

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-397
Administrative Law Judge Division
[Date]

RESOLUTION

RESOLUTION ALJ-397. Resolves K.20-07-015 the Appeal of Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community (PSG-5308) from Citation F-5680 issued by the California Public Utilities Commission, Transportation Enforcement Branch on June 18, 2020.

SUMMARY

This resolution resolves K.20-07-015 by approving the settlement agreement and dismissing Citation F-5680, issued on June 18, 2020 by the California Public Utilities Commission, Consumer Protection and Enforcement Division, Transportation Enforcement Branch. This proceeding is closed.

BACKGROUND

Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community (Cogir) is a Delaware corporation operating in California. Cogir owns a senior living center in Vallejo, California which, among other things, provides complimentary transportation to its residents for personal excursions and appointments, which is funded by resident rents and fees.¹ Cogir operates one 18-passenger capacity minibus for transporting residents.²

On October 10, 2019, the California Highway Patrol (CHP) conducted a terminal inspection of Cogir's senior living center and found it failed to obtain authority from the California Public Utilities Commission (Commission) prior to operating as a tour bus in

¹ CPED Compliance Filing, Case Summary, Attach. 1 at 2.

² *Id.*, Case Summary, Attach. 1 at 13.

violation of Section 5387(a) of the California Public Utilities Code.^{3,4} The CHP notified the Commission of Cogir's noncompliance by letter, dated November 22, 2019.⁵

Based on review of the CHP inspection, CPED staff determined that on September 20, 2019 a driver from Cogir had operated its minibus under a Private Carrier of Passengers Certificate issued by the California Department of Motor Vehicles (DMV), but without authority from the Commission under a Transportation Charter Party permit pursuant to Section 5387(a).⁶

On December 12, 2019, CPED issued a cease and desist notice directing Cogir to immediately cease and desist advertisement and operation of their transportation service, punishable by a fine of \$5,000 and/or up to three months imprisonment.⁷

On June 18, 2020, CPED issued citation F-5680, fining Cogir \$1,000 for one count of operating as an unlicensed charter-party carrier of passengers in violation of California Pub. Util. Code § 5387(a).⁸ Cogir filed an appeal to citation F-5680 on July 15, 2020 (Appeal). CPED filed a compliance filing to the Appeal in accordance with Resolution ALJ-299 on July 27, 2020.

While a citation appeal hearing was scheduled in this proceeding, the citation appeal hearing was later taken off-calendar upon the parties' indication that a settlement agreement was reached. Due to the temporary suspension of in-person appeal hearings resulting from the Coronavirus Disease 2019 (COVID-19) pandemic, the assigned Administrative Law Judge (ALJ) (ALJ Kline) set a remote, expedited citation appeal hearing for September 10, 2020 by ruling, dated August 19, 2020. Cogir issued a notice to opt-out of the expedited citation appeal procedure on August 24, 2020. ALJ Kline reset the expedited citation appeal hearing as a citation appeal hearing by ruling, dated August 25, 2020. At Cogir's request, ALJ Kline reset the citation appeal hearing from September 10, 2020 to October 22, 2020, by ruling, dated August 31, 2020. Upon CPED's email communication that the parties reached a settlement agreement, ALJ Kline took

³ *Id.*, Case Summary, Attach. 1 at 7-13.

⁴ All references to "Section" or "Sections" herein refer to the California Public Utilities Code.

⁵ CPED Compliance Filing, Case Summary, Attach. 1 at 6.

⁶ *Id.*, Case Summary, Attach. 1 at 2.

⁷ *Id.*, Case Summary, Attach. 1 at 15.

⁸ Pub. Util. Code § 5384(a) states that the Commission shall issues permits to "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 as a "Z" permit."

the citation appeal hearing off-calendar by ruling, dated October 6, 2020. CPED and Cogir (Settling Parties) filed a joint motion for approval of a settlement agreement that resolved all disputed issues in this proceeding (Settlement Agreement) on November 12, 2020.

REGULATORY AUTHORITY

The Commission regulates charter party carriers of passengers primarily pursuant to the Passenger Charter-party Carriers' Act. This authority is separate and distinct from the authority to register private carriers of passengers pursuant to the Private Carriers of Passengers Registration Act. The authority to regulate private carriers of passengers was transferred from the Commission to the DMV on July 1, 2018 pursuant to Senate Bill 19.

Pursuant to Resolution ALJ-187, issued by the Commission on September 22, 2005, CPED is authorized to issue citations to various classes of transportation carriers for violation of the California Public Utilities Code and Commission orders. In turn, a carrier issued such a citation may accept the fine imposed or contest it through a process of appeal under Resolution ALJ-299, as modified by Resolution ALJ-377.

RESOLUTION OF THE APPEAL

In evaluating the Settlement Agreement, the Commission is guided by Rule 12.1(d).⁹ The Commission historically favored settlement agreements as a means of resolving contested issues where the settlement agreement is reasonable in light of the record, consistent with the law and in the public interest. The Settlement Agreement, included in this resolution as Attachment A, satisfies these criteria. Accordingly, this resolution adopts the Settlement Agreement and dismisses Cogir's citation. Dismissal of citation F-5680 is conditioned on Cogir's compliance with the terms of the Settlement Agreement as ordered herein.

The Commission favors settlements that are fair and reasonable in light of the record as a whole. The record in this proceeding consists of the citation appeal, CPED's compliance filing and the Settlement Agreement. It provides a clear and succinct description of the facts and law at issue between Cogir and CPED. The Settlement Agreement reasonably resolves the question of Cogir's noncompliance with the Commission's rules because Cogir agrees that it may be considered a charter party of carrier of passengers subject to the Commission's authority. Cogir agrees to submit a "Z" permit application pursuant to Section 5384(a) within 45 days of the full execution of the settlement agreement and CPED agrees to review Cogir's "Z" permit application

⁹ All references to "Rule" or "Rules" herein shall refer to the Commission's Rules of Practice and Procedure.

within 90 days of receipt of a complete application. In the interim, Cogir agrees to operate its shuttle services solely for transportation of its residents for medical, including dental, treatment pursuant to Section 5353(i). Cogir will be held responsible for a penalty of \$750, which we find reasonable in light of the record as a whole.

The Settlement Agreement does not contravene any statutory provisions or prior Commission decisions, and it provides sufficient information for the Commission to discharge future regulatory obligations. The Settlement Agreement requirement for Cogir to obtain a "Z" permit to operate its private shuttle service for the recreational use of its senior living center residents is consistent with the requirements of Section 5387(a) because Cogir's shuttle service does not hold itself out to the general public and is incidental to its business of operating the senior living center. Restricting Cogir's transportation services to medical transport through the duration of Cogir's "Z" permit application complies with the exemption to the Passenger Charter-party Carriers' Act pursuant to Section 5353(i). Cogir's agreement to seek Commission authority for operate prior to resuming its recreational transportation shuttle service ensures full compliance with the Public Utilities Code and the Commission's General Orders to regulate the operations of charter party carriers of passengers' transportation services. The Settlement Agreement does not constitute a precedent regarding any principle or issue in this proceeding or any future proceeding.

The Settlement Agreement is in the public interest. Prior to the Settlement Agreement, Cogir and CPED disputed whether Cogir was a charter party carrier of passengers subject to the Commission's jurisdiction. Cogir asserted its operations fell under the exclusive jurisdiction of the DMV under an active Private Carrier of Passengers Certificate. The Settlement Agreement promotes the public interest by avoiding costly and protracted litigation. It conserves the resources of CPED and Cogir by avoiding the need for a citation appeal hearing. It also commands the unanimous sponsorship of CPED and Cogir, the only two active parties to this proceeding.

Approving the Settlement Agreement holds Cogir accountable for the consequences of its prior violation of Commission rules by assessing a penalty payment. In assessing the reasonableness of the \$750 penalty payment under the Settlement Agreement, we look to the criteria in Decision (D.) 98-12-075 to determine its reasonableness, including 1) the severity of the offense, 2) the conduct of the utility, 3) totality of the circumstances, 4) financial resources of the utility, and 5) the role of precedent.

First, we consider the severity of the offense. The size of the fine should be proportionate to the severity of the offense, based on the level of physical harm, harm to the regulatory process, and the number and scope of violations. It is also appropriate to consider the size of the entity and experience before the Commission.

Cogir's violation did not result in physical harm. No economic harm was imposed on residents of The Vallejo Hills Retirement Community and any economic benefit from Cogir's failure to obtain Commission authorization are recouped by the proposed penalty. However, we find there is harm to the regulatory process as a result of Cogir's actions. Compliance is necessary for the proper functioning of the regulatory process. Therefore, the Commission imposes a fine here to express disapproval of Cogir's operation without Commission authority.

Second, we consider the utility's conduct to prevent, detect, disclose and rectify the violation. Cogir was previously licensed to operate its shuttle service under a "Z" permit and intentionally failed to extend that authority, continuing to operate while rejecting the Commission's authority over its transportation services. The intentional and ongoing nature of Cogir's violation weighs in favor of imposing a penalty based on Cogir's failure to prevent, detect, disclose and rectify its violation.

Third, we consider the utility's financial resources. Cogir owns a senior living center and has operated one vehicle to transport its residents. Its operations are small compared to other charter party carriers regulated by the Commission. A penalty of \$750 is significant for a smaller company but will not impact Cogir's ability to continue operation of its business. Furthermore, Cogir does not object to the penalty amount as unreasonable.

Fourth, we consider the public interest in assessing a penalty, the public interest was harmed when Cogir operated in California without a license from the Commission. The purpose of the Passenger Charter-party Carriers' Act is "to secure to the people adequate and dependable transportation by carriers operating upon the highways" and "promote carrier and public safety through its safety enforcement regulations," among other things. By avoiding Commission authority over its operations, Cogir avoided requirements implemented under the Passenger Charter-party Carrier's Act to promote safe and dependable transportation services to Cogir's senior living center residents. Therefore, the public interest weighs in favor of assessing a penalty for Cogir's noncompliance.

Fifth, we consider the totality of the circumstances. In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of that case. In assessing the unique facts of each case, the Commission stated that it would consider the following factors: 1) the degree of wrongdoing, the Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing and 2) the public interest; in all cases, the harm will be evaluated from the perspective of the public interest.

The facts in this case indicate that the degree of wrongdoing, though serious, was not egregious. Though Cogir's operation without a permit was intentional and deliberate, Cogir now intends to seek a "Z" permit and agrees that the Commission has the authority to regulate its passenger transportation operations.

Finally, we consider Commission precedent. We consider the range of fines assessed in several other recent settlement agreements by senior living centers operating as unlicensed charter party carriers of passengers¹⁰ and find Cogir's fine of \$750 comparable. We also find the penalty sufficient to serve as an effective deterrent from future violations.

Considering the five factors in D.98-12-075, we find the penalty amount of \$750 reasonable. We also adopt the Settlement Agreement because it is reasonable in light of the record as a whole, consistent with the law, and in the public interest.

The parties' joint motion for Commission approval of the Settlement Agreement is granted. Cogir shall pay \$750 to the General Fund within 45 days of the effective date of this resolution and cease operation of its shuttle service for residents at its senior living center in Vallejo, California. Cogir shall apply for authority to operate as a charter party carrier of passengers prior to resuming shuttle service for residents at its senior living center in Vallejo, California.

Cogir's citation appeal is dismissed with prejudice because the Settlement Agreement resolves all disputed issues before the Commission. CPED shall withdraw its Notice to Cease, dated December 12, 2019 within 20 days of the effective date of this resolution.

SAFETY

The Commission has broad authority to regulate charter-party carriers of passengers, particularly with regard to safety concerns. Affirming citation F-5680 is consistent with the Commission's authority to ensure charter-party carriers of passengers meet their regulatory obligations.

COMMENTS

With the resolution's adoption of the Settlement Agreement, this is now an uncontested matter in which the resolution grants the relief requested. Accordingly, pursuant to Section 311(g)(2) and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

¹⁰ See K.20-03-012; K.20-03-013; and K.20-07-014.

FINDINGS OF FACT

1. Cogir is a Delaware corporation operating in California.
2. Cogir owns a senior living center located in Vallejo, California.
3. The senior living center operates a residential shuttle service, funded by monthly resident rents and/fees, which provides transportation for recreation and health appointments.
4. On October 10, 2019, the CHP conducted a terminal inspection of the Cogir's senior living center and found it noncompliant with Commission operating authority pursuant to Section 5387(a).
5. The CHP informed the Commission of the terminal's noncompliance with Commission requirements by letter dated November 22, 2019.
6. CPED staff conducted a document review of the CHP's inspection of Cogir's senior living facility terminal and determined Cogir was out of compliance with Section 5387(a) on September 20, 2019.
7. On December 12, 2019, CPED issued a cease and desist notice to Cogir, ordering Cogir to immediately cease advertisements and/or transportation operations without authority, punishable by a fine of up to \$5,000 and/or imprisonment of up to three months.
8. On June 18, 2020, CPED issued citation F-5680, fining Cogir \$1,000 for one count of operating as an unlicensed charter party carrier of passengers in violation of Section 5387(a).
9. On July 15, 2020, Cogir filed an appeal to citation F-5680.
10. CPED filed a compliance filing to the Appeal on July 27, 2020.
11. The parties submitted the Settlement Agreement on November 12, 2020.

CONCLUSIONS OF LAW

1. Cogir operated as a charter party carrier of passengers subject to the Commission's jurisdiction under Public Utilities Code §§ 5371 and 5384(a).
2. The Settlement Agreement between Cogir and CPED complies with Rule 12.1 and is 1) reasonable in light of the record, 2) consistent with the law, and 3) in the public interest.
3. With the adoption of the Settlement Agreement, this proceeding is an uncontested matter.

4. The penalty of \$750 reached in the Settlement Agreement is reasonable in light of the criteria in D.98-12-075, including 1) severity of the offense, 2) conduct of utility, 3) totality of the circumstances, 4) financial resources of the utility and 5) the role of precedent.
5. The Settlement Agreement should be approved and adopted.
6. Cogir should pay a penalty of \$750 within 45 days of the effective date of this resolution.
7. CPED should withdraw its cease and desist order, dated December 12, 2019, against Cogir within 20 days of the effective date of this resolution.
8. Cogir's appeal of citation F-5680 should be dismissed with prejudice.
9. This proceeding should be closed.

THEREFORE, IT IS ORDERED that:

1. The joint motion of Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community and the Consumer Protection and Enforcement Division of the California Public Utilities Commission, dated November 12, 2020, for Commission adoption of a settlement agreement pursuant to Article 12.1 of the Commission's Rules of Practice and Procedure is granted.
2. The settlement agreement between Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community and the Consumer Protection and Enforcement Division of the California Public Utilities Commission, as provided in Attachment A of this resolution, is approved.
3. The Consumer Protection and Enforcement Division of the California Public Utilities Commission and Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement must comply with the terms of the settlement agreement
4. Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community (Cogir) shall pay a penalty of \$750 within 45 days of the effective date of this resolution. Payment shall be made by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco CA 94102. Cogir shall write on the face of the check or money order "For deposit to the General Fund per resolution ALJ-397."
5. The Consumer Protection and Enforcement Division shall withdraw its Cease and Desist order, dated December 12, 2019, against Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community within 20 days of the effective date of this resolution.
6. The appeal of Welltower Cogir Tenant, LLC dba Vallejo Hills Retirement Community from citation F-5680 is dismissed with prejudice.

7. This proceeding is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

RACHEL PETERSON
Acting Executive Director

ATTACHMENT A