

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

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September 27, 2022

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Ratesetting

TO PARTIES OF RECORD IN PETITION 22-03-015:

This is the proposed decision of Administrative Law Judge Gerald F. Kelly. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's November 3, 2022 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, ex parte communications are prohibited pursuant to Rule 8.2(c)(4).

/s/ ANNE E SIMON

Anne E. Simon

Chief Administrative Law Judge

AES:smt

Attachment

Decision **PROPOSED DECISION OF ALJ KELLY** (Mailed 9/27/2022)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Petition to adopt, amend, or repeal a
regulation pursuant to Pub. Util.
Code § 1708.05

Petition 22-03-015

**DECISION DENYING PETITION TO REPEAL
AND/OR AMEND RESOLUTION SR-34****Summary**

This decision denies the Petition of Union Pacific Railroad Company to institute a rulemaking to evaluate whether the Commission should repeal and/or amend Resolution SR-34. This proceeding is closed.

1. Background

On March 16, 2022, Union Pacific Railroad Company (UP), a Class I Railroad in California filed a Petition requesting that the Commission open a rulemaking proceeding to repeal and/or amend Resolution (Res.) SR-34, which adopted an allocation methodology for fees provided for in Public Utilities (Pub. Util.) Code § 421 for Class I Railroads. Resolution SR-34 was adopted by the Commission on January 21, 1992.¹ UP asserts in its Petition that the percentage allocation should be based on gross intrastate revenues rather than the current allocation set forth in Res. SR-34. BNSF Railway Company (BNSF), the other Class I Railroad in California filed a Response in opposition to UP's Petition on

¹ Res. SR-34 can be found at the following link: [SR34_19920121_.pdf\(ca.gov\)](https://www.cpuc.ca.gov/Pages/Resolutions/SR34_19920121_.pdf)

April 15, 2022. BNSF asserts in its Response that the allocation of fees should continue as set forth in Res. SR-34. UP filed a Reply to BNSF's Response on April 25, 2022.

2. Discussion

On January 21, 1992, Res. SR-34 was adopted to establish the initial fee to be paid by all railroad corporations in California as required by Pub. Util. Code § 422, as amended by Senate Bill (SB) 152 (1991). On October 9, 1991, Governor Pete Wilson signed SB 152 into law. Among other things, this legislation required the Commission to establish a fee to be paid by railroad corporations to recover the amount equal to the Commission's annual budget for investigating and enforcing rail safety activities. The Commission was required to establish the initial fee by January 31, 1992.

To determine the proper fee, the Commission is authorized by Pub. Util. Code § 422(h), which states:

The commission shall establish regulations for allocating the proportionate share of the fee established pursuant to paragraph (2) of subdivision (a) to be paid by the rail corporations within that class. The regulations may utilize gross intrastate revenues; track mileage within the state; terminals located within the state; loaded car miles traveled within the state; fuel consumption; or any other measure deemed by the commission to be appropriate in allocating the fee among railroad corporations. On or before January 15, 1992, railroad corporations as a group may submit a proposed plan of allocation to the commission, which the commission shall consider in establishing the regulations.

When Res. SR-34 was adopted by the Commission, it among other things, adopted the agreement Class I Railroad corporations reached for the percentage allocation of the total fees among themselves as the basis for distribution of the fee, rather than a formula presented by Commission staff that was based solely

on gross revenues generated within the state, including a fee that was to be paid by all.² The resulting allocation adopted in Res. SR-34 is depicted in the following table:³

Southern Pacific	52.5%
Atchison, Topeka, & Santa Fe	28.5%
UP	18.5%
Burlington Northern	0.5%

Since 1992, several railroad mergers have occurred and UP and BNSF are the only two Class I Railroads remaining in operation in California today. Southern Pacific and UP merged and operates as UP. Atchison, Topeka, and Santa Fe merged with Burlington Northern and operates as BNSF. Based upon the allocations adopted in Res. SR-34 as set forth in the table above and the mergers, BNSF is allocated 29 percent of fees used to fund Commission inspection activities of railroad infrastructure and UP the remaining 71 percent.

UP asserts that UP and BNSF currently each account for approximately 50 percent of gross Class I Railroad revenues in the state.⁴ UP contends that it is unjust and unreasonable for them to now be required to pay most of the fees and contends that it would be more equitable for the allocation of Commission fees to be based on gross revenues within the state.⁵ Although UP argues that the allocation would be better based on gross revenues within the state, UP fails to

² Res. SR-34 at 1-2.

³ *Id.* at 3.

⁴ UP Petition at 3.

⁵ *Ibid.*

acknowledge that they clearly have a much larger footprint in California as it relates to infrastructure within the state.

BNSF opposes the Petition and does not believe that the Commission should open a rulemaking. BNSF states that the Commission considered and discarded an approach based on gross revenues because of the consensus view of railroads that gross revenue was not a good allocation criterion.⁶ BNSF notes that the Commission instead adopted a cost allocation agreed upon by the railroads and that the railroads proposal was founded on a more relevant set of railroad characteristics that better reflected each railroad's infrastructure footprint including train miles, track miles, number of crossings, and gross revenues.⁷ BNSF acknowledges that there have been various consolidations since Res. SR-34 was adopted but states that these mergers did not meaningfully change the footprint of Class I Railroad infrastructure that formed the basis of the Commission's cost allocation.⁸ BNSF also notes that the railroads' gross revenues bear little relationship to the costs of the Commission's regulatory activities as a railroad's revenues are the product of a myriad of factors including the railroad's strategic business decisions and pricing structure.⁹

UP states that it discussed its concerns with BNSF to reach an agreement on updated fees, but these efforts were unsuccessful.¹⁰ UP also engaged in informal discussions with the Commission's Deputy Executive Director about the request for rulemaking and in response to this communication the

⁶ BNSF Response at 3.

⁷ *Ibid.*

⁸ *Id.* at 2.

⁹ *Id.* at 3.

¹⁰ UP Petition at 4.

Commission's Deputy Executive Director noted that, since UP and BNSF were unable to come to an agreement, formal Commission action would be necessary to alter the existing fee allocation methodology set forth in Resolution SR-34.¹¹

Although UP asserts that the current fee allocation is unjust and warrants being changed, it should be noted that the railroad mergers in question happened shortly after Res. SR-34 was adopted. As noted by BNSF in its Response to UP's Petition, BNSF became the owner of Atchison, Topeka, and Santa Fe's California railway infrastructure in 1995.¹² UP became the owner of Southern Pacific's California infrastructure in 1996.¹³ UP did not adequately explain how mergers in the early 1990s now affect the appropriate allocation of regulatory costs.

The fees being allocated fund the Commission's inspection of railroad infrastructure, including rights-of-way, facilities, equipment, and operations of railroads.¹⁴ BNSF notes in its Response that BNSF owns 25 percent of California track and that UP owns 75 percent.¹⁵ Additionally, BNSF notes that they own 25 percent of railway crossings and UP owns the remaining 75 percent in California.¹⁶ As noted above, BNSF is currently allocated 29 percent of the fees to fund the Commission's inspections of railroad infrastructure and UP the remaining 71 percent.¹⁷

¹¹ *Id.* at Attachment A, Commission Letter dated October 18, 2021.

¹² BNSF Response at 4.

¹³ *Ibid.*

¹⁴ See, Pub. Util. Code § 309.7.

¹⁵ Response at 4-5.

¹⁶ *Id.*

¹⁷ *Ibid.* at 3.

UP argues that the Commission should not base the fee allocation on infrastructure ownership because this is not a logical benchmark for allocating regulatory costs.¹⁸ UP asserts it is not logical because a railroad may own 70 percent of track mileage and rail crossings within a state without ever physically operating a train on those tracks or through rail crossings within the state.¹⁹ We find no merit in UP's hypothetical as this situation clearly does not exist with the Class I Railroad in California. UP owns most of the facilities in the state and certainly operates trains at those facilities and through the rail crossings.

UP also argues that the Commission must reconsider the user fee allocation method because the Commission originally sought to base user fees on gross revenues but opted not to do so because the Class I Railroads came to an agreement concerning the allocation method and there is no longer an agreement between the remaining two Class I Railroads.²⁰ Here, the parties came to an agreement concerning the allocation of user fees and this was the basis for our decision in Res. SR-34. There is nothing in the Commission's Rules of Practice of Procedure or decisions that require the Commission to reevaluate every decision because parties to an agreement no longer wish to have the agreement apply.

Pub. Util. Code § 422(h) clearly states that the Commission "may utilize gross intrastate revenues; track mileage within the state; terminals located within the state; loaded car miles traveled within the state; fuel consumption; or any other measure deemed by the commission to be appropriate in allocating the fee among railroad corporations." We believe that the railroads' ownership shares of

¹⁸ Reply of UP at 10.

¹⁹ *Ibid.*

²⁰ *Ibid.*

the infrastructure being regulated should serve as the benchmark for allocating the proportional cost of that regulation. We agree with BNSF that the railroads' gross revenues bear little relationship to the cost of the Commission's regulatory activities and therefore decline to accept UP's arguments.

Basing the user fee on the amount of infrastructure owned and operated within the state is proportionate to the cost of regulation. As noted above, BNSF owns approximately 25 percent of the track and rail crossings while UP owns the remaining 75 percent. BNSF pays 29 percent of the total user fee allocation and UP the remaining 71 percent. Considering the infrastructure owned by each Class I Railroad, this allocation is proportionate, just, and reasonable.

UP also argues that the Commission should reevaluate Res. SR-34 based upon an informal communication that UP had with Commission staff. UP sent a letter on September 29, 2021, concerning the issues it raises in its Petition. In response to UP's letter, a reply was sent on October 21, 2021, which noted "it appears formal commission action will be necessary to modify the agreement the CPUC adopted in 1992. Considering how much time has elapsed since that adoption ... it seems appropriate for the CPUC to examine which methodology is appropriate."²¹ This was an opinion expressed in a letter and not an indication that the Commission would grant UP's Petition to amend Res. SR-34.

We have examined the issues UP raised in UP's Petition, and we are satisfied that the user fee allocation should be proportionate to the amount of infrastructure that is being regulated and not based on revenues. For all the reasons set forth above, we decline to grant UP's Petition to amend and/or repeal Res. SR-34. We find that the current allocation of user fees for

²¹ Petition at Exhibit A.

Class I Railroads is proportionate, just, and reasonable.

3. Comments

The proposed decision of Administrative Law Judge (ALJ) Gerald Kelly in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

4. Assignment of Proceeding

Commissioner Genevieve Shiroma is the assigned Commissioner.
Gerald F. Kelly is the assigned ALJ.

Findings of Fact

1. On March 16, 2022, UP Railroad filed a Petition requesting the Commission open a rulemaking to revise the methodology for allocation of the fees provided for in Pub. Util. Code § 421 among Class I Railroads.
2. The methodology for allocation of these fees were adopted on January 21, 1992, in Res. SR-34. The allocation methodology adopted in Res. SR-34, was based upon an adopted agreement of Class I Railroad Corporations existing in California at that time.
3. There have been several mergers of Class I Railroads since Resolution SR-34 was adopted.
4. Sothern Pacific and UP merged and operates as UP.
5. Atchison, Topeka, and Santa Fe merged with Burlington Northern and operates as BNSF.
6. UP and BNSF are the only two remaining Class I Railroads in California.
7. BNSF owns approximately 25 percent of California track and rail crossings.

8. UP owns approximately 75 percent of California track and rail crossings.

9. Based upon the allocations adopted in Res. SR-34, the mergers resulted in BNSF being allocated 29 percent of the user fees charged to fund the Commission's regulatory duties.

10. Based upon the allocations adopted in Res. SR-34, the mergers resulted in UP being allocated 71 percent of the user fees charged to fund the Commission's regulatory duties.

Conclusions of Law

1. A railroad's ownership shares of the infrastructure being regulated should serve as the benchmark for allocating the proportionate cost of that regulation.

2. The current allocation mechanism for Class I Railroads is proportionate, just, and reasonable.

3. UP's Petition for the Commission to institute a rulemaking to consider amending the methodology for allocating user fees for Class I Railroad Corporations should be denied.

4. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. Union Pacific Railroad Company's Petition for the Commission to institute a rulemaking to consider amending the methodology for allocating user fees for Class I Railroad Corporations is denied.

2. Petition 22-03-015 is closed.

This order is effective today.

Dated _____, at Chico, California.