

# FisherBroyles

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August 15, 2022

## **VIA EMAIL**

Jonathan C. Koltz, Esq.  
California Public Utilities Commission  
505 Van Ness Ave.  
San Francisco, CA 94102  
Email: Jonathan.Koltz@cpuc.ca.gov

## **RE: Mendocino Railway's Status As a Public Utility Railroad**

Dear Mr. Koltz:

Thank you for your August 12, 2022, letter, which we have carefully reviewed. According to that letter, the California Public Utilities Commission (“Commission”) determined in a January 21, 1998, decision that CWRR, Inc. (“CWRR”) did not function as a public utility to the extent it provided excursion passenger service over the California Western Railroad (“CWR”), which it operated at the time. On that basis, the letter opines that Mendocino Railway (“MRY”) is not a public utility.

In the interest of fairness and accuracy, we ask that this conclusion be reconsidered in light of the following key points that the letter does not address.

### **The January 21, 1998 Decision of the Commission**

There are two independent reasons why the Commission’s January 21, 1998, decision (“the Decision”) does not impact MRY’s public utility status. (For ease of reference, we have enclosed the Decision as “Attachment 1” to this letter.)

First, the Decision concerns another owner and operator of the CWR—**CWRR**—and is based on facts that have not existed for almost a quarter century. The Decision does not concern MRY. While MRY acquired the CWR out of bankruptcy in 2004 and has subsequently provided railroad services on the CWR, MRY does not have, and never has had, any relationship with CWRR. MRY also has not operated the CWR in the same manner as CWRR. Further, the CWR is just one of the railroad lines on which MRY provides railroad services.<sup>1</sup> And MRY has always

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<sup>1</sup> In addition to the CWR, which is located in Mendocino County, MRY also operates on railroad lines in Yolo County and Ventura County. MRY also has operated on railroad lines in Stanislaus County and Tuolumne County, lines on which MRY expects to operate again in the future.

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been, and continues to be, much more than an excursion railroad: in addition to providing excursion services, MRY has since its acquisition of the CWR also provided freight service and non-excursion passenger service, including commuter service that transports local residents to and from their homes along MRY's line. MRY continues to provide non-excursion passenger and freight services in addition to its excursion service. To opine in 2022 that MRY is not a public utility—based on a Decision rendered **almost a quarter century ago**, which applied solely to CWRR and that pertained solely to operations on just one of the railroad lines on which MRY operates—is misguided and fundamentally unfair to MRY.

Second, even if the Decision as to a different company with different operations were somehow relevant to MRY's operations today, the Decision does not repudiate CWRR's status as a public utility railroad. To the contrary, the Commission acknowledged in its Decision that CWRR provided more than just excursions, stating that "CWRR transports passengers and freight between Fort Bragg and Willits." The Commission repeatedly recognized the existence of CWRR's "passenger and freight operations" in addition to the railroad's excursion service. Indeed, in addition to seeking deregulation of its excursion service, CWRR's application also sought the Commission's approval to "reduce its commuter service."<sup>2</sup>

At most, the Decision states that CWRR's excursion operation was "not a public utility *function*" (emphasis added). A railroad may operate a service that is not a public utility *function*; but as long as it carries out other public utility functions—such as transporting non-excursion passengers and freight—the railroad retains its public utility status. That is why, in its Decision, the Commission directed that "[t]his proceeding shall remain open to consider CWRR's request to reduce its commuter service"—a service that undisputedly is a public utility function.<sup>3</sup> What authority would the Commission have had to regulate the frequency of a railroad's commuter service if the railroad was not a public utility? Indeed, your letter seems to acknowledge the limited reach of the Decision's conclusion, stating that: "the Commission determined that CWRR did not constitute a public utility *to the extent it provides excursion rail service*." In other words, to the extent CWRR provided services other than excursion services—and acted as a common carrier of passengers and freight—it remained a public utility.

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<sup>2</sup> We respectfully disagree with the suggestion that some regulated railroads are not public utilities. Section 216(a)(1) of the Public Utilities Code identifies, as the first kind of public utility, "every common carrier." Section 211(a) in turn defines a "common carrier" as "[e]very railroad corporation." There is no dispute that Mendocino Railway is a railroad corporation. Thus, it is a public utility.

<sup>3</sup> CWRR later withdrew its request to reduce its commuter service.

## Subsequent Decisions of the Commission

Your letter relies exclusively on the Commission's January 21, 1998, Decision. But there are other *later* decisions that reaffirmed CWRR's public utility status. Since your letter does not reference those decisions, we have enclosed them as Attachments 2 and 3 for your convenience and review.

The first is the Commission's May 21, 1998, decision concerning CWRR's motion to withdraw its request to reduce commuter service. (*See* Attachment 2.) The decision reiterates that CWRR "transports passengers and freight between Fort Bragg and Willits," and "serves a few communities" in between. Pub. Util Code § 211 (defining "common carrier" as any person or corporation "providing transportation for compensation to or for the public or any portion thereof"); *id.* § 216 (defining a "public utility" as a "common carrier," which includes "[e]very railroad corporation"). The decision makes clear that the railroad's "passenger service" is "[i]n addition" to the excursion service. The decision notes that the Commission's Rail Safety and Carriers Division fought (successfully) to retain "jurisdiction over CWRR's passenger service." The Commission ultimately granted CWRR's motion to withdraw its request to reduce commuter service, because "[g]ranted . . . CWRR's motion" was "in the best interest of passengers which use CWRR's service." The May 21, 1998, reaffirms CWRR's transportation service—an indisputably public utility function.

The second decision is dated August 6, 1998. (*See* Attachment 3.) It concerns CWRR's application for Commission approval of certain stock transactions. As the decision notes, "[b]efore a *public utility* may issue stocks and stock certificates, it must obtain an order from this Commission authorizing the issue . . . PUC Code Section 818" (emphasis added). CWRR made the application as a public utility, and the Commission accepted and adjudicated the application based on CWRR's status as a public utility. In its "findings of fact," the Commission specifically found that CWRR "is a common carrier railroad engaged in interstate commerce," and "operates railroad passenger and freight services between Fort Bragg and Willits, California." In its "conclusions of law," the Commission held: "[CWRR] is a public utility within the meaning of Section 216(a) of the PU Code." In footnote 7 of its decision, the Commission also held that "[CWRR] is a common carrier, see PU Code Section 211, and is therefore a public utility under California law. PUC Code 216(a)." The Commission's acknowledgement of CWRR's continued status as a public utility could not be clearer. However the earlier January 21, 1998, Decision might be interpreted, at least three times in its subsequent August 6, 1998, the Commission made unequivocal its view that CWRR was a public utility. No Commission decision exists that even remotely declares CWRR (much less MRY) to be anything other than a public utility railroad.

## Conclusion

The Commission's 1998 decisions about CWRR's operations on the CWR almost a quarter century ago do not control MRY's status as a California public utility railroad—even as to its operations on the CWR, much less as to all of its other operations throughout the state. But even if those decisions were somehow relevant to MRY today, they only *reaffirm* MRY's continuing status as a public utility. To repeat, since MRY acquired the CWR line following CWRR's bankruptcy, it has provided not just excursions, but non-excursion passenger and freight services as well. It therefore has the status of a public utility railroad under California law.

Given the foregoing, and for the record, we respectfully request that your office reconsider the conclusion set forth in the August 12, 2022, letter concerning MRY's status as a public utility. To that end, we would appreciate the opportunity to discuss this matter with you at your earliest convenience. Thank you in advance for your professional courtesy in this important matter.

Very truly yours,



Paul J. Beard II  
Counsel for Mendocino Railway

Attachs. (May and August 1998 Decisions of the CPUC)

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## 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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## 1998 Cal. PUC LEXIS 384

California Public Utilities Commission

May 21, 1998

Decision No. 98-05-054, Application No. 97-08-007 (Filed August 5, 1997)

CA Public Utilities Commission

*Decisions*

**Reporter**

1998 Cal. PUC LEXIS 384 \*

### **In the Matter of the Application of 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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commuter, passenger service, remainder, proposed decision, excursion, was, motion to withdraw, second phase, passenger, withdraw, best interest, final order, deregulate, interim, tourist, phase, train, fare

#### **Counsel**

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Gary Milliman and Sean J. Hogan, Attorney 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:** Richard A. Bilas, President, P. Gregory Conlon, Jessie J. Knight, Jr., Henry M. Duque, Josiah L. Neeper, Commissioners

#### **Opinion**

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##### **FINAL OPINION**

##### **Summary of Decision**

In response to a motion by California Western Railroad, Inc. (applicant), this decision dismisses without prejudice the remaining issues in this proceeding and closes the proceeding.

##### **Background**

California Western Railroad, Inc. (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 [\*2] times of the year, CWRR operates trains between Fort

Bragg and Northspur and less frequently between Willits and Northspur. Northspur is located approximately midway between Fort Bragg and Willits.

In addition to the passenger service CWRR also provides excursion passenger service to tourists on its famous "Skunk Train."

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 addressed CWRR's request to deregulate its tourist or excursion passenger service. The second phase addressed 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 [\*3] filing of briefs.

Based on the briefs filed, the Commission issued Decision (D.) 98-01-050 on January 21, 1998, which concluded that the excursion passenger service provided by CWRR should not be subject to Commission's regulation.

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

Concurrent briefs in the second phase were filed on January 21, 1998.

On February 17, 1998, CWRR filed a motion withdrawing its request to reduce commuter service. CWRR requests that the Commission Interim Opinion be made the final order in this proceeding and that the remainder of the application be dismissed without prejudice.

In the interim, on February 11, 1998, Commission's Rail Safety and Carriers Division (RSCD) filed a motion to strike portions of CWRR's briefs that challenges the Commission's jurisdiction over CWRR's passenger service or, in the alternative, a motion for leave to file response to CWRR's position. Based on CWRR's February 17th motion, RSCD's motion is moot. We will deny the motion.

No comments or protest on CWRR's motion to withdraw its request to reduce its commuter service have been filed.

### **Discussion**

CWRR's request to reduce its commuter [\*4] service is opposed by majority of the parties. Granting of CWRR's motion will be in the best interest of passengers which use CWRR's services. We will grant CWRR's motion to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice.

### **Comments on ALJ's Proposed Decision**

ALJ's proposed decision was filed and mailed to parties on April 20, 1998. No party has filed comments on the proposed decision. Accordingly, we will issue the decision as proposed after correcting an error from the proposed decision.

### **Findings of Fact**

1. CWRR requests to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice.
2. Granting of CWRR's motion would be in the best interest of the passengers which use CWRR's service.

**Conclusions of Law**

1. CWRR's motion to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice should be granted.
2. The proceeding should be closed.

**FINAL ORDER**

**IT IS ORDERED** that:

1. California Western Railroad's motion to withdraw its request to reduce its commuter service and to dismiss [\*5] the remainder of the application without prejudice is granted.
2. Since there are no issues remaining to be considered in this proceeding, this proceeding is closed.

This order is effective 30 days from today.

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

CA Public Utilities Commission

Decisions

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## 1998 Cal. PUC LEXIS 606; 81 CPUC2d 514

California Public Utilities Commission

August 6, 1998

Decision No. 98-08-017, Application No. 98-04-034 (Filed April 22, 1998)

CA Public Utilities Commission

*Decisions*

**Reporter**

1998 Cal. PUC LEXIS 606 \*: 81 CPUC2d 514

### **Application and request for Nunc Pro Tunc Authority, Authority to Merge Corporations, to Split Stock and to Issue Common Stock, and for Expedited Ex Parte Relief**

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#### **Core Terms**

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stock issue, stock, was, issuance, railroad, acquisition, passenger, rehabilitate, companies, exempt, merger, public utility, common stock, outstanding shares, locomotive, ownership, notice, shares of common stock, split, has, retroactive, outstand, track, train, working capital, common carrier, investor, finance, bridge, merge

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

#### **Opinion**

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##### **OPINION**

##### **Summary**

In this decision we grant the application of *California Western Railroad, Inc.* (California Western or applicant) for retroactive approval of previous stock issues, and for prospective approval of a transaction which would merge California Western Land Associates, Inc. (Land Company) into the applicant, split applicant's currently outstanding shares of common stock 2.407 for 1, and make a new public offering of an additional 614,000 common shares. Upon conclusion of this transaction, the applicant's present shareholders will have a 50.5% share ownership of California Western, and the newly offered shares will constitute the remaining 49.5%.

No protest has been filed in response to the application. We have held no hearing, and we make no determination under Public Utilities (PU) Code Section 822 concerning the fairness of the transaction or the underlying stock issues. The application is granted ex parte, as requested by the applicant.

##### **Background**

The applicant is a common carrier railroad engaged in interstate commerce. The application [\*2] states that it operates railroad passenger excursion and commuter services, and common carrier freight service, between Fort Bragg and Willits,

California.<sup>1</sup> We recently relieved the applicant from certain regulatory requirements in connection with its operation of excursion services, but the company otherwise remains subject to regulation under various provisions of the PU Code. (Decision (D.) 98-01-050.)

California Western was organized as a close corporation under California law in July 1996 under the name CWRR, Inc., and the affiliated Land Company was concurrently incorporated as a California close corporation.<sup>2</sup> According to the application, the [\*3] two corporations were organized to acquire the assets of California Western, an Arizona corporation. The directors and shareholders of the two corporations were, and have remained, identical. In order to obtain operating authority from the federal Surface Transportation Board (STB) to operate the railroad, CWRR, Inc. filed a verified notice of exemption under [49 CFR Section 1150.31](#) on August 9, 1996.<sup>3</sup> On August 12, 1996, the STB published its notice of exemption. (*STB Finance Docket No. 33005, 61 FR 42936* (August 19, 1996).)

[\*4]

According to the companies' audited combined financial statements, on August 1, 1996, the applicants' Board of Directors approved the sale of 171,350 shares to certain stockholders for \$ 5.00 per share. Pursuant to a Stockholders' Agreement dated August 16, 1996, for each share of CWRR, Inc. stock purchased, the stockholders received a share of Land Company stock. In order to maintain identical ownership in both companies, the shares are restricted in that the stockholder may not sell shares of either company without selling the identical shares in both companies. No authority was requested from this Commission for the initial stock issuance.

The asset purchase was completed on August 16, 1996. The total purchase price and closing costs for acquisition of the assets was \$ 1,642,503. Initial capitalization consisted of \$ 855,750 received in exchange for issuance of the common stock to the initial investors, and the proceeds of a mortgage in the amount of \$ 900,000 secured by all of the railroad's property. The applicant's resultant initial working capital was \$ 113,247. The applicant acquired the entire business operation of the railroad, and Land Company holds title to all of the [\*5] real property used in the railroad's operation.<sup>4</sup>

In March 1997, the companies sold 20,000 shares of common stock for \$ 5.00 per share, with the acquiring stockholders receiving a share in each company. However, the proceeds from these sales were not allocated to each company, as was done initially. All proceeds were recorded as CWRR common stock. This was part of the sale of a total of 50,000 shares to new investors for a total consideration of \$ 250,000 after the initial issuance. No authority was requested from the Commission for any part of this stock issuance. Sometime after May 31, 1997, an additional 38,879 shares were issued to stockholders [\*6] for \$ 194,385. No authority was requested from the Commission for this stock issuance.

Consistent with this account of share transactions, the most recent combined financial statement shows 260,229 shares of California Western common stock, and an equivalent number of shares of Land Company shares, issued and outstanding.

As noted above, the applicant did not ask this Commission to authorize the issuance of any of these shares. Applicant does not explain its failure to seek authorization for the initial issue, although with respect to the subsequent issues the application offers the explanation that applicant was "under the impression that such issuance was subsumed within the federal exemption

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<sup>1</sup> The characterization of some of California Western's passenger services as commuter service may be misleading. No trains are operated specifically to serve commuters; the terminology is used to refer to certain tariffs which govern multiple rides. According to the application, commuter passengers constitute about one percent of California Western's total business.

<sup>2</sup> On May 30, 1997, CWRR, Inc.'s articles were amended to change its name to *California Western Railroad, Inc.*

<sup>3</sup> By this means certain types of applicants can bypass the formal application procedure specified in [49 U.S Code Section 10901](#). See [49 CFR Section 1150.1 et seq.](#) The STB approves the acquisition by publishing a notice in the Federal Register within 30 days of the filing without making a determination of public convenience and necessity. The exemption is effective 7 days after it is filed, and the filing thus creates a presumption of public convenience and necessity. The exemption is void *ab initio* if the notice contains false or misleading information.

<sup>4</sup> Note 7 of the audited financial statements indicates that the proceeds from the initial sale of shares were allocated between CWRR, Inc. and Land Company, based upon the respective company's pro-rata share of the assets acquired during the purchase of the railroad. This resulted in 68% and 32% of the proceeds being allocated to CWRR, Inc. and Land Company, respectively.

authorizing acquisition of control." (P. 7.) The application states that the uses to which all funds raised through stock issues have been put are the repair of storm and disaster damage, performance of deferred maintenance, purchase of maintenance-related assets, and maintenance of working capital.

The applicant proposes to issue more shares of common stock to the public to raise an additional \$ 4.6 million as part of a three-part transaction. First, Land Company will merge into California [\*7] Western, leaving California Western as the surviving corporation holding all assets. Land Company's real estate would be transferred to California Western, and all outstanding shares in Land Company would be canceled. Because the two companies have identical share ownership, no new California Western shares would need to be issued, and no exchange of shares would be necessary. Second, California Western would split its common stock 2.407 shares for 1, resulting in 626,404 shares of common stock issued and outstanding.<sup>5</sup> The boards of the two companies have determined the amount of capital which will have to be raised for capital projects, and have decided that the present shareholders should retain 50.5% ownership of the surviving company after the stock transaction. Accordingly, the third part of the transaction is to issue additional common shares to be offered publicly in return for the remaining 49.5% ownership interest.

[\*8]

The applicant calculates that the new issue must consist of 614,000 additional common shares in order to maintain an ownership ratio of 50.5/49.5% between current and prospective shareowners. The offering price is set at \$ 7.50 per share to raise a total of \$ 4,605,000 from the sale of this number of shares.<sup>6</sup> At the conclusion of the transaction the total capitalization of the corporation would be \$ 5.9 million with 1,249,404 shares of stock issued and outstanding, according to the applicant.

According to the application, the purposes for which these proceeds would be used are:

1. Rehabilitation or upgrading of track and structures to handle 265,000-lb. gross weight cars (compared to 240,000-lb. maximum gross weight cars currently) for handling [\*9] traffic of the railroad's principal shipper. The current weight limitation places this customer at a competitive disadvantage because it must pay a higher rail rate per unit than other lumber companies, and many shipments are allegedly lost to the railroad as a result. The applicant has given this project the highest priority, and estimates that 47% of the proceeds of the new stock issuance will be devoted to this purpose.
2. Acquisition of a diesel locomotive and passenger cars to restore Willits-based passenger trains, which were eliminated some years ago.
3. Acquisition of an additional steam locomotive and passenger train set to add more steam-powered passenger trains out of Fort Bragg.
4. Refurbishment of passenger equipment, stations, and facilities.
5. Replacement of debt with equity to reduce fixed charges, currently amounting to about \$ 96,000 annually.

The applicant states that the public offering of the new shares will be made pursuant to a permit issued by the California Commissioner of Corporations, and a Regulation A Exemption from the United States Securities and Exchange Commission.

## Discussion

Section 817 of the PU Code specifically restricts the issuance [\*10] of stock by a public utility to use for certain enumerated purposes.<sup>7</sup> Those purposes include the acquisition of property; construction, completion, extension, or improvement of its facilities; improvement or maintenance of its service; and discharge of lawful obligations.

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<sup>5</sup>We note that when we multiply the number of issued and outstanding shares, 260,229, by 2.407, the product is 626,371 shares, rounded down to the nearest whole number. We do not know the reason for the discrepancy between the figure offered in the application and that which we obtain by means of this computation.

<sup>6</sup>Our calculation of the number and price of newly issued shares would differ slightly from that of the applicant, based upon the number of currently outstanding shares. See previous note. Shares issued both before and after the new issuance would be of the same class.

<sup>7</sup>Applicant is a common carrier, see PU Code Section 211, and is therefore a public utility under California law. PU Code 216(a). Provisions in the PU Code which regulate public utilities in general regarding the issuance of securities consequently apply to the activities of the

Before a public utility may issue stocks and stock certificates, it must obtain an order from this Commission authorizing the issue, stating the amount of the issue and the purposes to which the proceeds are to be applied, setting forth the Commission's opinion that the things to be paid for by the issue [\*11] are reasonably required for the purposes specified in the order, and specifying that such purposes are not reasonably chargeable to operating expenses or income. PU Code Section 818. In addition to refusing or granting permission for the issue, the Commission may grant permission for the issue in lesser amount than applied for, or grant it subject to such conditions as it deems reasonable and necessary. PU Code Section 819.

The application essentially asks us to approve all of California Western's past and proposed stock issues, including those for which it previously failed to obtain approval through its error or inadvertence. Our task is to ensure that all stock was (and will be) issued for proper purposes, and that the proceeds were (or will be) applied to those purposes. Although PU Code Section 822 also gives us discretion to approve the terms and conditions of issuance and the fairness of such terms and conditions after a hearing, we have not held a hearing, nor have we made a determination regarding the fairness of any past or future stock issue.

### **Nunc Pro Tunc Authority for Previous Stock Issues**

California Western seeks approval for several previous stock issues, completed [\*12] in each instance without this Commission's prior approval. California Western explains it was operating under the belief that authority for these stock issues was subsumed under the STB exemption, and now seeks to correct the error. It cites D.97-02-007 as authority for retroactively approving a stock issue that had not received timely approval before the transaction took place, on the grounds that the issue was for proper purposes and not adverse to the public interest.

The STB exemption process, as explained above, is available in appropriate circumstances as a substitute for formal approval of the construction, acquisition, or operation of a railroad line pursuant to [49 U.S. Code Section 10901](#). That statute only regulates those activities enumerated in the statute. Although an application for exemption is required to include information about the manner by which the applicant proposes to finance construction or acquisition, and specifically about the kind and amount of securities to be issued, the authority granted under the exemption plainly does not address the financing aspects. [49 CFR Section 1150.6 \(a\)](#). In the present instance, the Notice published by STB refers only to exempting [\*13] acquisition of the rail line and other assets from the applicant's predecessor, but makes no reference whatever to the type or manner of financing.

Under these circumstances, the applicant's assertion it was "under the impression" that authority for several stock issues was granted through the exemption process strikes us as disingenuous. Moreover, D.97-02-007, which the applicant cites as authority for granting retroactive approval, is inapposite. In that decision the Commission merely extended authority which had been granted several years before, and which was about to expire at the time the application was filed. To bridge the gap after the authority lapsed until the decision was issued several months later, the Commission granted the authority nunc pro tunc on the decision. Here the Commission has given no prior approval whatever, and the request therefore comes before us for the first time in the present application.

Although the grounds for applicant's request are flawed, the application reflects that the proceeds of previous stock issues were used for proper purposes. Specifically, the application states that those proceeds were used for acquisition of the railroad and [\*14] associated property, repair of the property, performance of deferred maintenance, acquisition of maintenance equipment, maintenance of working capital, and payment of interest expense on debt. This is consistent with the results reported in the financial statements submitted with the application, and complies with the requirements of PU Code Section 817, and no harm will result from belated approval. On the other hand, withholding approval of previous stock issues would create a hardship for the investors who have already acquired California Western and its associated properties, and jeopardize rail service which now serves shippers and the general public. Although we disfavor granting retroactive approval of stock issues, we will do so here subject to a requirement that California Western account for its disposition of past stock issuance proceeds pursuant to PU Code Section 824.

### **Approval of the Merger, Stock Split, and New Stock Issue**

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applicant. Jurisdiction to regulate the issuance of stock or other evidence of ownership by a public utility is vested in this Commission. See PU Code Section 816.



California Western's request for approval of the transaction which will result in issuance of approximately 614,000 additional shares of common stock to raise \$ 4.6 million is timely. We are principally concerned whether the purposes for which [\*15] the proceeds will be spent will conform to the requirements of PU Code Section 817. Our approval of other aspects of the transaction is essentially ministerial. PU Code Section 854 requires the applicant to secure our authorization to merge Land Company into California Western, but because both companies now have identical ownership, this merger is merely one of form rather than substance. No public interest is involved, and we will approve the merger transaction.

Any permissible use to which the sale proceeds will be applied, as reflected in the application, will benefit the public by improving the safety, service, and reliability of the railroad. The application sets forth the following list of purposes for which California Western proposes to use the proceeds of the public offering over an 18-month period. The applicant states that if less than the entire \$ 4.6 million is raised, the proceeds will be used in the indicated order of priority:

1. Cost of Issuance	\$ 200,000
2. Track, Roadbed and Bridge Rehabilitation	1,000,000
3. Purchase Maintenance of Way Equipment	70,000
4. Purchase/Rehabilitation of Locomotives/ Passenger Equipment	250,000
5. Track Roadbed and Bridge Rehabilitation	1,150,000
6. Purchase/Rehabilitation Steam Locomotives	300,000
7. Rehabilitate Existing Coaches	80,000
8. Northspur and Picnic Area Improvements	180,000
9. Willits Depot Rehabilitation	125,000
10. Debt Retirement	1,245,000
TOTAL	\$ 4,600,000

[\*16]

These purposes comply with PU Code Section 817. <sup>8</sup> We will therefore approve the proposed transaction.

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<sup>8</sup> Section 817 specifically allows a public utility to issue stocks for the acquisition of property; the construction, extension, or improvement of its facilities; the improvement or maintenance of its service; the discharge or lawful refunding of its obligations; and the reorganization or readjustment of its indebtedness or capitalization upon a merger, consolidation, or other reorganization. The proposed stock issue would be used for all of these purposes.

## Conclusion

We will approve the application. PU Code Section 823(a) prohibits a public utility, without the consent of the Commission, to apply any part of the stock issue, or any proceeds thereof, to any purpose not specified in the Commission's order, or to any purpose specified in the order in excess of the amount authorized for such purpose, or issue or dispose thereof on any terms less favorable than those specified in the order. The burden is therefore [\*17] upon the applicant to ensure that it uses the proceeds in the manner and to the extent set forth in the application.

In Resolution ALJ 176-2992 dated May 7, 1998, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status, public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-2992.

## Findings of Fact

1. Applicant is a common carrier railroad engaged in interstate commerce. Applicant operates railroad passenger and freight services between Fort Bragg and Willits, California.
2. Land Company is a nonutility affiliated with applicant.
3. The directors and shareholders of applicant and Land Company respectively are, and at all material times have been, identical.
4. Applicant obtained its operating authority from the federal STB by filing a verified Notice under [49 CFR Section 1150.31](#) on August 9, 1996. On August 12, 1996, the STB published the Notice in Finance Docket No. 33005 (*61 FR 42936* (August 19, 1996)). The Notice, on its face, does not address any financial aspect of the acquisition, [\*18] including the issuance of stock to raise funds for the purchase.
5. Applicant and Land Company were organized to purchase the railroad and associated real property and other assets from California Western Railroad, Inc., an Arizona corporation.
6. At the time applicant and Land Company acquired the railroad and other assets, applicant issued 171,350 shares of common stock. For each share of applicant's stock purchased, the stockholders received a share of Land Company stock. No authority was requested from this Commission for applicant's initial stock issue.
7. Between March and the end of May 1997, a total of 50,000 shares of applicant's common stock were issued to investors in various transactions. No authority was requested from the Commission for these stock issues.
8. Sometime after May 31, 1997, 38,879 shares of applicant's common stock were issued. No authority was requested from the Commission for this issue.
9. The application states that the uses to which all funds raised through previous stock issues have been devoted are the repair of storm and disaster damage, performance of deferred maintenance, purchase of maintenance-related assets, and maintenance of working capital. [\*19] Nothing in the record of this proceeding is inconsistent with the applicant's claim that these proceeds were used in this manner.
10. The applicant proposes to merge with Land Company. Applicant would be the surviving corporation. As part of this transaction all of Land Company's stock would be canceled.
11. Following the merger of applicant with Land Company, applicant proposes to split its issued and outstanding shares 2.407 shares for one.
12. Following the stock split, applicant proposes to issue an additional number of shares to the public in an amount equivalent to 49.5% of the total number of issued and outstanding shares, at a price of \$ 7.50 per share. All shares would be common stock of the same class. Sale of the new issue is intended to raise approximately \$ 4.6 million of capital.

13. The applicant states that the purposes for which the proceeds of the proposed issue will be used are to rehabilitate or upgrade track and structures to be able to handle rail cars of 265,000 pounds gross weight; acquire a diesel locomotive and passenger coaches for a new Willits-based passenger operation; acquire an additional steam locomotive and passenger train set for operation of an [\*20] additional Fort Bragg-based steam train; refurbish passenger equipment, stations and facilities; and replace debt with equity to reduce fixed charges.
14. The items for which the applicant states the proceeds of previous stock issues have been used were reasonably required for the purposes specified in this order, and such purposes were not reasonably chargeable to operating expenses or to income.
15. The items to be paid for by the proposed stock issue are reasonably required for the purposes specified in this order, and such purposes are not reasonably chargeable to operating expenses or to income.
16. Granting this Commission's approval of applicant's previous stock issues must be retroactive.
17. The Commission disfavors granting any authority retroactively, and does so only in extraordinary circumstances.
18. Withholding approval of applicant's previous stock issues would create a hardship for existing investors and jeopardize the operation of common carrier rail services by the applicant.
19. Approving applicant's proposed new issue of approximately 614,000 shares of common stock is in the public interest.
20. No protest has been filed in response to the application.
21. No hearing [\*21] has been held in this proceeding.
22. No finding is made in relation to the terms and conditions of any transaction which is the subject of this proceeding, or the fairness thereof.

#### Conclusions of Law

1. Applicant is a public utility within the meaning of Section 216 (a) of the PU Code.
2. The purposes for which applicant states the proceeds of all previous stock issues have been used comply with Section 817 of the PU Code.
3. The purposes for which the proceeds of the proposed stock issue will be used comply with Section 817 of the PU Code.
4. Applicant's previous stock issues should be approved nunc pro tunc.
5. Applicant's proposed merger with Land Company should be approved.
6. The approvals granted in the order should be subject to requirements to account for the disposition of the proceeds of stock issues, pursuant to PU Code Section 824.

#### ORDER

**IT IS ORDERED** that:

1. California Western Railroad, Inc. (applicant) is authorized nunc pro tunc to issue 260,229 shares of common stock at a par (stated) value of \$ 5.00 per share for the purposes of acquiring a railroad and associated property from California Western Railroad, Inc., an Arizona corporation; repairing [\*22] said property; performing maintenance on said property; acquiring additional equipment and rolling stock for the maintenance of the property; maintaining the level of initial working capital available as of the date of acquisition; and paying interest expense on debt.
2. On or after the effective date of this order, but not more than 30 days after applicant has received all regulatory approvals required by law, applicant is authorized to merge with California Western Land Associates, Inc., with applicant to be the

surviving corporation following the merger. All issued and outstanding shares of California Western Land Associates, Inc. shall be canceled, and there shall be no new issue or exchange of shares as part of this merger transaction.

3. Applicant is authorized, immediately upon completion of the merger transaction as specified in the preceding paragraph, to split its then existing shares of common stock in the amount of 2,407 shares for one, such that the total number of shares issued and outstanding shall be the product of 2,407 and the number of shares issued and outstanding upon completion of the merger.

4. Applicant is authorized, immediately upon completion of the stock [\*23] split as described in the preceding paragraph, to issue additional shares of common stock of the same class as the shares which are then issued and outstanding, at no par value, in a number that is equivalent to 49.5% of the sum of the new issue and the otherwise issued and outstanding shares, for total consideration not exceeding \$ 4,600,000.

5. The purposes and maximum amounts for which the proceeds of the newly issued shares may be used are as follows:

(1.) Cost of Issuance	\$ 200,000
(2.) Track, Roadbed and Bridge Rehabilitation	1,000,000
(3.) Purchase Maintenance of Way Equipment	70,000
(4.) Purchase/Rehabilitation of Locomotives/ Passenger Equipment	250,000
(5.) Track Roadbed and Bridge Rehabilitation	1,150,000
(6.) Purchase/Rehabilitation Steam Locomotives	300,000
(7.) Rehabilitate Existing Coaches	80,000
(8.) Northspur and Picnic Area Improvements	180,000
(9.) Willits Depot Rehabilitation	125,000
(10.) Debt Retirement	1,245,000
TOTAL	\$ 4,600,000

If the total proceeds received from the sale of this issue are less than the maximum authorized by this order, the actual proceeds received shall be applied in the amounts and in the priority order indicated [\*24] in this paragraph until such proceeds are exhausted. In no event shall the proceeds of this issue be used for any purpose other than the acquisition of property by the applicant; the construction, extension, or improvement of applicant's facilities; the improvement or maintenance of applicant's service; the discharge or lawful refunding of applicant's obligations; or the reorganization or readjustment of applicant's indebtedness or capitalization as part of the merger and stock issue, without the specific approval of this Commission.

6. In no event may the proceeds of any stock issue authorized by this order be charged to operating expenses or income.

7. Within 30 days after the effective date of this order applicant shall pay all fees with respect to previous stock issues as required by Public Utilities Code (PU) Section 1904.1. The amounts of these fees shall be computed in accordance with PU Code Section 1904 (b), and interest at the legal rate shall be added to each fee from the actual date of the issue until the date of payment of the fee.

8. Applicant shall pay the fee required by PU Code Section 1904.1, and computed in accordance with PU Code Section 1904 (b), before issuing [\*25] any shares pursuant to Paragraph 4 of this Order.

9. The staff of this Commission shall conduct such inquiry or investigation regarding the disposition of the proceeds of all sales of stocks and stock certificates, in such detail as is necessary, to insure that such disposition has been, and will be, for the purposes specified in this order. The applicant shall account for such disposition in the form and detail required by staff in the discharge of this duty, and upon reasonable request shall produce such witnesses, books, papers, documents and contracts, and file such data as staff deems to be of assistance in conducting its inquiry or investigation.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

CA Public Utilities Commission

Decisions

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