficulty retrieving his vehicle at the address shown on the Invoice. Based on all of this, the ALJ concludes that the preponderance of the evidence showed that the address listed in the Invoice for vehicle storage was accurate as of the time the tow occurred. As such, the ALJ concludes that Staff failed to meet its burden to show that Big Daddy violated Rule 6509(a)(III), 4 CCR 723-6.[5] Count 6 will be dismissed.

51. Count 7 alleges that Big Daddy violated Rule 6511(b)(IV), 4 CCR 723-6, by including an additional $75.00 two-back fee, which Staff asserts is an invalid fee for the Invoice.

52. Under Rule 6511(b), 4 CCR 723-6, the maximum towing rates for nonconsensual tows include a base rate for the tow; a mileage charge (including any applicable fuel surcharge); a charge for vehicle storage; and a charge for release from storage pursuant to paragraph 6511(f). *See* Rule 6501(l), 4 CCR 723-6 (defining Private Property Impound, referred to as PPI in

[5] To the extent that Staff asserts that Rule 6509(a)(III) requires that the storage address on Invoices to be identical to the address on file with the Commission, the ALJ disagrees. Nothing in the plain language of that Rule requires this and the ALJ will not read language into the Rule which does not exist. *See Anderson v. Longmont Toyota, Inc.,* 102 P.3d 232, 327 (Colo. 2004); *Farmers Group, Inc., v. Williams,* 805 P.2d 419, 422 (Colo. 1991); *Safeway Inc., v. Industrial Claim Appeals Office,* 186 P.3d 103, 105 (Colo. App. 2008). Instead, the ALJ finds that Rule 6509(a)(III) requires carriers to use *accurate* storage facility addresses. They separately must ensure that the storage addresses on file with the Commission are accurate, but the CPAN does not charge violation of those rule obligations. *See* Rule 6007(a) and 6005(c), 4 CCR 723-6. To read the rules otherwise could result in a rule violation for including the *correct* storage facility address on an invoice where a carrier has failed to update their storage facility address with the Commission. While that failure may be a separate rule violation, citing a carrier for including the correct storage facility address on an invoice is nonsensical and runs afoul of the intent of Rule 6509(a)(III), 4 CCR 723-6. It subverts the purpose of the rule's requirement, which Mr. Barton aptly described as ensuring that vehicle owners know where they can retrieve their towed vehicles.

Rule 6511(b), as nonconsensual tows from private property.). And, Rule 6511(b)(I) and (II) identifies specific maximum charges for: the base rate, mileage, and fuel surcharge. 4 CCR 723-6. Finally, Rule 6511(b)(IV), provides that a carrier may not charge or keep any additional fees for "the nonconsensual tow of a motor vehicle from private property." In other words, Rule 6511(b)(IV) explicitly bars towing carriers for charging and retaining charges for a nonconsensual tow from private property that are not authorized under Rule 6511(b), 4 CCR 723-6.

53. The evidence establishes that when Mr. Lebert went to retrieve his vehicle from Big Daddy, he asked Big Daddy to tow the vehicle back to its originating destination (High Hollows). In doing so, Mr. Lebert avoided having to contact a different towing company to tow his vehicle back to High Hollows. Big Daddy agreed to tow the vehicle back at a charge of $75.00, which Mr. Lebert agreed to pay. Staff did not dispute any of this evidence. For all these reasons, the ALJ finds that the preponderance of the evidence establishes that the $75.00 charge was for a consensual tow.

54. Staff's argument is essentially that Big Daddy should have created a separate invoice for the $75.00 tow-back charge for the consensual tow, and that listing that charge in the same invoice as the nonconsensual tow is akin to charging and keeping an additional fee that is not authorized for nonconsensual tows. This is understandable when viewing the Invoice in a vacuum, *i.e.,* as the only evidence on this issue. But, the evidence demonstrated that before the CPAN was issued, Big Daddy explained to Staff that the tow-back charge was for a consensual tow. Despite this, Staff argues that Big Daddy violated Rule 6511(b)(IV) by including the charge for the consensual tow on the Invoice for the nonconsensual tow. Staff points to nothing in the Rule that mandates this. Indeed, nothing in the plain language of Rule 6511(b)(IV) speaks to a

carrier's written invoices. Staff fails to identify any legal authority requiring a towing carrier to issue separate written invoices for the same customer when it performs a nonconsensual and consensual tow. While it is certainly best practice for towing carriers to issue separate invoices in order to avoid the type of confusion that happened here, Rule 6511(b)(IV), 4 CCR 723-6 simply does not mandate this.

55. Because Rule 6511(b)(IV) governs charges for nonconsensual tows, and the evidence established that the $75.00 charge was for a consensual tow, the ALJ concludes that Staff failed to meet its burden to prove that Big Daddy violated Rule 6511(b)(IV), 4 CCR 723-6. As such, Count 7 is dismissed.

E. Remedy for Rule Violations.

56. As discussed, the ALJ finds that Staff met its burden to prove by a preponderance of the evidence that Big Daddy committed the rule violations cited in Counts 1 through 5 of the CPAN. The ALJ now turns the appropriate remedy for these violations.

57. Staff requests that Big Daddy be required to refund Mr. Lebert for the full amount reflected on the Invoice, $345.00. *See* Hearing Exhibit 5.

58. Rule 6511(g) mandates that carriers are not permitted to keep money collected for its services when a tow is performed in violation of Commission rules; it must return such funds to the vehicle's owner, authorized operator, or agent. 4 CCR 723-6.

59. Big Daddy's Agreement with High Hollows's property manager fails to give Big Daddy authority to act as High Hollows's agent to perform tows since the Agreement does not include the minimum required information under Rule 6508(a)(I), 4 CCR 723-6. As such, Big Daddy's tow of Mr. Lebert's vehicle from High Hollows was not authorized, and was performed in violation of Commission rules. For those reasons, Big Daddy will be ordered to issue a full

refund to Mr. Lebert. This includes the $75.00 tow-back charge. The ALJ finds that Mr. Lebert would not have incurred the tow-back charge but for Big Daddy's unauthorized nonconsensual tow. Allowing Big Daddy to retain that charge would permit it to profit from its unauthorized tow, which is contrary to Rule 6511(g), 4 CCR 723-6. Big Daddy will be required to refund Mr. Lebert the full amount that he paid, $345.00. *See* Hearing Exhibit 5. Big Daddy will be required to work with Staff to refund this money to Mr. Lebert. Big Daddy is advised that failing to refund the money may result in a separate civil penalty assessment.

60. Staff seeks the maximum civil penalty of $275.00, plus a 15 percent surcharge of $41.25, for each violation of Rules 6508 and 6509 (Counts 1 through 5), for a total penalty and surcharge of $1,581.25. Hearing Exhibit 7.

61. The Commission may assess a civil penalty and surcharge for a proven violation of Commission rules per § 40-7-113(1)(g), C.R.S., (2020). The Commission must set the amount of the civil penalty to be assessed in its rules. § 40-7-113(2), C.R.S. Per Rule 6514(e), the Commission may assess a maximum civil penalty of $275.00 for each violation of Rules 6508(a) and 6509(a), 4 CCR 723-6. In addition, the Commission may also assess a surcharge of up to 15 percent of the assessed penalty, per § 24-34-109(2), C.R.S., (2020).

62. Staff argues that the full penalty should be assessed based on aggravating factors, such as multiple other investigations or alleged violations involving the same rules at issue here. *See* Hearing Exhibit 9.

63. The evidence did not reveal whether Big Daddy admitted or contested any prior alleged violations, or whether any prior alleged violations were proven by a preponderance of the evidence. At best, the evidence establishes that Big Daddy has been accused of violating the

same rules. Being accused of violating rules is not the same as committing the violations. Without more evidence, the prior investigations and alleged violations are unhelpful.

64. The majority of Big Daddy's violations arise out of inaccurate or missing information from its Agreement with High Hollows's property manager. *See* Hearing Exhibit 7, Counts 1 through 4. There is no question that Big Daddy did a poor job of ensuring that its Agreement included everything required under Commission rules, and that the information in its Agreement is accurate. That Agreement was in place for several years by the time of Mr. Lebert's tow. The fact is that Mr. Lebert's vehicle did not display valid vehicle registration; as such, the tow itself was performed consistent with the Agreement, despite the Agreement's failures. Hearing Exhibit 3. There was no evidence indicating that Big Daddy's failures in its Agreement with High Hollows's property manager negatively impacted the public or Mr. Lebert.[6] Indeed, Mr. Lebert's vehicle did not display valid registration, and Big Daddy's paperwork errors in its Agreement has no influence on that.

65. Likewise, there was no evidence showing that Big Daddy's failure to include its correct name on the Invoice had any negative impact on the public or Mr. Lebert. *See* Hearing Exhibit 7, Count 5 and Hearing Exhibit 5 (Invoice identifies "BIG DADDY's TOWING" instead of Big Daddy Towing and Recovery LLC). The evidence showed that despite this error, Mr. Lebert was able to contact Big Daddy and retrieve his vehicle based on the information in the Invoice. This does not excuse Big Daddy for failing to include its correct name on the invoice; it merely shows that Big Daddy's mistake did not create other aggravating factors (such as difficulty locating Big Daddy and retrieving the vehicle).

[6] Even if Mr. Lebert was negatively impacted because his vehicle was towed, this Decision addresses that by requiring Big Daddy to issue a full refund to Mr. Lebert. Given that Mr. Lebert's vehicle actually did not display valid registration at the time of the tow, this is a generous result for him.

66. Big Daddy was justifiably confused about what happened. After nearly a full year had passed since it heard from the Commission on the issues relating to the tow, Big Daddy received the refund request letter demanding that it refund Mr. Lebert, despite having provided proof that Mr. Lebert's vehicle did not display valid vehicle registration. Hearing Exhibits 3 and 6. Big Daddy attempted to learn more about what happened through discussions with Mr. Barton, and failing that, it continued to pursue matters by meeting in person with Commission Staff. As Ms. Branch said, Big Daddy wanted to understand what it did wrong. During that in-person meeting, Big Daddy offered to write a check on the spot to refund Mr. Lebert, but Staff declined. This evidence was undisputed.

67. Big Daddy also provided evidence that it has taken corrective measures to ensure that its contracts and invoices do not repeat the same issues that arose here. And, based on Ms. Branch's testimony, the ALJ finds that Big Daddy wants to avoid making the same mistakes again, and is not resistant to abiding by Commission rules. On top of all of this, Big Daddy's business has slowed significantly due to COVID-19, which may impact its ability to pay a large civil penalty.

68. For all the reasons discussed above, the ALJ declines to assess a significant penalty, and finds that the civil penalty should be reduced. In the circumstances here, the ALJ finds that the following penalties and surcharges are appropriate: a civil penalty of $18.00, and a 15 percent surcharge of $2.70 for each proven violation (Counts 1 through 5). This results in a total civil penalty and surcharge of $103.50 ($90.00 total civil penalty, and $13.50 total surcharge). This amount, combined with the ordered refund Big Daddy, totals $448.50 which Big Daddy will pay out as a result of the proven violations.

69. Although the ALJ is not assessing a significant penalty given the unique circumstances here, Big Daddy is on notice that future proven repeated violations of the same rules may result in a much harsher penalty.

70. The ALJ finds that the combination of the civil penalty assessments, surcharges, and refund achieves the following purposes: (a) deters future violations, whether by Big Daddy or others similarly situated; (b) punishes Big Daddy appropriately for its past behavior considering the unique circumstances here; and (c) implements and enforces Commission rules. The ALJ also finds that the civil penalty assessment, surcharge and ordered refund are reasonable, consistent with Commission policy, and are in the public interest.

71. Big Daddy is on notice that failing to pay the assessed civil penalties and surcharges as required by this Decision may result in an immediate revocation of its towing permit, per Rule 6012(a), 4 CCR 723-6.

72. Staff also seeks a cease and desist order. The Commission may issue a cease and desist order to a regulated motor carrier upon receiving proof that the carrier has violated Commission rules or orders. § 40-10.1-112(1)(c), C.R.S., and Rule 6008(c)(I), 4 CCR 723-6. Based on the foregoing, the ALJ concludes that at this time, a cease and desist order is unnecessary. But, if Big Daddy is proven to have violated the same rules in the future, a cease and desist order may be necessary.

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

IV. ORDER

A. The Commission Orders That:

1. Consistent with the above discussion, Big Daddy Towing and Recovery LLC (Big Daddy) violated Rules 6508(a)(I)(A), (B), (C) and (E) and 6509(a)(II), 4 *Code of Colorado Regulations* 723-6. Counts 1, 2, 3, 4, and 5 in Civil Penalty Assessment Notice No. 123824 (CPAN) in this proceeding are sustained.

2. As explained above, Big Daddy is assessed total a civil penalty and surcharge of $103.50 for the above violations, Counts 1 through 5 of the CPAN. This amount represents the total civil penalty assessed for the violations plus the 15 percent surcharge per § 24-34-108, C.R.S.

3. Big Daddy must pay the total amount due of $103.50 and must refund Mr. James Lebert the amount of $345.00 within 30 days of the date that this Recommended Decision becomes the decision of the Commission, if that is the case.

4. Big Daddy is required to work with Public Utilities Commission Staff to do so.

5. Counts 6 and 7 of the CPAN in this proceeding are dismissed with prejudice.

6. This proceeding is closed.

7. The 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.

8. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

9. 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)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director