

Decision No. R14-1487-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0373CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

COLORADO CAB COMPANY LLC,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING MOTION FOR DISCOVERY
SANCTIONS IN PART AND DENYING
THE REQUEST FOR STATUS CONFERENCE**

Mailed Date: December 16, 2014

I. STATEMENT

1. On April 24, 2014, the Public Utilities Commission's Staff (Staff) issued Civil Penalty Assessment Notice (CPAN) No. 109241 against Colorado Cab Company LLC (Colorado Cab or Respondent). The CPAN alleges over 700 violations against Colorado Cab.

2. On May 5, 2014, Respondent filed its Entry of Appearance, Request for a Hearing and Request to Set Prehearing Conference.

3. On May 21, 2014, the Commission referred this matter to an administrative law judge (ALJ) for disposition.

4. On May 21, 2014, Staff filed its Entry of Appearance, Joinder in Request for a Prehearing Conference and Notice Pursuant to Rule 1007(A).

5. The procedural history of this proceeding is set out in previous Decisions and is repeated here as necessary to put this Decision in context.

6. On December 11, 2014, Staff filed its Request for Status Conference and Motion for Discovery Sanctions (Motion). As grounds for the Motion, Staff states that a deposition had been scheduled with Mr. Brad Whittle of Colorado Cab to be held at 9:00 am on December 11, 2014.¹ Mr. Whittle failed to appear for the deposition.

7. Staff requests the following relief:

- a. That a new date be set for Mr. Whittle's portion of the 30(b)(6) deposition, and that the ALJ enter an Order requiring Mr. Whittle's attendance.
- b. That a similar Order be entered requiring Mr. Jensen to appear at the scheduled deposition on December 29, 2014.
- c. That Respondent be ordered to pay all costs incurred by Staff with regard to Respondent's non-appearance at the December 11, 2014 deposition.
- d. That, in the event of any further nonappearances pursuant to subsections 6.a. or 6.b., the full penalty in the Second Amended CPAN in this action be assessed against Respondent for its violations of pre-hearing discovery rules.

8. On December 12, 2014, Colorado Cab filed its Response to Staff's Request for Status Conference and Request for Discovery Sanctions (Response). In its Response, Colorado Cab states that the failure to appear of Mr. Whittle was due to a misunderstanding between counsel for Colorado Cab and counsel for Staff. Colorado Cab suggests new dates for the deposition of Mr. Whittle.

¹ A copy of e-mail conversations between Staff and counsel for Colorado Cab and Notice of Deposition of Respondent Colorado Cab LLC are included as attachments 1 and 2.

II. DISCUSSION

9. Under Colorado Rule of Civil Procedure (C.R.C.P.) 37(d)(3)² if a party or an officer, director, or managing agent of a party or a person designated pursuant to C.R.C.P. Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to appear for a deposition, after being served with a proper notice, “the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”

10. In the instant proceeding it is undisputed that a Notice of Deposition was served upon counsel for the Respondent. *See Staff Motion for Sanctions, Attachment 2.* The notice requirement of C.R.C.P. 37(d) was met.

11. Colorado Cab does not claim that the failure to appear of Mr. Whittle was “substantially justified” or that “other circumstances make an award of expenses unjust.” Counsel for Colorado Cab, in fact, admits to “an honest mistake.”³

12. Under the provisions of C.R.C.P. 37(d)(3) after proper notice of the deposition, the failure to appear of Mr. Whittle not being “substantially justified” or a showing that “other circumstances make an award of expenses unjust”, requires the undersigned ALJ to order that Colorado Cab pay the reasonable expenses, including attorney fees, caused by the failure to appear.

² C.R.C.P. 37(d) is incorporated in the Commission Rules pursuant to 4 CCR 723-1-1405(a)(I).

³ Colorado Cab Response, p. 2.

13. Therefore, Colorado Cab shall be ordered to pay the reasonable expenses, including attorney fees to the Staff of the Public Utilities Commission caused by Mr. Whittle's failure to appear for the deposition scheduled for December 11, 2014.

14. This is the only relief that shall be granted.

15. It is not alleged that the failure to appear was done in bad faith and there is no evidence of bad faith on the part of the Respondent.

16. There is also no evidence that Staff attempted to ascertain the reason for Mr. Whittle's failure to appear, attempted to contact counsel for Colorado Cab at the time the deposition was scheduled, or attempted to reschedule the deposition prior to the filing of the Motion.

17. Although Staff was not required to confer prior to the filing of the Motion, it is hoped that in the future that both Parties will take the time to confer prior to the filing of any motion. It is the sincere hope of the undersigned ALJ that any future disputes involving discovery issues can be resolved between the parties.

18. With the resolution of this issue, the undersigned ALJ does not believe a status conference is necessary, therefore the request for a status conference shall be denied.

II. ORDER

A. It Is Ordered That:

1. The Motion for Discovery Sanctions filed by the Public Utilities Commission's Staff on December 11, 2014 is granted in part.

2. Colorado Cab LLC shall be ordered to pay the reasonable expenses, including attorney fees caused by Mr. Whittle's failure to appear for the deposition on December 11, 2014. Colorado Cab LLC is ordered to make payment within 60 days of this Decision.

3. All other sanctions requested by the Public Utilities Commission's Staff are denied.

4. The Request for a Status Conference filed by the Public Utilities Commission's Staff on December 11, 2014 is denied.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director