

1 JONES MAYER  
2 Krista MacNevin Jee, Esq., SBN 198650  
3 kmj@jones-mayer.com  
4 3777 North Harbor Boulevard  
5 Fullerton, CA 92835  
6 Telephone: (714) 446-1400  
7 Facsimile: (714) 446-1448

8 Attorneys for Plaintiff,  
9 CITY OF FORT BRAGG

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 CITY OF FORT BRAGG,

13 Plaintiff,

14 v.

15 MENDOCINO RAILWAY,

16 Defendants.

Case No. 22-CV-06317-JST

*Assigned for all purposes to:  
Hon. Jon S. Tigar, Ctrm. 6*

**DECLARATION OF KRISTA  
MACNEVIN JEE IN SUPPORT OF  
MOTION TO REMAND**

DATE: February 2, 2023  
TIME: 2:00 p.m.  
CTRM: 6

17 I, KRISTA MACNEVIN JEE, HEREBY DECLARE AS FOLLOWS:

18 1. I am a Partner with Jones Mayer, the City Attorney and the attorneys of record for  
19 the City in the above-entitled action. If called upon, I could and would competently testify to the  
20 following facts, of my own personal knowledge.

21 2. The City filed its complaint against Mendocino Railway in the above-captioned  
22 matter in State court on October 28, 2021, and served its officers and/or representatives on or about  
23 November 23 and 30, 2021. After an unsuccessful attempt by Plaintiff Mendocino Railway to  
24

EXEMPT FROM FILING FEES  
PURSUANT TO GOVERNMENT CODE SECTION 6103



1 obtain a dismissal of the City’s complaint in its State Court action in *City of Fort Bragg v.*  
2 *Mendocino Railway*, Mendocino County Superior Court Case No. 21CV00850, by demurrer **filed**  
3 **on or about January 14, 2022**, Mendocino Railway filed a ***Petition for Writ of Mandate in the***  
4 ***California Court of Appeal***, which was denied on June 9, 2022. Thereafter, Mendocino Railway  
5 also filed a ***Petition for Review with the California Supreme Court*** on June 20, 2022, which was  
6 also denied. The underlying trial court proceedings were briefly stayed by the Court of Appeal  
7 pending its decision. In the demurrer ruling, issued by The Honorable Clayton L. Brennan on  
8 April 28, 2022, the court confirmed MR is not a public utility under state law, based on the ruling  
9 of the California Public Utilities Commission. *See* ¶ 5 *infra*, Exhibit C. In both its Demurrer and  
10 subsequent Answer filed in this State court action, Mendocino Railway has asserted broad federal  
11 preemption claims. In its demurrer, MR specifically argued to the State court that: “Mendocino  
12 Railway is a *federally* recognized railroad subject to the jurisdiction of the federal Surface  
13 Transportation Board. The unlimited control that the City seeks would therefore be federally  
14 preempted.” It also expressly argued in its demurrer to the State court that the City’s request for  
15 injunctive relief was barred by federal law, claiming that MR “is a *federally* recognized railroad,”  
16 and that that status meant it was “regulated by the federal Surface Transportation Board . . . under  
17 the Interstate Commerce Commission Termination Act, . . . [which] gives plenary and exclusive  
18 power to the STB to regulate federally recognized railroads.” (citing 49 U.S.C. § 10501 (b)) It  
19 claimed that “[t]he STB’s exclusive jurisdiction” constituted “broad[] preempt[ion].” (citing U.S.  
20 Const. art. VI, cl. 2 (Supremacy Clause); 49 U.S.C. § 10501 (b); *City of Auburn v. United States*,  
21 154 F.3d 1025, 1030-1031 (9<sup>th</sup> Cir. 1998); *Friends of Eel River v. North Coast R.R. Authority*, 3  
22 Cal. 5<sup>th</sup> 677, 703 (2017)). In its answer, **filed on or about June 24, 2022**, to the City’s Complaint,  
23 Mendocino Railway asserted the following Fourth Affirmative Defense: “The declaratory and  
24 injunctive relief sought by Plaintiff are barred by state and federal preemption, as embodied in  
25 statutory and constitutional law, because Defendant is a CPUC-regulated public utility and a  
26 railroad within the jurisdiction of the STB. *See, e.g.*, 49 U.S.C. §§ 10102, 10501(b); Pub. Util.  
27 Code § 1759(a); U.S. Const., art. VI, ¶ 2.” MR also admitted in its answer that “it is estimated to  
28 cost around \$5 million to repair and reopen Tunnel No.1.” Tunnel No. 1 last collapsed in or about

1 2016, and has not allowed any through service on MR's rail line between Fort Bragg and Willits  
2 since that time.

3 3. On June 22, 2022, Mendocino Railway filed a Notice of Related Case, seeking to  
4 have the City's State court action found to be related to an already-pending action by Mendocino  
5 Railway in *Mendocino Railway v. John Meyer, et al.*, Mendocino County Superior Court  
6 Case No. SCUUK-CVED-20-74939. This earlier action related to Mendocino Railway's  
7 attempt to take the private property of an individual, Defendant John Meyer, in the City of  
8 Willits by eminent domain. The eminent domain case was at that time pending in another  
9 department of the Mendocino Superior Court, before The Honorable Jeanine Nadel,  
10 whereas the City's State court action was pending in a different branch of the same court,  
11 before The Honorable Clayton L. Brennan. Judge Nadel has since conducted a bifurcated  
12 bench trial on the validity of the exercise of eminent domain, concluding trial testimony on  
13 or about November 10, 2022. On the bifurcated issue, excluding only damages (if any), the  
14 declarant is informed and believes the matter is presently in the process of being submitted  
15 to the court for decision. The Notice of Related Case was also heard by Judge Nadel, to  
16 whom Mendocino Railway sought to have the case transferred away from Judge Brennan,  
17 but Judge Nadel denied transfer on or about September 30, 2022.

18 4. At a case management conference in the City's State court action before Judge  
19 Brennan, on September 1, 2022, I informed the Court that the California Coastal  
20 Commission had confirmed to me that they would be shortly filing a Motion to Intervene  
21 in the City's action. The written case management statement submitted to the court prior  
22 to the appearance stated the same, which was filed and served on all parties on or about  
23 August 25, 2022. The Coastal Commission filed the motion, and its proposed Complaint  
24 in Intervention on or about September 8, 2022, and intervention was granted by Judge  
25 Brennan on October 20, 2022. The hearing and ruling on that motion had been briefly  
26 delayed, because Mendocino Railway also filed a Request for Disqualification of Judge  
27 Brennan on September 12, 2022, which was denied by an assigned judge for the purposes  
28 of determining the issue, The Honorable Gregory Elvine-Kreis, on September 29, 2022.



# **EXHIBIT A**

PUBLIC UTILITIES COMMISSION

Public Advocates Office  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



August 12, 2022

**Via Electronic Mail Only**

Michael Hart, CEO  
Sierra Railroad Company  
1222 Research Park Drive  
Davis, CA 95618  
E-mail: [mike@sierraenergy.com](mailto:mike@sierraenergy.com)

**Re: Public Utilities Commission's Response to Mendocino Railway's Request**

Dear Mr. Hart,

This letter is in response to your July 26, 2022 e-mail to the California Public Utilities Commission's (Commission) General Counsel, Christine Hammond.

In your July 26, 2022 e-mail, you request a letter from the Commission stating that Mendocino Railway is a regulated public utility railroad. Your request is similar to one received from Robert Jason Pinoli, General Manager of Mendocino Railway on October 31, 2018.

On December 7, 2018, the Commission responded in writing to Mr. Pinoli, stating that Mendocino Railway is a Class III railroad. Based on Mendocino Railway's representations to the Commission, the Commission considers Mendocino Railway's rail operations largely un-changed since that time.

**This letter confirms that Mendocino Railway is a Commission-regulated railroad. The Commission's website lists Mendocino Railway's status as a Class III Commission-regulated railroad.<sup>1</sup> While Mendocino Railway is a Commission-regulated railroad, it is not a public utility within the meaning of the California Constitution, the California Public Utilities Code, and the Commission's orders.**

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<sup>1</sup> Regulated California Railroads, available at: <https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety/regulated-california-railroads>

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The status of Mendocino Railway has previously been determined by the Commission. In 1997, the California Western Railroad (CWRR) - which was the company operating the excursion service commonly known as the “Skunk Train” at the time - applied to the Commission for status to reduce its commuter passenger services. In the course of this proceeding, the Commission determined that CWRR did not constitute a public utility to the extent it provides excursion rail service, which constituted 90% of its overall business. (D.98-01-050 (January 21, 1998) 1998 Cal. PUC LEXIS 189 [“In providing excursion passenger service, CWRR does not function as a public utility.”].)

The Commission found that, while CWRR was not a public utility, it was still subject to Commission regulation regarding the safety of CWRR’s rail operations. D.98-01-050, Conclusion of Law 3. CWRR agreed with these findings and did not challenge the Commission’s determination that it was not a public utility.

It is my understanding that Mendocino Railway later purchased the CWRR in a bankruptcy proceeding and has continued to provide excursion train service on the Skunk Train. The Commission is not aware of any changes to the excursion services provided by Mendocino Railway that would cause a change to its 1998 determination that Mendocino Railway is a regulated railroad but not a public utility. As such, the 1998 determination is still the applicable law with regard to Mendocino Railway’s status.

While some California railroads do constitute public utilities, “railroads” and “public utilities” are not synonymous under the Public Utilities Code. The Public Utilities Code gives the Commission authority to regulate the safety of rail operations in California, regardless of a railroads status as a public utility. (See, *e.g.*, Pub. Util. Code, § 309.7 [The Commission “shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways, and for enforcing state and federal laws, regulations, orders, and directives relating to transportation of persons or commodities, or both, of any nature or description by rail”]; Pub. Util. Code, § 765.5 (“provid[ing] that the commission takes all appropriate action necessary to ensure the safe operation of railroads in this state.”].)

The Commission also works in partnership with the Federal Railroad Administration as federally certified inspectors to ensure the implementation of railroad safety laws and regulations. (49 C.F.R. § 212.1, *et seq.*) The Commission also recognizes the regulatory authority of the Surface Transportation Board pursuant to 49 United States Code section 10501, *et seq.*

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The Commission's jurisdiction is limited to safety oversight over Mendocino Railway's rail operations, to ensure that Mendocino Railway is operating its rail vehicles safely and in compliance with the law. The Commission does not regulate other aspects of Mendocino Railway's operations, such as fare prices or schedules, and the Commission's authority would not pre-empt, for example, generally applicable land-use or environmental rules or regulations as such rules or regulations relate to non-railroad operations.

In addition, your July 26, 2022, e-mail recounts your difficulty with having Commission staff state that Mendocino Railway is a public utility, and also states that at a recent conference that included other California short-line railroads, "[o]ne of the government officials present simply suggested that we throw the next CPUC inspector off the property saying we are not regulated and not subject to his authority."

As explained above, Mendocino Railway is a Commission-regulated railroad, but not a public utility within the meaning of the California Constitution, the California Public Utilities Code, and the Commission's orders. As a Commission-regulated railroad, the Commission is authorized to access railroad property for inspections, as part of the Commission's obligation to ensure the safe operation of all railroads in California. (Pub. Util. Code, § 309.7.)

It is essential that Mendocino Railway have a complete understanding of its obligations as a Commission-regulated railroad, which includes allowing Commission inspectors access to its property. If Mendocino Railway were to throw Commission inspectors off of its property as your e-mail suggests, or otherwise impede or prevent Commission inspectors from accessing Mendocino Railway's property, this would constitute a blatant violation of the Public Utilities Code, punishable by fines or other penalties. Further, obstructing a public officer from carrying out their duties is a crime, as is threatening a public employee to refrain from carrying out the performance of their duties. (Pen. Code §§ 71; 148, subd. (a)(1).)

Ensuring the safety and integrity of Commission inspectors is of paramount importance. Any act of obstructing or attempting to remove Commission inspectors from railroad property will be prosecuted to the fullest extent of the law.



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We hope this letter answers your inquiry as the Commission continues to exercise its regulatory mission to ensure safe operations of Sierra Railroad and its related entities.

Sincerely,



Jonathan C. Koltz  
Assistant General Counsel  
Legal Division, Public Utilities Commission

cc: Christine Hammond, General Counsel, Public Utilities Commission  
([christine.hammond@cpuc.ca.gov](mailto:christine.hammond@cpuc.ca.gov))  
Kevin Wheelwright, Legal Counsel, Public Utilities Commission  
([kevin.wheelwright@cpuc.ca.gov](mailto:kevin.wheelwright@cpuc.ca.gov))  
Roger Clugston, Director of the Rail Safety Division-Public Utilities Commission  
([roger.clugston@cpuc.ca.gov](mailto:roger.clugston@cpuc.ca.gov))  
Glenn L. Block, Attorney for Mendocino Railway  
([glb@caledlaw.com](mailto:glb@caledlaw.com))

## **EXHIBIT B**

B.C.D. 06-42

SEP 28 2006

**EMPLOYER STATUS DETERMINATION**

**Sierra Entertainment**

**Mendocino Railway**

This is the determination of the Railroad Retirement Board concerning the status of Sierra Entertainment and Mendocino Railway, as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Sierra Entertainment and Mendocino Railway are owned and controlled by Sierra Railroad Company, an employer under the Acts (B.A. No. 2774) and are affiliated with Midland Railroad Enterprises Corporation, also an employer under the Acts (B.A. No. 9750).<sup>1</sup>

Information regarding these companies was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company. Sierra Entertainment was created and began operations on January 1, 2003. It operates dinner and brunch trains and excursion trains over the lines of its common carrier affiliates within California pursuant to an operating agreement. It also provides trains for use in movies, television, and commercials. Its excursion trains include (1) the Skunk Train which operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points); (2) the Sacramento RiverTrain which operates a round-trip excursion train from Woodland, California, to a turning point; and (3) the Oakdale Dinner Train which operates a round-trip dinner/excursion train from Oakdale, California, to a turning point 14 miles out. Sierra Entertainment owns its own equipment and employs its own staff, but does not own any rail lines.

Mendocino was created in 2004 to acquire the assets of the former California Western Railroad (a covered employer under the Acts; B.A. No. 2782), a 40-mile rail line in Mendocino County<sup>2</sup>. The acquisition was authorized by the Surface Transportation Board in a decision dated April 8, 2004 (Finance Docket No. 34465). Mendocino's line runs between Fort Bragg and Willits, California, and connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since Mendocino Railway's only access to the railroad system is over this line, that access is currently unusable.

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<sup>1</sup> Midland is a subsidiary of Sierra Railroad Company.

<sup>2</sup> CWRR, Inc., d/b/a California Western Railroad, was terminated as an employer effective September 30, 2003 (B.C.D. 04-40).

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Mendocino's ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," to include

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code \* \* \*.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) & (b)).

Section 10501 of Title 49 of the United States Code provides in pertinent part that the Surface Transportation Board has jurisdiction over rail carrier:

\* \* \* transportation in the United States between a place in –

(A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. § 10501(a)(2)(A).]

The rail service provided by Sierra Entertainment may be characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Since passengers are transported solely within one state, under section 10501(a)(2)(A), above, Sierra Entertainment would not be subject to Surface Transportation Board jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act. Therefore Sierra Entertainment is not a carrier by railroad.

The Railroad Retirement Act and the Railroad Unemployment Insurance Act also define the term "employer" to include:

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad \* \* \*.

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A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) & (b)).

Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Sierra Entertainment is under common control with a railroad employer by reason of its being owned by Sierra Railroad, which also owns Midland Railroad Enterprises Corporation, a covered employer under the Acts. Therefore, if Sierra Entertainment provides a service in connection with the transportation of passengers or property by railroad it is an employer under the Acts. Section 202.7 of the regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

There is no evidence that Sierra Entertainment provides any service to Midland. Rather, the evidence shows that Sierra Entertainment operates solely to provide public passenger excursion tours within one state. Because Sierra Entertainment does not perform a service in connection with rail transportation, the Board finds that it is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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Since Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts. If Mendocino commences operations, the Board will revisit this decision.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

## **EXHIBIT C**

*1998 Cal. PUC LEXIS 189; 78 CPUC2d 292*

California Public Utilities Commission

January 21, 1998

Decision 98-01-050, Application 97-08-007 (Filed August 5, 1997)

*CA Public Utilities Commission*                      *Decisions*

**Reporter**

1998 Cal. PUC LEXIS 189 \*; 78 CPUC2d 292

**In the Matter of the Application CALIFORNIA WESTERN RAILROAD, INC. for authority to modify scheduled commuter passenger service and seek relief from regulated excursion passenger scheduling and fares**

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**Core Terms**

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excursion, transport, sightseeing, passenger service, passenger, train, fare, public utility, commuter, was, deregulate, tourist, wine, subject to regulation, companies, bus

**Counsel**

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Gary Milliman and Sean J. Hogan, Attorneys at Law, for California Western Railroad, Inc., applicant; Bruce Richard, for Mendocino Transit Authority, and Johanna Burkhardt, Emile's Station, for herself, interested parties; James T. Quinn, Attorney at Law, and James R. Panella, for the Rail Safety and Carriers Division.

**Panel:** P. Gregory Conlon, President; Jessie J. Knight, Jr., Henry M. Duque, Josiah L. Neeper, Richard A. Bilas, Commissioners

**Opinion**

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**INTERIM OPINION**

The decision concludes that the excursion passenger service provided by California Western Railroad (CWRR) should not be subject to regulation by the Commission.

**Background**

CWRR transports passengers and freight between Fort Bragg and Willits, California. CWRR also serves a few communities between Fort Bragg and Willits in the Noyo River Valley.

CWRR currently provides one round trip daily except on Thanksgiving Day, Christmas Day and New Year's Day (362 days a year) from Fort Bragg to Willits and returning to Fort Bragg. CWRR charges commutation fares and special intermediate point round-trip-ticket fares for its service. Additionally, at various times of the year, CWRR operates trains between Fort Bragg and Northspur and less [\*2] frequently between Willits and Northspur. Northspur is located approximately midway between Fort Bragg and Willits.



CWRR's route between Fort Bragg and Willits is very scenic and CWRR attracts several tourists to ride its train. CWRR provides excursion passenger service to tourists on its famous "Skunk Train." CWRR's excursion service is provided for the same fare as the fare for commuter service.

According to the information provided by CWRR, CWRR's excursion service constitutes over 90% of its operations.

CWRR filed this application to seek Commission approval to reduce its commuter service to three days a week during the winter months of October through March. CWRR also seeks relief from regulation by the Commission of its excursion service.

### **Hearings**

Public participation hearings (PPHs) on the application were held in Willits (on October 22, 1997) and Fort Bragg (on October 23, 1997) before Administrative Law Judge (ALJ) Garde. In addition to the PPHs, a prehearing conference (PHC) was held on October 23, 1997 in Fort Bragg.

At the PHC, the ALJ bifurcated the proceeding into two phases. The first phase would address CWRR's request to deregulate its tourist or excursion passenger [\*3] service. The second phase would address the issue of reduction in commuter passenger service.

It was agreed that the issue of deregulation being a legal issue could be addressed through the filing of briefs. Accordingly, concurrent opening and reply briefs were filed on November 17, 1997 and November 25, 1997, respectively.

An evidentiary hearing in the second phase was held in Fort Bragg on December 4, 1997.

This interim decision addresses the issue of deregulation of CWRR's tourist or excursion passenger service. A separate order will be issued regarding CWRR's request to reduce its commuter passenger service.

CWRR and the Commission's Rail Safety and Carriers Division (RSCD) filed opening briefs. RSCD and Mendocino Transit Authority filed reply briefs.

### **Commission Regulation of Railroads**

Before considering CWRR's request for deregulation, it would be helpful to examine Commission's regulation of other railroads.

There are 15 railroad companies in California that provide excursion passenger service of which all but two are not regulated by the Commission. The two railroads regulated by the Commission are CWRR and the Napa Valley Wine Train (Wine Train).

In the case of Wine Train, [\*4] the Commission regulation involves the monitoring and enforcement of a program to mitigate any adverse impact of the operation of Wine Train on the environment. The Mitigation Implementation Program adopted by the Commission, under Section 21081.6 of the California Environmental Quality Act (CEQA), was part of the assessment of environmental impact of the operation of trains. Under the Mitigation Implementation Program, the Commission specifies, among other things, the hours of the day during which Wine Train can operate. The Commission does not regulate Wine Train's schedule or rates.

In the case of CWRR, the Commission regulates both the commuter service and excursion service.

### **Discussion**

All parties support deregulation of CWRR's excursion service. The following discussion is a distillation of opinions expressed in the briefs.

In considering CWRR's request for deregulation, we have determined whether CWRR's excursion service qualifies as "transportation" under Public Utilities (PU) Code § 1007 and whether in rendering such service CWRR functions as a public utility. We will examine CWRR's operations in that perspective.

#### **Does CWRR's Excursion Service Constitute Transportation? [\*5]**

What does the term "transportation" mean and what services qualify as transportation addressed by the [\*California Supreme Court in Golden Gate Scenic Steamship Lines v. Public Utilities Commission, 57 C.2d 373 \(1962\)\*](#). The steamship company operated sightseeing vessels on San Francisco Bay. The passengers being served by the steamship company boarded vessels at a certain point in San Francisco and after cruising the bay in a loop returned to the point of origin. Golden Gate Scenic Steam Ship Lines contended that its operations did not come under the Commission's regulatory authority because it did not transport people between points and thus was not providing transportation as provided in PU Code § 1007.

In that case, the court determined that "transportation" was a key word and that when applied to passenger vessels "plainly" meant transportation of persons between two different points. The court concluded that the steamship company's sightseeing cruises did not come under PU Code § 1007.

In a subsequent proceeding, (Application (A.) 59818 et al.), the Commission, based on the Supreme Court's determination, issued Decision (D.) 93726 (7 CPUC2d at 135-136), which concluded that sightseeing [\*6] service is not passenger stage corporation service. The Commission stated that:

"Aside from the legal analysis of the statutory scheme, concluding tour or sightseeing service is not passenger stage corporation service, we note that sightseeing or tour service is essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service. In those cases members of the public may be in a situation where they have no other mode for essential travel. And, there it is in the public interest to regulate rates, schedules, and service for what may very well be captive patrons.

"We recognize that today's decision is a departure from past Commission precedent. We are sure those companies who are already in business and doing well under regulation will take vocal exception with this decision. However, we believe our analysis of the statutory scheme for bus regulation in California is sound. Aside from the legal analysis requiring us to find sightseeing-tour service is not common carriage, we believe this change in our regulation will allow us to engage in better entry and rate regulation over point-to-point common [\*7] carriers, and ultimately enable us to provide better regulation for the user of regular route, point-to-point bus service." (7 CPUC2d at 135-136.)

CWRR's excursion service involves transporting passengers from Fort Bragg either all the way to Willits or to midpoint Northspur, and then returning them to Fort Bragg. Also, at some times of the year, CWRR operates a train from Willits to Northspur and then returning to Willits.

The operations described above involve transporting people from one point to a destination and returning them to the point of origin. While the operation does not entail transporting people in a continuous loop as the people using excursion buses or boats, the operation is comparable to the operation of excursion buses or boats. The difference in the operations is of degree, not kind, and should not be determinative of whether or not CWRR's operations meet the judicial definition of transportation under PU Code § 1007.

We conclude that CWRR's excursion service does not constitute "transportation" under PU Code § 1007.

Next, we will consider whether CWRR, in providing its excursion service, functions as a public utility. The primary purpose of CWRR's excursion [\*8] service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing. In D.82-09-087, the Commission stated the following about sightseeing:

"The basic question is whether sightseeing is a public utility function. In the absence of a clear declaration by the Legislature, we conclude that it is not." (9 CPUC2d at 687.)

Further, the Commission also opined that public utilities are ordinarily understood as providing essential services, the kind that other industries and the public generally require.

While the excursion service provided by CWRR may be beneficial to the economy of Mendocino County and may even be considered essential by the tourist industry, it is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility.

Based on the above, we conclude that CWRR's excursion service should not be regulated by the Commission.

We believe that discontinuance of Commission regulation of schedules and fares of CWRR's excursion service will have no adverse impact in the area [\*9] of the public interest. Moreover, it would conform the Commission's regulation over CWRR's excursion service with Commission regulation of other such rail services.

### **Consideration of Safety of CWRR's Operations**

While we have concluded that CWRR's excursion services be free from regulation by the Commission as regards to scheduling and fares, we believe that CWRR's excursion services should be subject to regulation in certain other areas. Foremost among these would be regulation with regard to the safety of CWRR's operations, which the Commission conducts as an arm of the Federal Railroad Administration (FRA). It is essential that the Commission staff and FRA personnel continue to inspect CWRR's track, signal and safety practices of CWRR's passenger and freight operations. It is also essential for the Commission to continue to regulate the upkeep and reliability of grade crossings and crossing protection devices under PU Code §§ 1201 et seq.

While the Commission ceased to regulate the schedules and fares of sightseeing tours provided by bus, the safety of bus operators was subject to regulation by state agencies. Accordingly, we conclude that CWRR should remain under the Commission's [\*10] regulation in all areas of safety of its passenger and freight operations, as it is now.

### **Findings of Fact**

1. CWRR seeks relief from regulation by the Commission of its excursion passenger service.
2. CWRR's excursion service does not constitute "transportation" under the provisions of PU Code § 1007.
3. The primary purpose of CWRR's excursion service is to provide its passengers an opportunity for sightseeing.
4. The Commission has concluded that sightseeing is not a public utility function.
5. The Commission currently regulates the safety of the operation of all services provided by CWRR.
6. While the Commission ceased to regulate the schedules and fares of sightseeing service provided by bus operators, the safety of the operations remained subject to regulation by state agencies.

### **Conclusions of Law**

1. In providing excursion passenger service, CWRR does not function as a public utility.
2. The Commission should not regulate the schedules and fares for the excursion passenger service provided by CWRR.
3. The Commission should continue to regulate the safety of the operation all services provided by CWRR.
4. This order should be made effective today to provide CWRR an opportunity [\*11] to publish its schedules and fares for the expected tourist season in 1998.

### **INTERIM ORDER**

**IT IS ORDERED** that:

1. The schedules and fares for the excursion passenger service provided by California Western Railroad (CWRR) shall not be subject to regulation by the Commission.
2. The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission.
3. This proceeding shall remain open to consider CWRR's request to reduce its commuter service.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

CA Public Utilities Commission

Decisions

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