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July 14, 2017**

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumer Protection and Enforcement Division
Transportation Enforcement Branch

San Francisco, California
Date: July 13, 2017
Resolution No.: TL-19125

RESOLUTION

**RESOLUTION TL-19125 RESOLVES THE REQUEST FOR
RECONSIDERATION OF ADESSA CALIFORNIA, LLC DBA
BRASHER'S AUTO AUCTION CEASE AND DESIST ORDERS**

SUMMARY

This resolution resolves a request by Adesa California, LLC, d/b/a Brasher's Sacramento (now "BSAA Capital, Inc.") and Brasher's San Jose Auto Auctions (hereinafter collectively known as "Adesa"), for reconsideration of two cease and desist orders. The Transportation Enforcement Branch of the California Public Utilities Commission's (Commission or CPUC) Consumer Protection and Enforcement Division (CPED) issued the orders on July 11, 2016 and September 14, 2016, respectively. Those orders prohibited Adesa from providing shuttle services for its customers and employees to and from its auction site because Adesa had failed to obtain the requisite operating authority from the CPUC. The cease and desist orders required Adesa stop its operations until it obtained a Z permit pursuant to Public Utilities (PU) Code § 5384. The Z permit is required because Adesa transports passengers incidental to its for-profit auction business. The Commission's cease and desist orders are affirmed.

BACKGROUND

The CPUC regulates and licenses passenger carriers in California pursuant to the Passenger Charter-Party Carriers' Act (PU Code § 5351, *et seq.*). PU Code § 5371 states that it is unlawful for any carrier to operate without valid authority.

Adesa operates a network of automobile auction services across the country, including California. As an adjunct service to its automobile auction business, Adesa offers to transport customers and employees to and from its auction sites. It provided this transportation service in passenger vehicles designed or used to transport fewer than 15 passengers, including the driver. Adesa did not charge for this service, but only provided the service to people attending its auctions or to Adesa's employees traveling to or from its auctions.

Prior to issuance of the cease and desist orders, Adesa operated under a Commission-issued Z permit, which had been issued to Brasher's Sacramento Auto Auction on April 1, 2014.¹ After learning that Adesa's liability insurance coverage would lapse as of November 1, 2014, the CPUC issued a "Notice of Impending Suspension" on October 2, 2014, and conditioned operating authority on Adesa's obtaining of coverage within 90 days after the effective date of the suspension. Adesa failed to obtain liability coverage, and the Commission subsequently issued an "Order of Suspension" on November 3, 2014. Finally, the Commission issued an "Order of Revocation" on January 30, 2015, revoking Adesa's Z permit for failure to maintain adequate insurance, as the Commission requires.²

On July 11, 2016, CPED issued the first "Notice to Cease and Desist" (First Notice) to Adesa for continuing to operate its shuttle transportation services without possessing a Commission-issued Z permit. The First Notice cited PU Code § 5384(a) which addresses passenger carriers that do not hold themselves out to serve the general public but do conduct transportation services incidental to their business.

On September 14, 2016, CPED issued a "Second Notice to Cease and Desist" (Second Notice) to Adesa. The Second Notice rescinded Adesa's application to register as a Private Carrier with the Commission's License Section, stating that Adesa did not meet the requirements to register as a Private Carrier as set forth in PU Code § 4001. The Second Notice redirected Adesa to immediately cease and desist all California advertisements and operations as an unlicensed charter-party carrier until it obtained a Z permit.

On September 23, 2016, Adesa sent a letter to the Commission's Legal Division disputing the investigative findings of Commission staff, and requested a legal interpretation on the applicability of the Commission's permit and registration requirements for not-for-hire passenger transportation in small motor vehicles.

In a letter sent to Adesa on May 17, 2017, Legal Division declined to provide an interpretation, as this was a matter that may be brought before the Commission.

On February 15, 2017, Adesa sent a letter to CPUC Executive Director Tim Sullivan, requesting a legal interpretation on the applicability of the Commission's permit and registration requirements for not-for-hire passenger transportation in small motor vehicles.

¹ Brasher's Sacramento Auto Auction obtained a Z permit on April 1, 2014 after being issued a Notice to Cease and Desist on February 1, 2014.

² See "Notice of Impending Suspension," dated October 2, 2014; "Order of Suspension," dated November 3, 2014; and "Order of Revocation," dated January 30, 2016.

On March 21, 2017, Executive Director Sullivan responded, informing Adesa that its request for reconsideration is being forwarded to the Director of CPED, and that a Resolution would be issued and voted on by the full Commission.

REQUEST FOR RECONSIDERATION

In its February 15, 2017 letter, Adesa alleges it does not meet the definition of a charter-party carrier under PU Code § 5384, nor does it meet the definition of a private carrier under PU Code § 4000 because it is not a “bus” as defined under Vehicle Code § 233.

Adesa disputes the Commission staff’s determination that a Z permit is required on the grounds it does not receive compensation for transporting its passengers and that it operates vehicles that transport less than 15 passengers. Based on these facts, Adesa further seeks clarification that: (1) Adesa’s transportation services do not implicate the Z permit, and (2) the services do not require a private carrier registration due to the small size of the vehicles.

DISCUSSION

I. The Public Utilities Code Authorizes The Commission To Regulate Adesa Either As A Charter-Party Carrier or As A Private Carrier

The Commission’s jurisdiction over Adesa is set forth in PU Code § 5381, *et seq.*, and § 4000, *et seq.*, which delegate to the Commission its regulatory and enforcement powers over charter-party carriers and private carriers.

A. Adesa is a Not-For-Hire Passenger Carrier That Receives a Business or Economic Benefit and is Subject to Commission Jurisdiction

The Commission’s jurisdiction over charter-party carriers is defined in PU Code § 5381, which grants the Commission authority to “supervise and regulate every charter-party carrier of passengers in the State and may do all things which are necessary and convenient in the exercise of such power and jurisdiction.”

PU Code § 5360 defines charter-party carriers, and states in part:

“Charter-party carrier of passengers” means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

Adesa argues that since it does not receive compensation from its customers or employees in exchange for its transportation service, it does not fit within the definition of a charter-party carrier. We reject this argument.

In Decision (D.) 13-09-045, the CPUC exercised its jurisdiction over Transportation Network Carriers (TNCs) although they did not fit neatly into the conventional understanding of a charter-party carrier.³ In that proceeding, Lyft and SideCar argued that any payment for rides arranged through their Internet applications, or “apps,” is voluntary and not for compensation. The Commission rejected those arguments, and held that transportation furnished by business enterprises without charge is also “for compensation” if the organization receives either an economic or business benefit.⁴ The Commission explained,

Although the phrase “for compensation” is not defined by PU Code § 5360, the plain-meaning interpretation of PU Code § 5360 in D.69231 (June 15, 1965) informs our decision in this proceeding.

In D.69231, a skate arena owner was ordered to cease and desist transporting passengers to his skate arena until he obtained his TCP certificate. While the record was unclear as to whether the owner would charge a fee for the proposed service, the Commission determined that even if the transportation was for free, “transportation furnished by business enterprises without charge is also ‘for compensation’ if the organization sponsoring the trip receives a business benefit.” The Commission reiterated this interpretation in D.81805 (August 28, 1973) where we reasoned that “it was not necessary for the staff to prove that respondent actually received money consideration for the transportation in question. It is enough that he received an economic benefit.”⁵

Consistent with the Commission’s interpretation of PU Code § 5360 in D.13-09-045 and prior decisions, Commission’s Z-permitting requirements applies even though Adesa

³ See D.13-09-045 at pp. 11-12.

⁴ See D.13-09-045, p. 19.

⁵ See D.13-09-045 at pp. 18-19. See also D.13-09-045, fn 28 [“The Commission reached a similar conclusion with respect to free service provided by PSCs, finding that the service was for compensation. (See *Peter J. Van Loben Sels (Valley Transit Lines) v. B.J. Smith et al., copartners (Cal. Transit Lines)*, 49 Cal. P.U.C. 290 (1950); and *Richard Chala v. Morris Gordon of Gordon’s Outlet Store, et al.*, Decision No. 57356 in Case No. 6152 (1958), unreported. Our reasoning is also similar the Legislature’s when it added Section 17510.1 to the Business and Professions Code: ‘As used in this article, ‘sale’ shall include a gift made with the hope or expectation of monetary compensation.’ Thus, a donation or a gift can still be considered a form of compensation.”]

does not receive payment for its transportation services *directly*. By providing its customers transportation to and from its auction site, Adesa derives a business and economic benefit *indirectly* through the profits gained on the sales at its auctions. Therefore, because its transportation service is offered on a commercial enterprise basis, Adesa is not exempt from Commission jurisdiction.⁶

Furthermore, in addition to holding charter-party carrier status, Adesa's transportation service falls within "specialized carrier" status under PU Code § 5384 by providing transportation services to its customers incidental to its auction business. PU Code § 5384(a) requires the Commission issue permits to passenger carrier operations that fall within the following categories:

Specialized carriers, who do not hold themselves out to serve the general public, but only provide service under contract with industrial and business firms, governmental agencies, and private schools, or who only transport agricultural workers to and from farms for compensation, ***or who only conduct transportation services, which are incidental to another business.*** This permit shall be designated a "Z" permit.⁷

Under this provision, while the requirement of compensation is explicitly stated for the transport of agricultural workers, it is not explicit for transportation services that are incidental to another business.⁸ Thus, it is irrelevant whether Adesa receives compensation for transporting its customers for Z permit purposes. Because Adesa conducts its transportation services for its customers incidental to its for-profit auction business, PU Code § 5384 requires Adesa to obtain a Z permit.

⁶ "The term 'commercial' denotes an enterprise 'having financial profit as a primary aim.'" (*Siegel v. City of Oakland* (1978) 79 Cal. App. 3d 351, 358.)

⁷ Emphasis added.

⁸ It is also important to note that PU Code § 5353 enumerates those carriers not subject to Commission jurisdiction. PU Code § 5353(f) specifically exempts "[p]assenger vehicles carrying passengers on a noncommercial enterprise basis." However, it does not exempt passenger vehicles carrying passengers on a commercial enterprise basis, which Adesa is found to be doing here.

B. Adesa May Also Be Considered a Private Carrier Subject to the Commission's Jurisdiction

Adesa further asserts its services do not require private carrier registration because of the small size of the vehicles used, since it transports fewer than 15 passengers in its vehicles. This argument is also without merit.

The Commission's jurisdiction over private carriers of passengers is set forth in PU Code § 4000, *et seq.*, which requires private carriers to, among other things, register its operation with the Commission,⁹ and carry a certificate of insurance or surety bond evidencing protection against a liability judgment.¹⁰ By statute, the Commission may deny or suspend a private carrier of passenger's registration for failure to meet certain registration requirements,¹¹ including when the insurance or surety bond has lapsed or been terminated.¹²

PU Code § 4001(a) defines a "private carrier" as:

...a not-for-hire motor carrier, as defined in Section 408 of the Vehicle Code, who transports passengers and is required to obtain a carrier identification number pursuant to Section 34507.5 of the Vehicle Code...¹³

"Motor carriers," according to Vehicle Code § 408, are "the registered owner, lessee, licensee, or bailee of any vehicle set forth in [Vehicle Code §] 34500, who operates or directs the operation of any such vehicle on either a for-hire or not-for-hire basis."

Vehicle Code § 34500(c) includes "buses" within its list of vehicles. Vehicle Code § 233 defines a "bus" as "any vehicle, including a trailer bus, designed, used, or maintained for

⁹ PU Code § 4005 states in part, "No private carrier of passengers shall operate a motor vehicle on any public highway in this state unless its operation is currently registered with the commission."

¹⁰ PU Code § 4010 requires private carriers, as a condition for registration, to provide "a currently effective certificate of insurance or a surety bond evidencing protection against liability imposed by law for the payment of damages for personal injury to, or death of, any person or property damage, or both."

¹¹ PU Code § 4007(b) provides that the Department of the California Highway Patrol—in conjunction with the Department of Motor Vehicles and State Board of Equalization—periodically transmit to the Commission a list of passenger carriers to the Commission, and that "Upon receipt of the list, the commission shall notify the private carriers of passengers of the registration requirements and of the penalties for failure to register."

¹² PU Code § 4010(b).

¹³ PU Code § 4001(a) exempts transportation service provided by the operator of an automobile rental businesses and services provided by the operator of a hotel, motel, or other place of temporary lodging in vehicles owned or leased by that operator.

carrying more than 15 persons including the driver.” Subpart (b) of Section 233 also states,

(b) A vehicle designed, used, or maintained for carrying more than 10 persons, including the driver, which is used to transport persons for compensation or profit, or is used by any nonprofit organization or group, is also a bus.

Here, Adesa’s letter for reconsideration fails to mention the actual size of the vehicles it operates, and whether those vehicles are designed to carry fewer than 10 passengers. Adesa states, however, that its vehicles transport fewer than 15 passengers. Should Adesa’s vehicles carry 10 or more passengers, Adesa’s vehicles certainly fall within the definition of a “bus” under Vehicle Code § 233(b), and the Commission may require Adesa to register as a private carrier as required by PU Code § 4005.

Private carriers also are, by definition, “not-for-hire motor carriers.” The term, “not-for-hire” is not clarified in statute or prior Commission decisions, but the term can be reasonably interpreted to mean that a motor carrier that does not accept compensation for transportation is also “not-for-hire.” Thus, theoretically, Adesa might also be considered a private carrier as it does not charge its customers or employees for its transportation services. However, that theoretical interpretation does not apply here, because, for reasons described *supra*, Adesa derives an economic and business benefit by providing the transportation service incidental to its for-profit business. Accordingly, we conclude that Adesa fits squarely within the meaning of a charter party carrier and should be treated as a charter-party carrier for regulatory and enforcement purposes.

We turn now to the issue of whether the CPUC’s rescission of Adesa’s private carrier registration in the Second Notice was appropriate. Adesa failed to renew its Z permit after receiving the First Notice on July 11, 2016. Instead, Adesa attempted to register as a private carrier with the Commission’s License Section.¹⁴ In the Second Notice issued to Adesa on September 14, 2016, CPED staff indicated the License Section could not verify Adesa met the statutory requirements as set forth in PU Code § 4000, *et seq.*, and accordingly rescinded Adesa’s private carrier registration.

CPED cited PU Code § 4005, which states, “[t]he commission shall grant registration upon the filing of the application and the payment of the fee as required by this article, subject to the private carrier of passengers’ compliance with this chapter.” Because Adesa did not comply with the conditions of registration as a private carrier, we conclude that CPED staff’s action to rescind Adesa’s private carrier registration was proper.

¹⁴ While Adesa itself never held a private carrier permit, its San Diego location previously registered as a private carrier (CA195131). Registration was cancelled on February 2, 2004 for failure to renew and pay fee.

II. The Commission's Cease and Desist Orders Are Proper.

For the reasons discussed supra, we find the cease and desist orders issued on July 11, 2016 and September 4, 2016 by CPED's Transportation Enforcement Branch are proper. CPED's Transportation Enforcement Branch acted within its delegated authority to issue these orders based on its determination that Adesa violated provisions of PU Code.

Adesa previously operated on a Z permit that the Commission issued on April 1, 2014, and subsequently revoked on January 30, 2015 for Adesa's failure to maintain adequate insurance. After Adesa's Z permit revocation, Adesa still continued to operate without submitting the proper documentation to the Commission as required by the PU Code and noticed in the cease and desist orders. We conclude that CPED staff's actions were proper, and the cease and desist orders are affirmed.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was mailed to the parties on May 30, 2017, in accordance with Cal. Pub. Util. Code § 311(g). The Commission received comments from Adesa California, LLC d/b/a Brasher's Auto Auctions on June 19, 2017. No parties submitted reply comments.

In its comments, Adesa disagrees with the conclusions set forth in the Draft Resolution. Adesa raises several arguments, in large part repeating the same arguments set forth in its February 15, 2017 letter to Executive Director Sullivan. We have addressed many of these arguments in this Resolution, and do not find Adesa's new arguments persuasive.

Adesa asserts we do not account for the fact that Adesa routinely provides free shuttle service to individuals who never end up purchasing a vehicle from one of the company's various auction sites.¹⁵ To Adesa's point, the fact that not all individuals end up purchasing a vehicle at the company's auction site does not remove Adesa from charter-party carrier designation under PU Code § 5360. In D.69231, the Commission interpreted the meaning of "for compensation" to also encompass potential customers offered free transportation—the consideration was the implied promise of the passenger that he is a prospective customer.¹⁶ Thus, it is the *possibility of receiving this economic benefit* that is the important factor in determining charter-party carrier status. Regarding the skate arena owner in D.69231, the Commission observed, "Applicant would receive a

¹⁵ Comments of Adesa California LLC on Draft Resolution, p. 6.

¹⁶ In D.69239, the Skate Arena owner testified his "purpose in performing the transportation service would be to advertise his skate arena business and thereby stimulate increased patronage for it." D.69231 at 406, 408.

business benefit and compensation from the increased patronage for his skate arena business resulting from the advertising.”¹⁷ Moreover, the fact that Adesa provides transportation for its own employees¹⁸ does not impact our analysis here. While Adesa’s employees may also use the transportation service—which is not the subject of our cease and desist orders—the primary purpose of offering the passenger vehicle service is to transport potential customers, with the expectation that the offered incentive would entice those individuals to purchase vehicles at the auction site.¹⁹

Finally, Adesa states regulation of every business in the state that provides incidental transportation services for its customers and derives some economic benefit would leave no business beyond the CPUC’s reach.²⁰ The CPUC’s authority is not so broadly sweeping as Adesa suggests, as indicated by the long list of exemptions set forth in PU Code § 5353. The Legislature intended the Commission to regulate and enforce carrier and public safety only to the extent provided by the Act, and we have determined here that the cease and desist orders issued to Adesa is a proper exercise of that authority.

For these reasons and the reasons set forth above, we find that Adesa’s shuttle services is also considered “for compensation” for purposes of classifying it as a Charter-party Carrier of passengers subject to Commission jurisdiction.²¹

¹⁷ D.69231 at 409; *see also* D.13-09-045, 2013 Cal. PUC LEXIS 504, *30.

¹⁸ Comments of Adesa California LLC on Draft Resolution, p. 7.

¹⁹ We note the PU Code § 5353(h) provides an exemption for “[t]ransportation of persons between home and work locations or of persons having a common work-related purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when ridesharing is incidental to another purpose of the driver... This exemption does not apply if the primary purpose for the transportation of those persons is to make a profit.”

²⁰ Comments of Adesa California LLC on Draft Resolution, p. 8.

²¹ Adesa’s comments to the Draft Resolution further argues that because its services are not for compensation, the applicable definition for a “bus” in its situation for designation as a private carrier is Vehicle Code § 233(a) [“more than 15 persons including the driver”], since it transports passengers of 15 persons or less in its vehicles. (Comments of Adesa California LLC on Draft Resolution, p. 10.) However, because we find that Adesa is providing its services “for compensation,” the appropriate definition for private carrier designation is Vehicle Code § 233(b) [“carrying more than 10 persons, including the driver, which is used to transport persons for compensation or profit”].

FINDINGS OF FACT

1. Adesa California, LLC, d/b/a Brasher's Sacramento Auto Auctions and San Jose Auto Auctions (Adesa), operates a network of automobile auction services across the country, including California.
2. Adesa transports customers and employees to and from its auction sites, and does not charge a fee for this service.
3. Adesa provides transportation service in passenger vehicles designed or used to transport fewer than 15 passengers, including the driver.
4. Adesa operated under a CPUC issued Z permit, which was issued to Brasher's Sacramento Auto Auctions on April 1, 2014.
5. On October 2, 2014, the CPUC sent Adesa a "Notice of Impending Suspension," as Adesa's liability insurance coverage was set to terminate on November 1, 2016.
6. On November 3, 2014, the CPUC issued an "Order of Suspension" for failure to have a liability and property damage insurance policy on file with the Commission.
7. On January 30, 2015, the CPUC sent Adesa the "Order of Revocation," revoking Adesa's operating authority for failure to maintain adequate insurance on file with the Commission.
8. On July 11, 2016, the CPUC issued Adesa a "Notice to Cease and Desist" for continuing to operate its shuttle transportation services without possessing a Commission issued Z permit.
9. On September 14, 2016, the Commission issued a "Second Notice to Cease and Desist," rescinding Adesa's application to register as a Private Carrier with the Commission's License Section, and redirecting Adesa to immediately cease and desist all California advertisements and operations as an unlicensed charter-party carrier until it obtained a Z permit.
10. On February 15, 2016, the CPUC formally received Adesa's request seeking interpretation on the applicability of the Commission's permit and registration requirements for not-for-hire passenger transportation in small motor vehicles, and reconsideration of the cease and desist orders.

CONCLUSIONS OF LAW

1. The Commission has jurisdictional authority over Adesa, as provided under PU Code § 5381, *et seq.*, and § 4000, *et seq.*, which gives the Commission regulatory and enforcement powers over charter-party carriers and private carriers.
2. Adesa is a charter-party carrier within the meaning of PU Code § 5360, and subject to the registration requirements of the Passenger Charter-party Carriers Act.
3. Although Adesa does not charge its customers or employees for transportation, Adesa is considered a “charter-party carrier” because it derives a business and economic benefit from its transportation service from the profits gained on the sales from its automobile auctions.
4. Under PU Code § 5384, Adesa is required to obtain a Commission-issued Z permit, since Adesa is considered a “specialized carrier” that conducts transportation services incidental to another business.
5. Adesa may also be considered a “private carrier” within the meaning of PU Code § 4001 of the Interstate and Foreign Motor Carriers of Household Goods and Passengers Act, since its 15-passenger vehicles fall within the definition of a “bus” in Vehicle Code § 233.
6. Since Adesa derives an economic and business benefit by providing the transportation service incidental to its business, its services are “for compensation” for purposes of designating charter-party carrier status rather than as a private carrier, which operate on a “not-for-hire” basis.
7. Adesa failed to meet the statutory requirements as set forth in PU Code § 4000, *et seq.*, to establish private carrier status.

ORDER

1. The request for reconsideration by Adesa of the cease and desist orders is denied.
2. The cease and desist orders issued by CPED are affirmed.
3. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of July 13, 2017, and that the following Commissioners approved it:

/s/ TIMOTHY J. SULLIVAN
TIMOTHY J. SULLIVAN
Executive Director

MICHAEL PICKER
President

CARLA J. PETERMAN
LIANE RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners