Decision No. R09-0149

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-478TR

IN THE MATTER OF THE PROPOSED RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CODE OF COLORADO REGULATIONS 723-6.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ ADOPTING RULES

Mailed Date: February 19, 2009

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I. STATEMENT

1. The above-captioned rulemaking proceeding was commenced on October 30, 2008, when the Colorado Public Utilities Commission (Commission) issued its Notice of

Proposed Rulemaking (NOPR) in this matter. *See*, Decision No. C08-1130. A copy of the proposed rule was attached to the NOPR.

2. The NOPR was published in the November 10, 2008 edition of *The Colorado Register*.

3. The purpose of this proceeding is to amend certain Commission Rules Regulating Transportation by Motor Vehicle found at 4 *Code of Colorado Regulations* (CCR) 723-6 (Rules). More specifically, the basis and purpose of the proposed Rules is to implement House Bills (HB) 08-1216 and 08-1227; to make modifications to advertising rules; to consolidate the rules on revocation, suspension, alteration, or amendment of certain authorities, permits, and registrations; to clarify the applicability of the Unified Carrier Registration Agreement (UCR); to increase the flat rate for taxi service to and from Denver International Airport (DIA); to clarify the rules regarding luxury limousine exterior signs and graphics, and operational requirements; to increase the towing and storage rates and charges for non-consensual tows; and to add a consumer advisement and binding arbitration rule for household goods movers.

4. The statutory authority for the proposed Rules is found in §§ 40-2-108, 40-2-116, 40-3-102, 40-5-105, 40-7-113(2), 40-10-105(2)(c), 40-10-105.5(5), 40-10-111, 40-10.5-102(20(c), 40-11-103(1), 40-11-105, 40-13-104(1), 40-13-107, 40-14-108(1), 40-14-110, 40-16-103.8, 40-16-104.5(5), and 40-16-105(1), C.R.S.

5. Written comments were filed in this proceeding by or on behalf of Colorado Cab Company, LLC, doing business as Denver Yellow Cab and/or Boulder Yellow Cab (Colorado Cab); Diamond Limousine, LLC; A Custom Coach Transportation; A Luxury Limo & Sedan Service, LLC; A Affordable Transportation, LLC; Denver Lincoln Limousine, Inc.; A Last

Minute Limousine; Mr. Brandon LaSalle, representing American Family Insurance Group; and Mr. Harvey V. Mabis.

6. A hearing was conducted in this matter on December 4, 2008. Representatives of the following entities entered appearances and provided oral comments at the hearing: Staff of the Commission (Staff); Mr. Richard Fanyo on behalf of Colorado Cab; Mr. George Connolly on behalf of The Towing and Recovery Professionals of Colorado; Mr. Brandon LaSalle of American Family Insurance Group; Mr. Greg Fulton of the Colorado Motor Carriers Association; Mr. Harvey Mabis; Mr. James Cookenboo and Ms. Barbara Curtis of the Limousine Association of Colorado; Mr. John Hafer on behalf of A Custom Coach Transportation; Mr. David Glassey; and Mr. Shawn Stickle on behalf of Presidential Limousine. Several other representatives of limousine companies offered oral comments at the hearing as well. The comments received at hearing are discussed in more detail below.

7. At the conclusion of the rulemaking hearing, the ALJ took the matter under advisement. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, as well as a written recommended decision.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

A. General Provisions

8. The addition or amendment of several of the terms contained in the Definitions section of Rule 6001 were proposed in the NOPR. Proposed Rule 6001(a) established a definition of the terms “advertise” as used in proposed Rule 6016, which in addition to

household goods movers, established advertising requirements for common carriers, contract carriers, and exempt passenger carriers. Proposed Rule 6001(a) added the following definition:

> "Advertise" means to advise, announce, give notice of, publish, or call attention to by use of any oral, written, or graphic statement made in a newspaper or other publication, on radio, television, or any electronic medium, or contained in any notice, handbill, sign (including signage on a vehicle), flyer, catalog, or letter, or printed on or contained in any tag or label attached to or accompanying any article of personal property.

According to Staff, this new language fits in with proposed Rule 6016. Additionally, as a result of this new language, Rule 6601(b) is proposed to be deleted, in order for the new rule to be applied on a broader scope than just household goods movers.

9. Only one comment regarding the addition of this definition was received during the hearing. Mr. Mabis commented that an adjunct should be placed at the end of the definition indicating the definition of "advertise" is applicable only to commercial offering services. He offered that the definition is not applicable to "private carriers" or "motor private carriers" because these carriers are exempt from Commission jurisdiction pursuant to federal statute 49 U.S.C. 14501(c).

10. The undersigned ALJ finds that the proposed language as indicated above is clear and unambiguous. Including language as proposed by Mr. Mabis does not add clarification, therefore, proposed Rule 6001(a) will be adopted without change, including the deletion of Rules 6601(b) and 6606.

11. Proposed Rules 6001(r) through 6001(w) merely delete the reference to "NARUC" since this reference is no longer applicable. Additionally, Rule 6001(uu) which defines the acronym NARUC is deleted. No comment was received regarding these proposed rule changes. These proposed changes will be adopted.

12. Proposed Rule 6001(ii) establishes the definition of "luxury limousine service" that is used throughout the Rules as follows:

> "Luxury limousine service" means a specialized, luxurious transportation service provided on a prearranged, charter basis as defined in rule 6301(a). "Luxury limousine service" does not include taxicab service or any service provided between fixed points over regular routes at regular intervals.

Amendments are also made to Rule 6001(hh) to correspond to these proposed changes.

13. No comments were offered either in writing or at hearing regarding these rule changes. The proposed modifications to Rule 6001(ii) and Rule 6001(hh) will be adopted.

14. Proposed Rule 6001(qq) is deleted in its entirety and replaced with Rule 6001(ccc) which defines the "Unified Carrier Registration Agreement Rules." No comments were provided regarding this change. The deletion of Rule 6001(qq) coupled with the addition of Rule 6001(ccc) will be adopted.

15. The proposed amendment to Rule 6006(b) removes the reference to the Colorado Department of Revenue as an agency from which a transportation carrier must provide supporting documentation regarding name changes such as trade names or trade name additions, because this reference is no longer applicable. This amendment to Rule 6006(b) will be adopted.

16. Proposed Rule 6008(a)(I)(B) establishes a criterion for cancellation of an insurance filing upon failure of the issuing insurance company to respond to an inquiry from the Commission requesting verification of the insurance coverage. The title of Rule 6008 is proposed to be amended from *Summary Suspensions and/or Revocations for Lack of Financial*

Responsibility to *Revocation, Suspension, Alteration, or Amendment*. Additionally, subsection (a)(I)(B) is added to indicate that:

> [f]or purposes of this paragraph, failure on the part of an insurance company to respond to a Commission inquiry for verification of insurance coverage within 60 days shall be treated as a cancellation of insurance.

17. According to Staff, this section was added due to problems encountered by Staff when insurance companies fail to respond to requests as to whether a carrier's insurance remains active. Staff represents that this addition provides it with the ability to act administratively to revoke an authority despite the insurance company's failure to update the carrier's information, or require a formal process to revoke an authority because current proof of insurance is not available at the Commission.

18. No other comments were received on this proposed rule addition. Administrative inefficiencies in this area are certainly a concern of Staff. Not being able to remove a carrier's authority merely because an insurance company fails to timely respond to Staff inquiries is frustrating and time consuming, especially when Staff is aware that a carrier has gone out of business. Therefore, the proposed rule will be adopted.

19. Proposed Rule 6008(c) consolidates into a single rule, the revocation, suspension, alteration, and amendment rules found in current Rules 6204, 6306, 6505, and 6604. With the adoption of proposed Rule 6008(c), it is proposed that Rules 6204, 6306, 6505, and 6604 be deleted. The proposed rule combines regulated intrastate carriers, exempt passenger carriers, towing carriers, household goods movers, or property carriers under a single rule regarding when the Commission may revoke, suspend, alter, or amend those entities' authorities, permits, or registrations.

20. Additionally, proposed Rules 6008(d), (e), and (f) address when various carriers may re-apply for authority when their existing authority or registration is revoked. At the hearing, Staff proposed further amending Rule 6008 by combining Rules 6008(d) and (e) into an amended paragraph (d) entitled *Period of Ineligibility*.

21. Subsection (I) of new Rule 6008(d) provides that exempt passenger carriers, household goods movers, property carriers, and towing carriers, whose operating rights are revoked, shall be ineligible to be issued another operating right for at least one year from the date of revocation. According to new subsection (d)(II), if a carrier as listed above has its operating right revoked more than twice, shall be ineligible to be issued another operating right for at least two years from the date of revocation. Subsection (d)(III) is added and provides that in the case of an entity other than an individual, the periods of ineligibility will also apply to all principals (including members of a limited liability company), officers, and directors of the entity, whether or not those persons apply individually or as a principal, officer, or director of the same or a different entity for an operating right during the period of ineligibility. Subsection (e), which replaces proposed subsection (f), provides that revocations solely the result of a failure to maintain financial responsibility required by Rule 6007, unless the failure was knowing, are not applicable to subparagraphs (d)(I) and (II).

22. According to Staff's comments at hearing, proposed Rules 6008(d) and (e) alleviate the "revolving door" effect under the current and proposed Rules whereby a person whose operating right is revoked for the first time may immediately obtain a new operating right. Staff asserts that subsection (d)(III) is consistent with the statutory language of §§ 40-13-107 and 40-16-103.6(3), C.R.S. Additionally, the proposed amendments are consistent with the statutory

language of §§ 40-13-107 and 40-13-109, C.R.S., regarding towing carriers. The new, proposed language for Rules 6008(d) and (e) is provided in the attached rules to this Order.

23. In comments at hearing, Mr. George Connolly, representing the Towing and Recovery Professionals of Colorado, expressed concerns regarding proposed Rule 6008(d)(III) that provides that the period of ineligibility to apply for operating rights is applicable to "principals (including members of a limited liability company), officers, and directors of the entity …" Mr. Connolly stated that his concern centers around the inclusion of the terms "officers," and "directors." Mr. Connolly is of the opinion that the rule should be directed at principals of a corporation only, in order to avoid confusion.

24. The subsequent changes to proposed Rules 6008 (d), (e), and (f) proposed by Staff provide clarity to the rule. It also achieves the purpose of removing the "revolving door" aspect that allowed entities and individuals to immediately apply for an authority after revocation of a previous authority. No further changes are necessary to the language of Rule 6008(d)(III). The inclusion of the terms "officers" and "directors" ensures the rule is inclusive and unambiguous as to whom it applies. Therefore, the proposed amendments to Rules 6008(d), (e), and (f) which consolidate those rules into subsections (d) and (e) are adopted.

25. Proposed Rule 6009 Annual Motor Vehicle Identification Fees, includes several amendments. Rule 6009(a) is amended to include the language "[e]xcept as provided in paragraph (h) …" Rule 6009(b) amends and establishes, on a permanent basis, the existing emergency rule for annual identification fees. The proposed language of subsection (b) is as follows:

> Notice of the annual identification fee provided on the Commission's website, at least 60 days prior to the effective date of such fee, transportation carrier

registration and application forms, and annual identification fee renewal notices, shall constitute sufficient public notice of the applicable annual identification fee.

26. Proposed Rule 6009(g) is amended to provide language on the proper placement of the vehicle identification stamp.

27. Proposed Rule 6009(h) replaces original proposed Rule 6009(i). New proposed subsection (h) addresses the concerns raised by several parties at hearing regarding confusion surrounding the meaning and applicability of proposed subsection (i) relating to a UCR Registrant. In response to those concerns, Staff proposed to delete subsection (i) and add subsection (h), which reads as follows:

(h) Exception for a UCR registrant.

(I) Except as provided in subparagraph (II), a transportation carrier that is also a UCR registrant for the same calendar year is exempt from paragraph (a) of this rule.

(II) A transportation carrier that is also a UCR registrant is subject to the annual identification fee for any motor vehicle used only in intrastate commerce if:

(A) the motor vehicle was not included in the calculation of fees paid under the UCR Agreement, and

(B) the motor vehicle is used to provide:

(i) transportation of waste or recyclable materials;

(ii) transportation of household goods;

(iii) non-consensual tows; or

(iv) passenger transportation that is not subject to the preemption provisions of 49 U.S.C. section 14501(a).

28. The proposed language for new Rule 6009(h) alleviates the concerns of the ALJ and the parties offering comment on the rule. The new rule clearly identifies when UCR registrants are, and are not exempt from the requirement to pay an annual identification fee.

Therefore, proposed Rule 6009(h) is adopted as indicated in ¶ 27 above. As a result, existing Rule 6401(c) is deleted.

29. Several parties at hearing also expressed concerns regarding the amount of the fees and the methodology for their determination. The basis for the rule change emanates from HB08-1227, the Commission's Sunset Bill. Under the provisions of that Bill, the language of § 40-2-110.5(1), C.R.S., was amended, effective July 1, 2008. That statutory section now provides in relevant part that "every motor vehicle carrier exempt from regulation as a public utility shall pay an annual identification fee, set administratively by the commission, for each motor vehicle such carrier owns, controls, operates, or manages." *See*, § 40-2-110.5(1), C.R.S. That section goes on to state that "[f]ees shall be set based upon the appropriation made for the purposes specified in section 40-2-110(2)(a)(I), subject to the approval of the executive director of the department of regulatory agencies, such that the revenue generated from all motor vehicle carrier fees approximates the direct and indirect costs of the commission in the supervision and regulation of motor carriers." *Id*.

30. In turn, § 40-2-110(2)(a)(I), C.R.S., provides that:

> At each regular session, the general assembly shall determine the amounts to be expended by the public utilities commission for its administrative expenses in the supervision and regulation of motor carriers as provided by law and shall appropriate such amounts from the public utilities commission motor carrier fund established in section 40-2-110.5 as are necessary to be expended by the commission to accomplish said purposes.

While some parties expressed frustration at the amount of the fee and the method in which it is calculated, the language of the above cited statutes makes clear that the fee amount is a function of the general assembly, which the Commission must then pass along to the affected motor carriers. While the undersigned ALJ understands the concerns of the parties, it is also clear that the relief they seek lies within the legislature and not at the Commission. The Commission must

abide by the terms of the statute and set fees based upon the appropriation made for the purposes specified in § 40-2-110(2)(a)(I), C.R.S., subject to the approval of the executive director of the department of regulatory agencies. As such, the fee setting responsibility is now a component of the general assembly's appropriation from the motor carrier fund, rather than a Commission determination of what the fee amount should be.

31. The undersigned ALJ finds the proposed rule language comports with the statutory requirements of §§ 40-2-110(2)(a)(I) and 40-2-110.5(1), C.R.S. Therefore, deletion of subsection (i) and new, proposed Rules 6009(a), (b), (g) and (h) are adopted as proposed by Staff.

32. Proposed Rule 6011(a), *Designation of Agent*, amends the applicability for filing a designation of agent. The proposed language exempts sole proprietorships and partnerships from the requirement to file a designation of agent for service of process. No comments were offered regarding this rule change. Therefore, the language of proposed Rule 6011(a) will be adopted.

33. Proposed Rule 6015 *Fingerprint-Based Criminal History Background Checks* amends the existing emergency rule for fingerprint-based criminal history background checks. Amendments to the rule were also made due to new statutory provisions amended by HB08-1227 in §§ 40-10-105.5 and 40-16-104.5, C.R.S.

34. Initially, Rule 6015(a)(IV) exempts fire crew transport from the definition of "passenger carrier." Recent legislation struck fire crew transports from having to go through the fingerprint process. The proposed amendment will be adopted.

35. Rule 6015(f) Disqualification amends the existing rule that defines a felony or misdemeanor involving moral turpitude. Staff's experience with the rule revealed that the definition did not give the Commission any discretion. Rather, it merely provided stringent parameters that provided little direction to Staff. Amendments to Rule 6015(f) now define a

felony or misdemeanor that constitutes moral turpitude specifically for the purpose of Staff's initial qualification determination. Under this process Staff will make an initial qualification, depending on the information Staff receives regarding the crime from the fingerprint check information received from the Colorado Bureau of Investigation. The driver may then appeal Staff's decision within 60 days of the determination under the provisions of the Colorado Administrative Procedures Act. Unlike the current process, this method would provide the Commission with the opportunity to consider mitigating factors such as rehabilitation.

36. Proposed Rule 6015(f)(II) amends the disqualifying offenses pursuant to the changes in HB08-1227. Prior to the enactment of HB08-1227, disqualifying offenses included crimes of violence, driving under the influence, and driving while ability impaired. Under HB08-1227, the Commission now has some discretion to set the disqualifying offenses. Pursuant to §40-10-105.5(4)(a), C.R.S., disqualification occurs under the following circumstances:

> 4) An individual whose criminal history record is checked pursuant to this section shall be disqualified and prohibited from driving a taxicab for a holder of a certificate of public convenience and necessity that contains authority to operate as a taxicab if the criminal history record check reflects that:
>
> (a) The individual is not of good moral character, as determined by the commission based on the results of the criminal history record check required by this section;
>
> (b) (I) The individual has been convicted of a felony or misdemeanor involving moral turpitude.
>
> (II) As used in this paragraph (b), "moral turpitude" shall include any unlawful sexual offense against a child, as defined in section 18-3-411, C.R.S., or a comparable offense in any other state or in the United States.
>
> (c) Within the two years preceding the date the criminal history record check is (I) Convicted in this state of driving under the influence, as defined in section 42-4-1301 (1) (f), C.R.S.; driving with excessive alcoholic content, as described in section 42-4-1301 (2) (a), C.R.S.; driving while ability impaired, as defined in section 42-4-1301 (1) (g), C.R.S.; or driving while an habitual user of a controlled

substance, as described in section 42-4-1301 (1) (c), C.R.S.; or completed, the individual was:

(II) Convicted of a comparable offense in any other state or in the United States.

Similar language can be found at §§ 40-16-104.5(4)(a) through (c)(II), C.R.S.

37. Utilizing the requirements of § 40-10-105.5, C.R.S., and Commission discretion, Staff proposes that the following crimes that constitute "not of good moral character" or crimes involving "moral turpitude" be included in Staff's initial determination of disqualification: Rule 6015(f)(II)(A) a conviction at any time of a class 1 or 2 felony under Title 18, C.R.S.; (f)(II)(B) a conviction in the State of Colorado at any time of any unlawful sexual offense against a child as defined in § 18-3-411, C.RS.; (f)(II)(C) a conviction in the State of Colorado, within the ten years preceding the date the criminal history record check is completed, of a crime of violence, as defined in § 18-1.3-406(2), C.R.S.; and (f)(II)(D) a conviction in the State of Colorado within the eight years preceding the date the criminal history record check is completed, of any class 3 felony under Title 18, C.R.S. Staff notes that this excludes computer crimes; a conviction in the State of Colorado, within the four years preceding the date the criminal history record check is completed, of any class 4 felony under Articles 2, 3, 3.5, 4, 5, 6, 6.5, 8, 9, 12, or 15 of Title 18, C.R.S.

38. Proposed Rule 6015(f)(IV) provides that a deferred judgment and sentence pursuant to § 18-1.3-102, C.R.S., shall be deemed to be a conviction during the period of the deferred judgment and sentence.

39. Finally, proposed Rule 6015(m) provides that at any time, Staff shall disqualify a previously qualified driver whose subsequent conviction meets the criteria of subparagraph (f)(II). Additionally, the provisions of paragraph (j) are to apply as if the subsequent qualification determination was an initial qualification determination.

40. It is apparent that §§ 40-10-105.5 and 40-16-104.5, C.R.S., provide the Commission with certain discretion in determining when an individual is not of "good moral character." In addition, subsection (4.5) requires the Commission to "consider the information resulting from the criminal history record check in its determination as whether the individual has met the standards set forth in section 24-5-101(2), C.R.S."

41. Section 24-5-101(2), C.R.S., provides that when a state agency is required to find that an applicant for a license, certificate, permit, or registration is a person of good moral character as a condition to its issuance, the fact that the applicant has been convicted of a felony or other offense involving moral turpitude, as well as pertinent circumstances surrounding the conviction, are to be given consideration in determining whether the applicant is of good moral character at the time of the application. Most importantly, the legislative intent is unambiguously stated. "The intent of this section is to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society." *Id.*

42. Consequently, as long as an agency's rules are designed to carry forward that legislative intent, they should be considered reasonable and within the statutory requirements of the agency. Here, the undersigned ALJ finds that the amendments to the Fingerprint-Based Criminal History Background Check Rules are consistent with the statutory changes brought about by HB08-1227 and with the legislative intent expressed in § 24-5-101(2), C.R.S. Therefore, the language amending Rule 6015 as proposed by Staff will be adopted.

43. Proposed Rule 6016, *Advertising*, sets out the requirements for regulated intrastate carriers, exempt passenger carriers, towing carriers, and household goods movers regarding advertising. The rule generally provides that such carriers are not to advertise a transportation

service in a name other than the name under which the carrier's or mover's authority or operating right is held. However, subsection (a)(I) provides that a trade name may be used if the authority or operating right is held under that trade name, and the name of the parent company is not required in the advertisement. Under subsection (a)(II), if multiple authorities are held under multiple trade names, the carrier or mover is not required to advertise under all the trade names.

44. Colorado Cab expressed concern at the hearing regarding proposed subsection (c) that the proposed language seemed to prohibit roof lights with the exception of roof lights that identify a taxicab operated by a common carrier under authority to provide taxicab service. Colorado Cab's concern is that the proposed language seems to preclude illuminated advertising signs on top of taxicabs. In response, Staff indicated that it was not the intent to preclude a taxicab company from being able to make a legitimate income from advertising that occurs through illuminated roof signs.

45. As a result, Colorado Cab and Staff propose new language regarding Rule 6016(c)(III)(B) to preclude taxicabs from the advertising restriction as follows:

> B) a roof light to identify a taxicab operated by a common carrier under an authority to provide taxicab service, or any advertising on the roof of a taxicab operated by a common carrier under an authority to provide taxicab service.

The remaining proposed language of Rule 6016 remains as provided in the NOPR.

46. With the changes to subsection 6016(c)(III)(B) as indicated above, the proposed language of Rule 6016 *Advertising* will be adopted.

47. Proposed Rule 6017(l) amends the civil penalty assessment notice (CPAN) rule to include the surcharge required by § 24-34-108(2), C.R.S., as enacted by HB08-1216. No comments were received by any party. Therefore, the language of proposed Rule 6017(l) will be adopted.

B. Safety Rules

48. Proposed Rule 6102(a) updates the provisions of federal regulations at 49 *Code of Federal Regulations* (CFR) that are incorporated by reference into the Commission rules at 4 CCR 723-6. No comments were received regarding these changes. Therefore, the amendments that add the federal regulations at 49 C.F.R. that are incorporated by reference into the Commission rules will be adopted.

C. Common and Contract Carrier Rules

49. Proposed Rules 6203(a)(III), (IV), and (V), *Applications to Operate as a Common Carrier or Contract Carrier*; Rules 6303(a)(IV), (V) and (XIII), *Registration* (exempt passenger carriers); and Rules 6603(a)(IV) and (V), *Registration* (household goods movers and property carriers), are amended to provide some uniformity in the type of information requested in the applications and registrations. The Rules generally provide for the name and address of the applicant's Colorado agent for service of process, if required by Rule 6011, as well as including limited liability companies as an entity in the description of the applicant's business structure.

50. No comments were received regarding the proposed rule changes. Therefore, the amendments to the proposed rules above in ¶ 37 will be adopted.

51. Proposed Rules 6203(a)(X), (XII), (XIII) and (XIV); as well as Rules 6205(c)(I), (II), (XIII), and (XIV) make permanent, the existing emergency rules pertaining to certificates of public convenience and necessity (CPCN) to provide taxicab service. These rule changes propose to make permanent, the existing emergency rules pertaining to CPCN applications to provide taxicab service. The emergency rules were implemented to comport with statutory changes regarding taxicab service in the Counties of Adams, Arapahoe, Boulder, Broomfield, Douglas, El Paso, and Jefferson. For example, §§ 40-10-105(2)(b)(II)(A) and (B), C.R.S., spells

out the process for a taxicab CPCN application in the above mentioned counties and the burdens of proof in determining whether to grant the authority. Additionally, § 40-10-105(2)(c), C.R.S., provides that the Commission has the duty and authority to "adopt rules which are in the public interest to regulate matters of safety, insurance and service quality for taxicab service in the state."

52. No comments were received from any party regarding these proposed Rules. The language of proposed Rules 6203(a)(X), (XII), (XIII) and (XIV); as well as Rules 6205(c)(I), (II), (XIII), and (XIV), which make permanent, the existing emergency rules pertaining to CPCNs to provide taxicab service will be adopted.

53. Proposed Rule 6207(i)(III) relating to proposed tariff amendments which result in an increase in rates, fares, or charges, amends the rule in order that it applies to call-and-demand limousine, scheduled, special bus, or taxicab service, but not to sightseeing service.

54. No comments were received from any party regarding the proposed rule. The language of proposed Rule 6207(i)(III) will be adopted.

55. Proposed Rule 6210 amends the driver courtesy rule so that it applies not only to passengers, but to "other persons" as well. No comments were received from any party regarding the proposed rule. The language of proposed Rule 6210 will be adopted.

D. Rules Specifically Applicable to Taxicab Carriers

56. Proposed Rule 6252 amends the current rule to allow the placement of required notices either on the inside of the left window behind the driver's window, or on the back of the front seat. No comments were received from any party regarding the proposed rule. The language of proposed Rule 6252 will be adopted.

57. Proposed Rule 6256(f) amends the current rule to increase the flat rate for taxi service to and from DIA and the three zone areas (Zone A – Downtown Denver; Zone B – Denver Tech Center; Zone C – Boulder), based on the lowest meter rate on file with the Commission. The flat rates were initially set at $43 for Zone A, $45 for Zone B, and $70 for Zone C. The proposed rule change would increase the flat rates to $47, $54, and $81 respectively. Staff indicates that this rate has not been changed since it was set in approximately 1999.

58. Colorado Cab filed written comments on the proposed rule change and offered comments at hearing as well. While it concurs that the flat rate should be increased, it argues that the rates should instead be increased by approximately 20 percent to $51, $57 and $84 respectively. In determining these flat rates, Colorado Cab represents that utilizing MapQuest, it has determined that the mileages used to calculate the flat rates are incorrect. For example, it argues that the mileage between DIA and the specified point for Zone B is 27.7 and not 26.3 miles as specified in the current and proposed Rules. Therefore, the Zone B flat rate for 27.7 miles should have been $48, not $45. A 20 percent increase in the $48 rate would be approximately $57.

59. The proposed flat rates of $51, $57, and $84 are based on the lowest tariff meter rates currently on file for the three taxi companies which are now subject to the rule, which are Freedom Cab's tariff rates of $1.80 for the first 1/9 mile and $1.80 per mile thereafter, according to Colorado Cab. Staff supports the 20 percent increase proposed by Colorado Cab.

60. While Staff was not entirely in agreement with Colorado Cab's mileage calculations regarding the distance to DIA from Zone B, Staff nonetheless supports Colorado

Cab's proposal to increase the flat rates. Given the length of time since the flat rates were increased (nearly ten years), it is reasonable to approve the rates proposed by Colorado Cab.

61. As a result, Rule 6256(f) is amended to increase the flat rate for taxi service to and from DIA as follows: Zone A - $51; Zone B- $57; and, Zone C - $84 will be adopted.

E. Exempt Passenger Carrier Rules

62. Proposed Rules 6301(a) and (b) establish definitions for "charter basis" and "chartering party." These definitions are proposed only within the context of the Exempt Passenger Carrier Rules. Because the terms appear within the Rules, Staff felt it necessary to define them here.

63. No party offered comment regarding the proposed language. The proposed language to Rules 6301(a) and (b) will be adopted.

64. Proposed Rule 6303 amends the current rule regarding information required for registration for exempt passenger carriers. Subsection (a)(IV) amends the current rule to require only the name and address of the registrant's Colorado agent for service of process if required by Rule 6011. Subsection (a)(V) requires a statement describing the registrant's business structure. Subsection (a)(XIII) requires a statement that the registrant understands the filing of a registration does not constitute authority to operate.

65. The Limousine Association of Colorado, through Mr. Eugene Cookenboo offered comment on Rule 6303. The concern addressed dealt with the requirement to register the use of a trade name with the Commission. Mr. Cookenboo questioned how limousine carrier owners would register a trade name. Staff provided information to contact the Secretary of State in order to meet the rule requirements.

66. No other comments were provided concerning the amendments to Rule 6303. The proposed language to Rules 6303(a)(IV), (V), and (XIII) will be adopted.

67. Proposed Rule 6304(a) and the corresponding deletion of Rule 6304(c) clarify the limits on the use of exterior signs and graphics on luxury limousines. Rule 6304(c) is proposed to be deleted because some of the requirements there have been moved to Rule 6304(a). Additionally, the term "identified" in Rule 6304(c) should be deleted.

68. No party provided comment on the proposed rule change. The proposed language to Rule 6304(a) and the deletion of Rule 6304(c) will be adopted.

69. Proposed Rule 6305(a) *Luxury Limousine Features*, addresses features required in a luxury limousine. The proposed rule delineates the requirements regarding the appearance of a luxury limousine at all times. Most importantly, the requirement that a luxury limousine contain a television, telephone, and beverage service are eliminated from this rule.

70. No party offered comment regarding the amendments to Rule 6305. The proposed language to Rule 6305(a) will be adopted.

71. Proposed Rule 6308(a)(II) amends the current rule by including the Chevrolet Tahoe in the category of an executive car. No party offered comment regarding the addition to Rule 6308(a)(II). The proposed language will be adopted.

72. The Limousine Association of Colorado expressed concern regarding Rule 6308(a)(III)(B)(ii). Its concern centers around the requirement that an ice container be "securely positioned inside a console or cabinet located inside the passenger compartment …" Rather, it was proposed that limousine operators be permitted to utilize an ice chest or cooler container that could be easily removed, cleaned, and sanitized at the end of each ride.

73. The concern raised about ice containers is well taken. However, it does not appear to the undersigned ALJ that an amendment to Rule 6308(a)(III)(B)(ii) is necessary. The intent of the rule is twofold. First, that an approved vehicle contains the amenities required of a luxury limousine under the Rules. Second, that beverage and beverage service amenities are secured to ensure the safety of passengers in the event of an accident or sudden stop.

74. The rule requires that beverages and amenities, including an ice container to be securely positioned inside a cabinet or console, which is securely attached to the vehicle in a professional manner. Giving the rule language its logical and plain meaning, it appears to the ALJ that the concerns of the limousine industry are met. While the cabinet or console in which an ice container is placed must be secured to the motor vehicle, the container itself need not be similarly secured. In other words, the ice container may be removable from the fixed cabinet or console to change ice and clean the container as indicated by Mr. Cookenboo. Consequently, given this interpretation, Rule 6308(a)(III)(B)(ii) will not be amended.

75. Proposed Rule 6309 amends the current rule to specify the date at which the rule became effective and to clarify the applicability of the qualification status. No party offered comment on the proposed amendment. The proposed language will be adopted.

76. Proposed Rule 6310(b) provides language that clarifies the type of service to be classified as luxury limousine service. Proposed Rule 6310(c) is amended to provide a period of time for stationing a luxury limousine. The proposed language provides for a "reasonable amount of time" for a luxury limousine to be stationed for a pickup as noted on the charter order.

77. No party offered comment on the proposed changes to Rules 6310(b) and (c). The proposed language will be adopted.

78. Several limousine carriers provided written comments regarding the proposed rule changes and offered comments during the hearing. Those comments regarded whether a rule should be adopted requiring every new luxury limousine company to have at least one stretch limousine in its fleet that has been modified by no less than 60 inches by a licensed manufacturer, as a condition of receiving a permit to operate. Those who favored such a rule also proposed that any luxury limousine permit holder as of the date the Rules go into effect would be exempt from such requirements.

79. After consideration of arguments on both sides of the proposed rule changes, the undersigned ALJ finds that the proposed language would not serve the purpose anticipated by the proponents of the rule change. While it is important to maintain the reputation and high standards of the luxury limousine industry, it is doubtful the proposed rule change would accomplish that purpose. Rather, it appears that the proposed language would merely create an artificial barrier to entry into the luxury limousine industry. The ALJ was persuaded by testimony from current permit holders that the use of stretch limousines is waning and those carriers that maintain stretch limousines in their fleets use them sparingly. The ALJ, however, also acknowledges the frustration of current luxury limousine permit holders regarding what they perceive as less than reputable. Those current owners may rest assured that Staff will endeavor to enforce current laws and regulations within the limited resources and means at its disposal. Therefore, the undersigned ALJ declines to adopt an amendment to the luxury limousine rules as recommended.

80. Additionally, Mr. Stickell recommended that the application fee for a luxury limousine registration should be increased to maintain the integrity of the industry. Staff opposes such a fee increase because no registration fee is provided for exempt motor vehicle carriers

under statute, nor do the statutes provide a mechanism for the Commission to establish such a fee. The ALJ finds that it is not necessary (and indeed is most likely not possible) at this time to increase the application fee for a luxury limousine permit. Therefore, no language will be added to Commission rules regarding that issue.

F. Towing Carrier Rules

81. Proposed Rule 6501(b) is amended to clarify that a towing carrier may be an authorized agent of the owner or lessee of a motor vehicle for the disposition of the motor vehicle. No party offered comment regarding the proposed changes. The proposed language will be adopted.

82. Rule 6501(k)(II) regarding the definition of "property owner," provides a cross-reference to Rule 6508(a), which in turn, provides an exception to the terms of the definition contained in Rule 6501(k)(II). The proposed language in Rules 6501(k)(II) and 6508(a) will be adopted.

83. Regarding Rule 6507, *Storage Facilities* Mr. Mabis commented that the only disclosure notification requirement under this rule of the facility location for non-consensual tows of other than an abandoned motor vehicle, should be to the appropriate law enforcement agency as indicated in subsection (a)(III), and not to the vehicle owner or property owner. Mr. Mabis reasons that many law enforcement agencies require notification by local ordinance. Staff is aware of this issue and that it is applicable to most local jurisdictions. Consequently, Staff recommends the following language to Rule 6507(a):

> (a) Disclosure of facility location. For non-consensual tows of other than an abandoned motor vehicle as provided for under paragraph (b) of this rule, within one hour of placing a motor vehicle in a storage facility, or such lesser time as may be required by law, a towing carrier shall disclose the location of the storage facility by notifying the responsible law enforcement agency having jurisdiction

> over the place from which the motor vehicle was towed. However, if notification of the law enforcement agency is not possible, then by notifying either:
>
> (I) the owner, the authorized operator, or the authorized agent of the owner of the towed motor vehicle; or
> (II) the owner of the property from which the motor vehicle was towed
>
> Compliance with this paragraph will be considered accomplished if the location of the storage facility was provided to the property owner or the law enforcement agency in conjunction with obtaining authorization for the tow.

Subsection (a)(III) is deleted. Subsections (b), (c), and (d) remain unchanged.

84. The proposed amendments to Rule 6507(a) better conform to the requirements of local jurisdictions regarding non-consensual tows. Therefore, the proposed language, as delineated above will be adopted.

85. Proposed Rule 6508(b)(II)(A) clarifies the time frame for obtaining authorization to remove a vehicle from private property. The proposed language provides that the property owner authorization is to be filled out in full, signed by the property owner, and given to the towing carrier **before** the motor vehicle is removed from the property.

86. Additionally, Mr. Connolly, representing the Towing and Recovery Professionals of Colorado recommended that the property owner authorization be further amended to permit the use of some sort of employee ID number or code name in lieu of the person's signature, in order to help ensure the property owner's safety. According to Mr. Connolly, in the past, some property owners' employees who had signed the authorizations had their own vehicles vandalized by irate vehicle owners whose vehicles had been towed. Rule 6508(b)(II)(C) requires the towing carrier to make the tow authorization available for inspection by the motor vehicle owner.

87. Staff supports such an amendment to Rule 6508(b)(II)(A) and is convinced it would work effectively with Staff proposed Rule 6509(a)(XIII), discussed below. Staff recommends the following sentence be added to the end of Rule 6508(b)(II)(A):

> The authorization shall be filled out in full, signed by the property owner, and given to the towing carrier, before the motor vehicle is removed from the property. The property owner may sign using a verifiable employee identification number or code name in lieu of the person's proper name.

The recommendation by Mr. Connolly and Staff's amendment to Rule 6508(b)(II)(A) are prudent and help to protect property owners from retaliation from angry motor vehicle owners whose vehicles are towed. Therefore, the proposed amendments to the rule as indicated above will be adopted.

88. Proposed Rule 6508(c) clarifies that a motor vehicle that is held in storage and was towed without proper authorization is to be released without charge. No party offered comment on this amendment. The proposed language amending Rule 6508(c) will be adopted.

89. Proposed Rule 6509(a)(VII) amends the current rule so that the information required on the tow record/invoice form need not be duplicated if the same information is also provided in the authorization pursuant to Rule 6508(b)(II). No party offered comment regarding this amendment. The proposed language amending Rule 6508(c) will be adopted.

90. Proposed Rule 6509(a)(XIII) requires notice to be included on the tow record/invoice that provides as follows: "Report problems to the Public Utilities Commission at (303) 894-2070." Mr. Connolly commented that towing carriers were concerned about the cost of printing new invoices to include the notice. He suggests an 18-month grace period to allow the current supply of tow tickets to be exhausted. In follow up comments subsequent to the hearing, Mr. Mabis suggests that to reduce the financial impact on towing carriers, the rule

should allow for the notice to be stamped on the customer's copy of the invoice. The concerns of Mr. Connolly and Mr. Mabis are well taken. Therefore, the required notice may be applied to current invoices, as well as used as an alternative to pre-printed invoices, with stamp, as long as the lettering of the stamp with the notice language comports with the 10 point font requirement. Therefore, since towing carriers may apply the notice containing the PUC phone number to its existing invoices utilizing a stamp, the undersigned ALJ finds no need for a 6 or 18-month grace period. Consequently, Rule 6509(a)(XIII) will read as follows:

> i. within 30 days of the effective date of these rules and on at least the customer's copy, the following notice in a font size of at least 10: Report problems to the Public Utilities Commission at (303) 894-2070.

91. The undersigned ALJ agrees that it would not be cost effective to require towing carriers to immediately order new invoice forms to include the required notice when a viable alternative is available. Mr. Mabis' suggestion to allow the use of a stamp is certainly cost-effective and addresses a concern of the industry. The language above provides a reasonable alternative and takes into consideration the towing carriers' concerns. Therefore, within 30 days of the effective date of this Order, towing carriers must include the above notice on the customer copies of the invoice. A towing carrier may use a stamp to provide the required notice on the customer's copy of the invoice. Consequently, the proposed addition of subsection (XIII) to Rule 6509(a) as indicated above will be adopted.

92. Proposed Rules 6511(b)(I), (d), (e), (g), and (h) are amended to increase the rates and charges for towing carriers based on the Consumer Price Index (CPI). Mr. Connolly commented that the rate increases amounted to approximately a 9 to 11 percent increase, while towing operators' costs in the last four years have increased a minimum of 25 to 30 percent.

Mr. Connolly further noted that no increase was recommended for mileage charges under Rules 6511(f)(I) or (II).

93. Staff commented that it did not propose amending the mileage rate because the fuel surcharge in subparagraph (II) had driven the price up well above any increase resulting from the CPI. However, with the volatility of diesel fuel costs in a slumping economy, the surcharge was reduced to zero. Consequently, Staff recommended adjusting the mileage rate by the same CPI factor as was utilized in recommending increases of the other towing rates and charges as identified above.

94. The CPI factor (.912) would increase the mileage rate from $3.45 per mile to $3.78 per mile. Staff recommends this amount as indicated in new Rule 6511(f)(I) be rounded up to $3.80 per mile.

95. The fuel surcharge in subsection (f)(II) of Rule 6511 is based on the price per gallon for diesel fuel of $2.60, which was the price on April 1, 2006. The price on December 1, 2008 was $2.58. Staff recommends adjusting the monthly surcharge and setting the base price in Rule 6511(f)(II) at $2.60 per gallon.

96. Staff's recommendation to increase the maximum mileage charge that may be assessed for a non-consensual tow of a motor vehicle with a GVWR of less than 10,000 to $3.80 per laden mile will be adopted. Staff's recommendation to set the fuel surcharge to $2.60 will also be adopted. Staff's recommendation to amend Rules 6511(b)(I), (d), (e), (g), and (h) to increase the rates and charges for towing carriers based on the CPI will also be adopted. While Mr. Connolly commented that cost increases are in the area of 25 to 30 percent, there is no substantive evidence of those numbers on record in this rulemaking. Staff, in response to Mr. Connolly's concerns regarding no increase to mileage charges or fuel surcharges,

recommended an increase in those charges as well. The undersigned ALJ finds those recommendations by Staff to be reasonable and utilizing the CPI to be a fair indicator for setting those rates and charges.

97. Proposed Rule 6511(k) establishes a requirement that a towing carrier accept at least two forms of payment for the rates and charges related to non-consensual tows. An amendment is also made to Rule 6512(a) so that it conforms to the proposed language in Rule 6511(k).

98. Mr. Mabis and Mr. Connolly both objected to proposed Rule 6511(k) that requires towing carriers to accept a form of payment in addition to cash for payment of towing charges and drop charges. Mr. Connolly pointed out that cashier's checks are no longer issued by banks, and towing carriers are concerned that money orders and traveler's checks may be easily counterfeited with desktop publishing software. At the hearing, Staff proposed that Rule 6511(k) be struck in favor of proposed Rule 6512(a). Proposed Rule 6512(a) provides that the towing carrier may specify which credit card(s) it will accept. Staff represents that the proposed rule also accounts for the fact that many people carry a credit card rather than cash. In addition, while Mr. Connolly raised the issue that a credit card transaction may be cancelled, Staff points out that the towing carrier can refute the cancellation by providing evidence to the credit card company that a service was in fact provided.

99. Mr. Mabis also argued that in Decision No. C02-0948, the Commission already determined that a towing carrier may only require a cash payment, rather than accepting a check or credit card. In that decision, the Commission reasoned, "… because nonconsensual tows almost necessarily involve hard feelings, it is reasonable for a towing carrier to demand payment in cash for fear of having a check or credit card payment be rescinded. The ALJ therefore

recommended dismissal of Count 2 of CPAN No. 27558. We agree." Mr. Mabis argues that because a Commission decision already exists regarding the form of payment a towing carrier may require, the Commission may not now create a rule that provides otherwise.

100. The undersigned ALJ would note that while the Commission decision did address the issue of the form of payment for nonconsensual tows, it was in the context of the CPAN proceeding and not in a general rulemaking. In addition, the decision there does not serve as binding precedent on all future Commission actions. Certainly, changes in circumstances, technology, and indeed the towing industry as a whole dictates that it is prudent and necessary for the Commission to promulgate rules that comport with the state of affairs at the time.

101. Staff proposed the following language to replace current Rule 6511(k):

> (k) A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including the credit card transaction fee that the towing carrier must pay the credit card company for the transaction.

This language amending the rule will be adopted.

102. Rule 6512(a) is then proposed to be amended to read as follows:

> (a) Except as provided in paragraph (c) of this rule, if payment of the drop charge is offered in either cash or a valid credit card (specified by the towing carrier), or if payment of the towing, storage, and release charges is offered in cash or another form of payment accepted by the towing carrier, the towing carrier shall immediately accept payment and release the motor vehicle to:

The proposed language amending Rule 6512(a), in concert with the language of proposed Rule 6511(k) as indicated above, appears to allay the concerns of Mr. Connolly and Mr. Mabis. Therefore, the language amending this rule will be adopted.

103. Proposed Rule 6512(c)(I) merely clarifies that "at the time the motor vehicle is to be released from storage," if the towing carrier is reasonably certain the driver of the motor vehicle is not capable of safely driving due to the influence of drugs or alcohol, the towing carrier need not release the motor vehicle from storage. The numbering hierarchy has been amended as well. Amended Rule 6512(c)(I) replaces existing Rule 6512(b)(II). Subsections (II)(A) through (D) are now numbered as subsections (c)(I) through (IV). No party offered comment regarding the proposed amendments. The language amending this rule will be adopted.

104. Proposed Rule 6512(c)(IV) provides that a towing carrier may refuse to release a motor vehicle if it does not comply with the release procedures agreed to between the towing carrier and the applicable law enforcement agency. No party offered comment regarding the amendment to the rule. The proposed language for Rule 6512(c)(IV) will be adopted.

105. New Rule 6512(e) establishes that a towing carrier may require either written or oral notification from the owner or lienholder of a motor vehicle that the person to whom it is to be released is authorized to take possession of the motor vehicle. No party offered comment regarding that amendment. The proposed language for Rules 6512(e) will be adopted. The language of Rule 6512 with amendments will now read as follows:

(a) Except as provided in paragraph (c) of this rule, if payment of the drop charge is offered in either cash or a valid credit card (specified by the towing carrier), or if payment of the towing, storage, and release charges is offered in cash or another form of payment accepted by the towing carrier, the towing carrier shall immediately accept payment and release the motor vehicle to:

(I) the motor vehicle owner, authorized operator, or authorized agent of the owner of the motor vehicle;

(II) the lienholder or agent of the lienholder of the motor vehicle; or

(III) the insurance company or agent of the insurance company providing coverage on the motor vehicle, if released to the insurance company by the owner.

(b) A towing carrier that accepts for storage a motor vehicle that has been towed as a non-consensual tow upon the authorization of the property owner shall be available within the first 24 hours of storage to provide access to or release of the motor vehicle as provided in paragraph (a) to the owner, authorized operator, or authorized agent of the owner of the motor vehicle either:

(I) With one hour's notice during all times other than normal business hours; or

(II) Upon demand during normal business hours.

(c) The towing carrier, at its discretion, need not comply with paragraph (a) if:

(I) the towing carrier is reasonably certain that, at the time the motor vehicle is to be released from storage or upon payment of the drop charge, the driver of the motor vehicle is not capable of safely driving the motor vehicle due to the influence of drugs or alcohol;

(II) the towing carrier that is to remove the motor vehicle from storage does not have a valid towing carrier permit or proof of motor vehicle liability coverage;

(III) a hold order is in place on the motor vehicle by a court, district attorney, law enforcement agency, or law enforcement officer;

(IV) the release of the motor vehicle does not comply with the release procedures agreed to between the towing carrier and the applicable law enforcement agency;

(V) the towing carrier, upon notification for the release of or access to a motor vehicle at other than normal business hours, has immediately contacted an appropriate law enforcement agency and, in the interest of public order, has requested a law enforcement officer's presence during the release of the motor vehicle. This exception is applicable when the towing carrier has reason to believe that the motor vehicle's owner, authorized operator, or authorized agent of the owner of the motor vehicle may disrupt the public order.

(d) Upon payment of the charges the towing carrier shall make the property owner's written authorization available for inspection by the owner of the towed motor vehicle or his or her authorized representative.

(e) The towing carrier may require either written or oral notification from the owner or lienholder of a motor vehicle that the person to whom it is to be released is authorized to take possession of the motor vehicle.

106. During the hearing, Mr. Mabis offered comments that brought to light that sections of Rule 6513 with regard to the inspection of records are duplicative of Rule 6005 and

should be deleted. This would put the production of records for towing carriers on par with all other carriers. Staff therefore recommends the following proposed amendments to Rule 6513 that deletes in subsection (a) the requirement to make available for inspection, a towing carrier's books and records concerning its towing and storage operations; and from subsection (b) the requirement to make available for inspection, any records required to be carried in the towing vehicle. These items are now addressed in Rule 6005. The proposed deletions to Rule 6513 will be adopted.

107. Staff proposes an amendment to Rule 6514(b) to correct an earlier oversight. The overcharge to which the penalty applies in this rule occurs in subsection (b)(1), and not in subsection (b) of Rule 6511. The proposed amendment to Rule 6514(b) will be adopted.

108. Mr. Mabis argues that federal statute 49 U.S.C. § 14501(c) preempts a great deal of the Commission's authority to promulgate towing carrier rules. Consequently, Mr. Mabis takes the position that many of the Commission's rules relating to towing carriers are preempted and not enforceable. To support his claim, Mr. Mabis cites to a report entitled *Report to Congress on the "Review of Federal and State Laws Regarding Vehicle Towing"* (*Vehicle Towing Report*).[1]

109. While Mr. Mabis makes a rather sweeping challenge to the Commission's towing carrier rules, relying on 49 U.S.C. § 14501 and the Vehicle Towing Report, those citations do not fully support his arguments that many of the towing carrier rules are preempted by federal law.

110. Section 49 U.S.C. § 14501 *Federal authority over intrastate transportation*, preempts States or their political subdivisions from enacting or enforcing laws and regulations

[1] *Report to Congress on the "Review of Federal and State Laws Regarding Vehicle Towing,"* prepared by John A. Volpe, National Transportation Systems Center, Motor Carrier Safety Assessment Division, DTS-47; prepared for Federal Motor Carrier Safety Administration, Vehicle and roadside Operations Division, May 2007.

relating to prices, routes, or services of motor carriers, including towing carriers. Notwithstanding those federal preemptions, 49 U.S.C. § 14501(c) provides several statutory exceptions to the law. For example, States may enact safety regulations with respect to motor carriers, as well as provisions relating to the price of nonconsensual transportation by a towing carrier, and may require that a towing operator have prior written authorization from a property owner and/or that the property owner be present at the time of a nonconsensual tow.

111. It is the extent to which State's may enact laws under those exceptions that is at issue. While federal courts have addressed the issue of federal preemption under 49 U.S.C. § 14501, the decisions are notable for the fact that to what extent States may enact laws and regulations under the exceptions contained in § 14501(c) remains unsettled.

112. In *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), while the U.S. Supreme Court determined that both State and local governments have the ability to exercise, free from federal preemption, the "safety regulatory authority" provided in current law. Unfortunately, the Court failed to enumerate what specific types of regulation would fall under the rubric of safety regulatory authority. Therefore, it was left to the Circuit Courts to individually determine those parameters. As a result, the limits of State regulatory authority, especially over towing carriers, remain unsettled.

113. Some courts have determined that § 14501 is more preemptive of States' authorities over regulating towing carriers, *e.g., R. Mayer of Atlanta v. City of Atlanta*, 158 F.3d 538 (11th Cir.1998), where the court held that ordinances that governed the provision of towing services in the City of Atlanta that made it unlawful to use or operate a wrecker, without a license and without registering the towing vehicles were preempted under 49 U.S.C. §§ 13102(12) and 14501. The court held that the plain language of those two statutes expressly preempted State

and municipal ordinances that regulate the prices, routes, or services provided by the towing companies. The court noted that if Congress had not intended for § 14501(c)(1) to preempt State and local regulation of towing services generally, then it would not have included an express exemption that applies solely to the prices charged for nonconsensual towing services. *See also, Tocher v. city of Santa Ana,* 219 F.3d 1040 (9th Cir.2000).

114. However, an equal number of courts have held that § 14501 is less preemptive of States' authorities over regulating towing carriers. For example, in *Independent Towers of Washington v. Washington,* 350 F.3d 925 (9th Cir.2003), the court held that if a statute was not related to the price a towing company may charge or the route it may take, and only had an "indirect, remote, or tenuous effect" on the services a towing company may provide, then such a State statute was not preempted under § 14501. The court further reasoned that even if a statute had the effect of regulating a tow truck operator's services, if it was enacted under a State's safety authority, as part of its police powers, the regulation met the exception requirement to preemption.

115. The scope of the safety exception found at § 14501(c)(2)(A) is one of the most contentious issues with which the federal courts struggle. However, it appears that most Circuits are reluctant to tread on a State's police powers. In *Ace Auto body & Towing v. City of New York,* 171 F.3d 765 (2nd Cir.1999) the Second Circuit construed that safety exception broadly enough to encompass regulations that required tow truck operators to be licensed and establishing qualifications for licensing. In addition, the regulations required a rotational towing program and a program granting exclusive towing privileges in certain areas of the city to eliminate the practice of towing carriers racing to be the first on the scene of accidents. In upholding those regulations, the court determined that the safety exception of § 14501(c)(2)(A) was not merely

limited to safety regulation of the mechanical components of motor vehicles. The court went on to find that requirements regarding licensing, display of information, reporting, recordkeeping, criminal history checks, insurance, and the posting of a bond by towing companies, as well as requiring tow operators to maintain their own storage and repair facilities, were well within the safety regulation and financial responsibility exemptions to preemption.

116. Further, in *Galactic Towing v. the City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003), the Eleventh Circuit found that a comprehensive regulatory scheme that required towing businesses that also stored vehicles parked on private property to obtain a permit, which required an application fee, proof of insurance, and a background investigation within the safety exemption of § 14501. The court held that Congress's intent behind § 14501 was to preempt States' economic authority over motor carriers of property, not to restrict traditional State police power over safety. *Id*. *See also*, *City of Columbus v. Ours Garage and Wrecker Service*, *supra*.

117. It is a long-held canon of preemption that the historic police powers held by the individual States are generally not to be superseded, unless such was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted); *see also, Vehicle Towing Report*, at p. 36. Even when it is clear that Congress intended to preempt State regulations, the scope of preemption is determined by the statute and must be tempered by the presumption against preemption of a State's police powers. *Medtronic, Inc.* at 485; *City of Columbus*, 536 U.S. 424, 432; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *see also, Vehicle Towing Report*.

118. An analysis of the Rules proposed to be promulgated here, as well as the remaining transportation rules pertaining to towing carriers reveals that no rule appears to be outside the scope of the Commission's authority. Further, there is nothing to indicate that the

authority to promulgate those Rules is preempted by 49 U.S.C. § 14501. Therefore, the undersigned ALJ finds that the proposed and existing towing carrier rules are within the Commission's jurisdiction and not subject to federal preemption.

G. Household Goods Mover and Property Carrier Rules

119. Proposed Rule 6603(d)(II) amends and establishes, on a permanent basis, the existing emergency rule regarding fingerprint-based criminal history record checks. No party commented on the proposed rule. Proposed Rule 6603(d)(II) will be adopted.

120. Proposed Rules 6608(a), (b)(X), (d), and (f) amend the various requirements for estimates and contracts. Existing Rule 6608(a) is proposed to be amended by requiring household goods movers to provide an estimate of the **total costs**, and **the basis for such costs** to be incurred by the shipper.

121. Proposed Rule 6608(b)(X) includes additional language as follows: An itemized breakdown and description of: (i) all costs and/or rates <u>including, if applicable, an explanation of the hourly amounts charged and/or amounts charged based on the weight of the load</u>, (ii) services for transportation, and (iii) accessorial services to be provided during a move or during the storage of household good; and …

122. Proposed Rules 6608(b) and (d) clarify that a copy of the documents must be left with the shipper.

123. Proposed Rule 6608(f) establishes a requirement that the mover must provide the shipper with a completed, final bill, including any amendments, upon completion of the move. The proposed language is as follows: <u>(f) Upon completion of the move, the mover shall leave with the shipper, a copy of the completed contract, including any amendments with a breakdown of all charges.</u>

124. The amendments to Rule 6608 as delineated above improve the communications between the household goods mover and the shipper regarding the exchange of information necessary to understand the estimate and contract. No party provided comment to the proposed amendments. The language amending Rules 6608(a), (b)(X), (d), and (f) will be adopted.

125. Proposed Rule 6609(a) establishes a rule requiring a consumer advisement pursuant to § 40-14-108(4), C.R.S. Proposed Rule 6609(b) establishes a rule requiring a mover to offer binding arbitration pursuant to § 40-14-114, C.R.S. The language of the proposed Rules and advisement is as follows:

6609. Consumer Advisement and Binding Arbitration

(a) A mover shall provide the shipper with a consumer advisement at or before the commencement of the move or any accessorial services rendered. The consumer advisement shall be in substantially the following form and language:

CONSUMER ADVISEMENT

Intrastate movers in Colorado are regulated by the Colorado Public Utilities Commission (PUC). Each mover should have a PUC registration number. You are encouraged to contact the PUC to confirm that the mover you are using is indeed registered in Colorado.

A mover that is not registered may not withhold any of your property to enforce payment of money due under the contract ('carrier's lien').

A mover must include its PUC registration number, true name, and physical (street) address in all advertisements.

You should be aware that the total price of any household move can change, based on a number of factors that may include, but are not limited to:

Additional services you request at the time of the move;

Additional items to be moved that were not included in the mover's original estimate;

Changes to the location or accessibility of building entrances, at either end of the move, that were not included in the mover's original estimate; and

Changes to the previously agreed date of pickup or delivery.

> You should also be aware that, in case of a dispute between you and the mover, Colorado has an arbitration process available to resolve the dispute without going to court.
>
> If you have any questions, you are encouraged to call the PUC for guidance on your rights and obligations.
>
> I acknowledge that I have been given a copy of this consumer advisement to keep for my records.
>
> Signed _____ (shipper). Date _____

> (b). In the event of a dispute between the shipper and the mover regarding the amount charged for services or concerning lost or damaged goods, the mover shall offer the shipper the opportunity to participate in binding arbitration per the requirements of §40-14-114, C.R.S.

In addition, Staff proposes the following language to appear in the Consumer Advisement: If you have any questions, you are encouraged to call the PUC at (303) 894-2070 for guidance on your rights and obligations. This information is to be provided to a shipper with the cost estimate.

126. The consumer advisement is required pursuant to § 40-14-108(4), C.R.S. The above language comports with that statutory requirement. The proposed language for Rules 6609(a) and (b) will be adopted.

127. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Commission Rules pursuant to 4 *Code of Colorado Regulations* 723-6-6000, *et seq.*, contained in Attachment A to this Order are adopted consistent with the discussion above.

2. 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.

3. 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.

4. 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)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

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Decision No. C09-0463

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-478TR

IN THE MATTER OF THE PROPOSED RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CODE OF COLORADO REGULATIONS 723-6.

ORDER ADDRESSING EXCEPTIONS

Mailed Date: May 1, 2009
Adopted Date: April 29, 2009

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I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R09-0149 (Recommended Decision) filed by Mr. George Connolly and Mr. Harvey Mabis. No party to this rulemaking docket filed a response to these exceptions. Both sets of exceptions pertain to certain rules that apply to towing carriers. Now, being fully advised in the matter and consistent with the discussion below, we grant the exceptions filed by Mr. Connolly and deny the exceptions filed by Mr. Mabis in their entirety.

B. Procedural background

2. The Commission issued a Notice of Proposed Rulemaking (NOPR) on October 30, 2008. *See* Decision No. C08-1130. The basis and purpose of the proposed rules was to implement House Bills 08-1216 and 08-1227; to make modifications to advertising rules; to consolidate the rules on revocation, suspension, alteration, or amendment of certain authorities, permits, and registrations; to clarify the applicability of the Unified Carrier Registration Agreement (UCR); to increase the flat rate for taxi service to and from Denver International Airport (DIA); to clarify the rules regarding luxury limousine exterior signs and graphics, and operational requirements; to increase towing and storage rates and charges for non-consensual tows; and to add a consumer advisement and binding arbitration rule for household goods movers. *Id.*, at ¶3.

3. The hearing was held on December 3, 2008 in front of Administrative Law Judge (ALJ) Paul C. Gomez. Mr. Mabis and Mr. Connolly are two of the parties that commented at the hearing. The ALJ issued the Recommended Decision on February 19, 2009.

C. Exceptions filed by Mr. Connolly

4. Mr. Connolly is the president of Bob's Towing and Recovery, Inc., and he also represents Towing and Recovery Professionals of Colorado. In his exceptions, he recommended that the Commission modify proposed Rule 6511(k). Proposed Rule 6511(k), as recommended by the ALJ, states that:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction.

5. Mr. Connolly argues that a merchant accepting credit cards does not receive the credit card statement until the month following the transaction. There are many different fees associated with accepting credit cards and it is not known what fees might be assessed by each credit card company until after a charge is processed. Mr. Connolly therefore argues that the Commission find a common percentage that would be a proxy to all possible fees and charges, such as 5 percent. He believes that a fixed percentage would alleviate the potential for abuse.

6. We agree and grant the exceptions on this issue. We find that the 5 percent credit card transaction fee is reasonable considering that the fees generally run between 3 and 5 percent and that towing carriers may incur additional expenses when processing credit card transactions. We therefore amend Rule 6511(k) as follows:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction. If the credit card transaction fee will not be known until after the charges are processed, the towing carrier may charge the customer a credit card transaction fee in the amount of up to 5 percent of the drop charge, or the towing and storage fees.

D. Exceptions filed by Mr. Mabis

1. Request to disqualify ALJ Gomez

7. In his exceptions, Mr. Mabis moves to disqualify ALJ Gomez pursuant to § 40-6-124, C.R.S., Canon 3 of the Colorado Code of Judicial Conduct, and Rule 1108(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Mr. Mabis claims that ALJ Gomez disregarded his input. Mr. Mabis further claims that ALJ Gomez is biased because of his prior employment as Commission Counsel. Then Commission Counsel Gomez advised the Commission with respect to a prior rulemaking affecting towing carriers (Docket No. 06R-504TR). Mr. Mabis therefore argues that the Commission should rescind the Recommended Decision on these grounds.

a. Applicable legal standards

8. Section 40-6-124(1), C.R.S., states that:

> Commissioners and presiding administrative law judges shall disqualify themselves in any proceeding in which their impartiality may reasonably be questioned, including, but not limited to, instances in which they:
>
> (a) Have a personal bias or prejudice concerning a party;
>
> (b) Have served as an attorney or other representative of any party concerning the matter at issue, or were previously associated with an attorney who served, during such association, as an attorney or other representative of any party concerning the matter at issue;
>
> (c) Know that they or any member of their family, individually or as a fiduciary, has a financial interest in the subject matter at issue, is a party to the proceeding, or otherwise has any interest that could be substantially affected by the outcome of the proceeding; or
>
> (d) Have engaged in conduct which conflicts with their duty to avoid the appearance of impropriety or of conflict of interest.

9. Canon 3(C)(1) of the Colorado Code of Judicial Conduct states that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned." Canon 8 further states that "[a]nyone … including, for example, a referee or commissioner, is a judge for the purposes of this code." In addition, Colorado courts have implicitly and explicitly considered Canon 3 with Rule 97 of the Colorado Rules of Civil Procedure (CRCP). *See e.g., Zoline v. Telluride Lodge Ass'n.,* 732 P.2d 635, 639 (Colo. 1987), *Tripp v. Borchard*, 29 P.3d 345, 346 (Colo. App. 2001). C.R.C.P. 97 states that "[a] judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein."

10. We find that Canon 3 and C.R.C.P. 97 do apply to the Commission ALJs because the plain language in Canon 8 and court precedent. Further, the Colorado Court of Appeals has held that the officials presiding in a quasi-judicial administrative proceeding should be treated as judges. *Venard v. Dep't of Corr.,* 72 P.3d 446, 449 (Colo. App. 2003).[1]

11. Further, it is well settled that judges are presumed to have known and applied the law and are not presumed to have violated the Code of Judicial Conduct. *See People ex rel. S.G.*, 91 P.3d 443, 450 (Colo. Ct. App. 2004). The courts have also found that a judge has the duty to sit on the case in the absence of a valid reason for disqualification. *See Moody v. Corsentino*, 843 P.2d 1355, 1374 (Colo. 1993), citing *Smith v. District Court*, 629 P.2d 1055, 1056 (Colo. 1981). The Colorado Supreme Court has stated that "[t]he purpose of statutes and court rules which provide for the disqualification of a trial judge is to guarantee that no person is forced to litigate before a judge with a "bent of mind." *See Johnson v. District Court of County of Jefferson*,

[1] We were not able to find any case law on whether the officials presiding in quasi-legislative rulemaking proceedings should also be treated as judges. However, it is arguable, that *Venard* and similar cases apply to *any* administrative proceeding, whether quasi-judicial or quasi-legislative. Out of abundance of caution, we will apply the principles stated in Canon 3 and C.R.C.P. 97 to the Commission ALJs presiding in rulemaking dockets.

674 P.2d 952, 956 (Colo. 1984); *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. App. 2006). With that in mind, we apply the above mentioned standards to the claims that Mr. Mabis makes in his exceptions.

b. The claim that ALJ Gomez disregarded Mr. Mabis' input

12. We find that ALJ Gomez did not disregard the input provided by Mr. Mabis in this rulemaking docket. On the contrary, ALJ Gomez adopted Mr. Mabis' recommendation regarding notices on tow invoices that provide that persons can report problems to the Commission. *See* Recommended Decision, at ¶¶90-91. The ALJ also modified a proposed rule requiring towing carriers to accept a form of payment other than cash for payment of towing charges and drop charges, in part, due to a concern expressed by Mr. Mabis. *Id.*, ¶¶97-102. Further, the ALJ did address all of the arguments made by Mr. Mabis. It is important to note that Mr. Mabis repeats his arguments pertaining to, for example, federal preemption multiple times, with respect to each rule that is allegedly preempted. The ALJ, on the other hand, addressed the federal preemption arguments all at once. Finally, just because the ALJ ruled against Mr. Mabis on many issues and disagreed with his policy and legal arguments does not mean that the ALJ is biased or ignored the input provided by Mr. Mabis during the hearing. *See Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo. App. 2006) (adverse rulings by the trial court do not constitute grounds for recusal absent evidence that the judge is biased, prejudiced or has a bent of mind).

c. The claim that ALJ Gomez is biased because of his prior employment as Commission Counsel

13. As a preliminary matter, we note that this is a different proceeding than Docket No. 06R-504TR and therefore this is not the same "matter at issue" provided for in § 40-6-124, C.R.S. This is a different docket, even if many of the legal and policy arguments presented by Mr. Mabis are similar. We find that the most helpful analogy is that of a former district attorney

who later becomes a judge and presides over a criminal trial of a defendant that the judge prosecuted in the past. The majority of courts have found that judges are not disqualified from sitting or acting in criminal cases *solely* on the ground that they have previously prosecuted the defendant in a different criminal proceeding. *See Schupper v. People*, 157 P.3d 516 (Colo. 2007); *People v. Julien*, 47 P.3d 1194, 1199 (Colo. 2002).[2] In *Julien*, the Colorado Supreme Court noted that:

> Many trial and appellate judges have spent a portion of their careers working for government agencies; disqualification should be based on bias and prejudice, or the reasonable appearance of partiality, not on technical grounds having to do with prior governmental association.

The court in *Julien* discussed former prosecuting district attorneys who later become judges and preside in criminal cases. This reasoning is even more applicable here, since public utilities law is an even more narrow and specialized field of law than criminal law. We find that ALJ Gomez should not be disqualified from this proceeding merely because of his prior employment as Commission Counsel. We therefore deny Mr. Mabis' request to rescind the Recommended Decision on this ground.

2. Oral argument

14. Mr. Mabis requests oral argument regarding his exceptions pursuant to Rule 1505(c). We find that an oral argument will not assist us in making a just and reasonable decision in this case and that written exceptions are sufficient. We therefore deny that request.

3. Federal preemption

15. In his exceptions, Mr. Mabis generally argues that many of the Commission rules that pertain to towing carriers are preempted by 49 U.S.C. § 14501(c). In the Recommended

[2] *See also, Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case* by Jay M. Zitter, J.D., 85 A.L.R.5th 471, and the cases cited therein.

Decision, the ALJ carefully analyzed this argument, beginning with the presumption that historic police powers of states are not preempted by federal law unless that was the clear and manifest purpose of Congress. The ALJ also noted that in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), the Supreme Court found that 49 U.S.C. § 14501(c) did not preempt states from establishing safety regulations governing towing carriers or from delegating that authority to its municipalities. The Court did not enumerate what types of regulations would fall under this safety category.

16. The United States Court of Appeals for the Tenth Circuit Court and the Colorado Supreme Court have not previously ruled on this issue. However, as the ALJ notes, although some courts have decided that § 14501(c) is more preemptive of states' authorities over towing carriers, most courts have interpreted the safety exemption contained in § 14501(c) broadly and are reluctant to tread on a state's police powers.[3]

17. We note that the Commission rules, in general, govern rates and charges for non-consensual tows, storage of towed and abandoned vehicles, requirements that must be met in cases of towed and abandoned vehicles, and procedures that must be followed during release of towed vehicles. We therefore find that the Commission rules that pertain to towing carriers fall within the safety exception and are not preempted by § 14501(c). We deny the exceptions on this ground.

4. Collateral attack on prior Commission decisions

18. We note that in his exceptions Mr. Mabis presents many of the arguments that he presented in prior rulemaking dockets. Many of these arguments focus not on the proposed rules

[3] We note that the two cases cited by the ALJ where federal courts have found that § 14501(c) preempted authority of states over towing carriers, *Torcher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000) and *R. Mayer of Atlanta v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998) have been subsequently overruled.

themselves, but on various related issues. These issues, among other things, are: (1) whether the Commission rules should require an affidavit or a formal complaint before the Commission may request production of documents from a towing carrier; (2) minimum levels of insurance for towing carriers; (3) the claim that the Commission unlawfully delegates its authority to local law enforcement agencies; (4) and the claim that law enforcement agencies, insurance carriers, and motor clubs engage in unlawful conduct. Most importantly, we find that in his exceptions Mr. Mabis argues against certain rules that are not at issue in this rulemaking docket and are beyond the scope of the NOPR.

19. Section 40-6-112(2), C.R.S., states:

> In all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive.

See Lake Durango Water Co. v. Pub. Utils. Comm'n, 67 P.3d 12, 22 (Colo. 2003), *citing Archibold v. Pub. Utils. Comm'n*, 933 P.2d 1323 (Colo. 1997). In *Lake Durango Water Co.*, for example, the court found that the merits of final Commission decisions in a ratemaking proceeding could not be attacked in a later, separate proceeding for attorneys' fees and costs. *Id.*

20. Pursuant to § 40-6-112(2), C.R.S., Mr. Mabis may not collaterally attack previous Commission decisions that adopted rules. We find that his arguments are a collateral attack on previous Commission decisions. We therefore deny the exceptions on this ground.

II. ORDER:

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R09-0149 (Recommended Decision) filed by Mr. George Connolly are granted, consistent with the discussion above.

2. The exceptions to the Recommended Decision filed by Mr. Harvey Mabis are denied, consistent with the discussion above.

3. The Commission adopts a modification to the rules attached to the Recommended Decision. This modification is attached to this Order as Attachment A.

4. A copy of the rules adopted by this Order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*.

5. The 20 day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

6. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING April 29, 2009.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

Commissioners

COMMISSIONER MATT BAKER
ABSENT.

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COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 *CODE OF COLORADO REGULATIONS* (CCR) 723-6

PART 6
RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE

6511. Rates and Charges.

(k) ~~Except as provided in rule 6512(a), a towing carrier shall accept at least two of the following four forms of payment for the rates and charges related to non-consensual tows:~~A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction. If the credit card transaction fee will not be known until after the charges are processed, the towing carrier may charge the customer a credit card transaction fee in the amount of up to 5 percent of the drop charge, or the towing and storage fees.

~~(I) Cash;~~

~~(II) Cashier's check, money order, traveler's check, or other form of certified funds;~~

~~(III) A valid personal check, showing upon its face the name and address of the owner, authorized operator, lienholder or authorized agent of said vehicle; or~~

~~(IV) A valid credit card.~~

Decision No. C09-0567

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-478TR

IN THE MATTER OF THE PROPOSED RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CODE OF COLORADO REGULATIONS 723-6.

ORDER GRANTING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: May 29, 2009
Adopted Date: May 27, 2009

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration (RRR) to Decision No. C09-0463 filed by the American Financial Services Association, the Colorado Bankers Association, and the Electronic Payments Coalition. This matter also comes before the Commission for consideration of a pleading filed by Mr. Harvey Mabis entitled "Intent to File Complaint and Petition for Certiorari in the District Court." Now, being fully advised in the matter and consistent with the discussion below, we grant the RRRs. We also take note of the pleading submitted by Mr. Mabis.

2. In Decision No. C09-0463, we granted exceptions filed by Mr. George Connolly and denied exceptions filed by Mr. Harvey Mabis. In his exceptions, Mr. Connolly urged the Commission modify Rule 6511(k). Rule 6511(k), as recommended by Administrative Law Judge Gomez, stated that:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction.

3. Mr. Connolly argued that a merchant accepting credit cards does not receive the credit card statement until the month following the transaction. There are many different fees associated with accepting credit cards and it is not known what fees may be assessed by each credit card company until after a charge is processed. Mr. Connolly therefore recommended that the Commission find a common percentage that would be a proxy to all possible fees and charges, such as 5 percent. He believed that a fixed percentage would alleviate the potential for abuse.

4. We agreed and granted exceptions on this issue. We found that the 5 percent credit card transaction fee was reasonable considering that the fees generally run between 3 and 5 percent and that towing carriers may incur additional expenses when processing credit card transactions. We therefore amended Rule 6511(k) as follows:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction. <u>If the credit card transaction fee will not be known until after the charges are processed, the towing carrier may charge the customer a credit card transaction fee in the amount of up to 5 percent of the drop charge, or the towing and storage fees.</u>

5. In their RRR, the American Financial Services Association, the Colorado Bankers Association, and the Electronic Payments Coalition argue that Rule 6511(k) conflicts with § 5-2-212(1), C.R.S., which expressly prohibits surcharging for credit card transactions.[1]

[1] We note that these entities did not participate in this proceeding during the hearing. However, we find that their pleadings will be useful to us in reaching a just and reasonable decision in this rulemaking docket.

B. Analysis

6. Section 5-2-212(1), C.R.S., is a part of Title 5 of the Colorado Revised Statutes (Consumer Credit Code). It states that:

> Except as otherwise provided in sections 24-19.5-103(3) and 29-11.5-103(3), C.R.S., no seller or lessor in any sales or lease transaction or any company issuing credit or charge cards may impose a surcharge on a holder who elects to use a credit or charge card in lieu of payment by cash, check, or similar means. A surcharge is any additional amount imposed at the time of the sales or lease transaction by the merchant, seller, or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or charge card. For purposes of this section, charge card includes those cards pursuant to which unpaid balances are payable on demand.

Sections 24-19.5-103(3) and 29-11.5-103(3), C.R.S., permit state governmental entities to impose certain fees. These exemptions do not apply to towing carriers.

7. Section 5-1-202(1)(c), C.R.S., states that "[t]this code [the Consumer Credit Code] does not apply to…transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the charges for the services involved, the charges for delayed payment, and any discount allowed for early payment." We find that this provision does not apply here because towing carriers are not public utilities (although they are affected with the public interest and as such are regulated by the Commission pursuant to § 40-13-102(1), C.R.S.) or common carriers.

8. We also consider whether a towing transaction (particularly in cases of non-consensual tows) can be considered a sales transaction. Section 5-1-301(41), C.R.S., defines "sale of services" as follows:

> Sale of services means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.

The phrase "furnishing *or* agreeing to furnish" implies that transactions other than completely consensual transactions can be deemed to be "sales of services." We were not able to find any

case law on whether a non-consensual towing is a sale of services for purposes of the Consumer Credit Code.

9. We finally consider that consumer protection is one of the underlying policies and purposes of the Consumer Credit Code. *See* § 5-1-102(2)(d), C.R.S. We therefore will interpret § 5-1-202(1)(c), C.R.S., if possible, in a manner that protects consumers in both consensual and non-consensual transactions and best promotes these underlying policies and purposes.

10. We find that Rule 6511(k) violates § 5-2-212(1), C.R.S. We therefore grant the RRRs of the American Financial Services Association, the Electronic Payments Coalition, and the Colorado Banking Association and strike Rule 6511(k) in its entirety at this time. However, we intend to address the concerns expressed by Mr. Connolly in an alternative manner during the next rulemaking.

II. ORDER:

A. The Commission Orders That:

1. The applications for rehearing, reargument, or reconsideration to Decision No. C09-0463 filed by the American Financial Services Association, the Colorado Bankers Association, and the Electronic Payments Coalition are granted, consistent with the discussion above.

2. Rule 6511(k) is stricken in its entirety.

3. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 27, 2009.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

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