

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Catalina Channel Express
for Rehearing of Resolution M-4865.

Application 23-01-002

**ORDER MODIFYING RESOLUTION M-4865 AND
DENYING REHEARING AS MODIFIED**

I. INTRODUCTION

In Resolution M-4865 (Resolution), issued December 16, 2022, the Commission adopted the Public Utilities Commission Transportation Reimbursement Account (PUCTRA) user fees that became effective on January 1, 2023. The Commission increased and reinstated user fees to support the level of expenditures needed and to maintain required fund reserves. In addition, the Commission stated that a carrier’s “gross intrastate revenue” as defined in Public Utilities Code section 424 includes “bridge tolls, wharfage fees, and similar charges collected from passengers.” (Resolution, p. 7.)

A timely application for rehearing of the Resolution was filed by Catalina Channel Express, Inc. (CCE). CCE contends that taxes and fees paid to local governments are not revenue derived from compensation for transportation under the relevant statutes. CCE further alleges that the Resolution changes a long-standing practice of excluding wharfage fees from gross revenue for the purpose of user fees imposed on regulated vessel operators (VCCs). CCE argues the decision is contrary to legal precedents dealing with taxes and fees paid to local governments, and that the lack of findings and conclusions on material issues violates Public Utilities Code section 1705, which requires a decision to “contain, separately stated, findings of facts and conclusions of law by the commission on all issues material to the order or decision.”

CCE also requests oral argument pursuant to Rule 16.3 of the Commission’s Rules of Practice and Procedure. CCE contends that no PUCTRA

resolution has ever extended its reach to government taxes and fees collected for the government body that imposed them. Moreover, CCE argues that the “clarification” made in the Resolution, i.e., extending the reach of PUCTRA to all receipts of a VCC, would lead to the inclusion of revenue that is not derived from activities subject to the Commission’s jurisdiction. CCE asserts that because no rulemaking or other formal proceeding was held to adopt this clarification, oral argument is appropriate.

We have carefully considered all the arguments presented by CCE and have determined that we will modify the Resolution as follows: If wharfage fees for VCCs are not included in their tariffs, they are not considered “gross intrastate revenue” or “compensation for transportation” under Public Utilities Code section 494 and may be excluded from revenue for the purposes of calculating PUCTRA user fees. CCE’s application for rehearing of the Resolution, as modified in today’s order, is denied.

II. BACKGROUND:

The City of Avalon operates a landing facility (Wharf) on Santa Catalina Island. According to CCE, over fifty years ago the City of Avalon imposed a fee (City Fee or Wharfage Fee) on passengers that embark or disembark at the Wharf.¹ The City also required commercial carriers to collect the City Fee from passengers and remit the collected sums to the City.

Initially, many of the VCCs included the City Fee in their tariffed fares. However, because the City Fee could be changed by the City without any action on the part of the VCC or the Commission, one VCC sought to remove the City Fee from the tariffed fares. In *H. Tourist, Inc.* (1980) 4 Cal.P.U.C.2d 424 [1980 WL 129080], the Commission determined that the City Fee need not be included in the tariffed fares. In that case, H. Tourist, Inc. (doing business as Catalina Island Cruises) proposed to amend its tariff to exclude landing fees charges by the City of Avalon. The stated reason for this was so H. Tourist would not have to amend its tariff every time the City of Avalon

¹ Prior to this, Avalon taxpayers bore the costs of operating and maintaining the Wharf.

changed its landing fee or absorb the change in revenue because of the landing fee was increased. The Commission agreed.

The proposed removal from H. Tourist's tariff of the landing fee collected by the City of Avalon will increase flexibility by allowing automatic fare changes to compensate for changes in the landing fee.

(*H. Tourist, Inc., supra*, Finding of Fact 1.) The Commission thus concluded, "The exclusion of landing fees from H. Tourist's tariff for Avalon its justified and its tariff should be revised accordingly." (*Id.*, Conclusion of Law 1.)² Pursuant to this order, CCE states that for forty years it did not include the City Fee in revenue for purposes of the PUCTRA user fees.

In 2021, the Commission Transportation Enforcement Branch Staff conducted an audit and asserted that items such as the City Fee should be included in gross intrastate revenue for purposes of calculating PUCTRA user fees. CCE states that, at the time, it apprised Staff of its disagreement with this view, arguing that it was contrary to (1) statutory construction as informed by jurisdictional imitations, (2) decades of Commission administration of the PUCTRA fees, and (3) the fact that the revenue derived from the City Fee belonged to the City and not CCE. (CCE App. for Rhrq., pp. 2-4, 6-9.)

CCE raised this issue again when the Commission adopted PUCTRA fees for 2022 in Resolution M-4858, issued on March 17, 2022. CCE's comments on the draft resolution stated that the Commission sought to impose PUCTRA fees on "gross intrastate revenues" as defined by IRS regulations, which, according to CCE, were broader than "gross intrastate revenues" as defined by Public Utilities Code section 424(b). (Resolution M-4858, p. 8.) The Commission responded that "the particular application of Public Utilities Code section 424(b) to CCE's wharfage fees and sightseeing tours is beyond the scope of this resolution." (*Ibid.*)

² The *H. Tourist* case does not address the PUCTRA user fee.

As stated above, the instant Resolution M-4865, issued on December 16, 2022, set the PUCTRA user fees for 2023. Here, the Commission expressly addressed the issue of calculating revenue subject to the PUCTRA fee. The Resolution states that the PUCTRA fee applies to a carrier's "gross intrastate revenues for 'all compensation for the transportation or storage of property or the transportation of persons when both the origin and destination of the transportation or the performance of the service is within this state.'" (Resolution, p. 7, fns. omitted, citing Pub. Util. Code, §§ 422 and 424(b).)

The Resolution continues, "'Transportation of persons' includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage." (Resolution, p. 7, citing Pub. Util. Code, § 208.) For tariffed common carriers, "'compensation for transportation' includes not only 'fares' approved in their tariffs, but also other 'rates' and 'charges.'" (Resolution, p. 7, citing Pub. Util. Code, § 494(a).)

The Resolution explains that the Public Utilities Code specifies that the user fee applies to "gross" revenue and "all" compensation for transportation. (Resolution, p. 7.) Revenue is not limited to net revenues or "fares," and the Public Utilities Code defines "transportation of persons" broadly to include the collection and payment charges incidental to the delivery of transported persons. The Resolution concludes that "fees such as bridge tolls, wharfage fees, and similar charges collected from passengers is considered gross revenue derived from compensation for transportation and subject to the PUCTRA fee." Finally, the Resolution adds, "The purpose of this clarification on revenue subject to the PUCTRA fee is to provide guidance to regulated entities and to ensure revenues are calculated in a consistent way." (Resolution, p. 7.)

III. ISSUES PRESENTED

CCE sets forth the following "specifications of error" pertaining to the Commission's conclusion that "fees such as bridge tolls, wharfage fees, and similar charges collected from passengers is considered gross revenue derived from

compensation for transportation and subject to the PUCTRA fee.” (CCE App. for Rhrgr., pp. 8-9, quoting Resolution, p. 8.) CCE argues that the Commission has failed to proceed in a manner require by law by (1) subjecting VCCs to PUCTRA fees based on sums collected on behalf of entities other than themselves; (2) subjecting passengers that have paid the City Fee to an additional charge from the Commission; (3) allocating the budget for the vessel class amongst members of that class based on revenues that are not the revenues of those members; and (4) failing to issue findings of fact and conclusions of law on all material issues as required by Public Utilities Code section 1705.

IV. DISCUSSION

A. **Whether taxes and fees imposed by and paid to local government are “revenue derived from compensation for transportation.”**

CCE’s overarching argument is that, pursuant to the law, prior practice, and policy considerations, the City Fee collected by CCE and remitted to the City of Avalon for the operation and maintenance of harbor facilities in Avalon, should not be included in CCE’s revenues for purposes of calculating user fees under PUCTRA.

1. **The City Fee need not be excluded from revenue for purposes of PUCTRA simply because it is not set or regulated by the Commission.**

CCE first argues that, because the Commission plays no role in the financing nor the maintenance of the harbor facilities, the Commission cannot base user fees on revenue that is collected for this purpose. Pursuant to Public Utilities Code section 422(a)(2), each class of carrier and related business “shall pay fees sufficient to support the commission’s regulatory activities for the class from which the fee is collected, and to establish an appropriate reserve.” (Emphasis added.)

CCE points out the City Fee is collected by CCE and remitted directly to the City of Avalon. CCE further states that the fee does not fund CCE’s costs of

operations and does not belong to CCE. (CCE App. for Rhrgr., p. 10.)³ According to CCE, it acts as merely a “billing service” for the City of Avalon. (CCE App. for Rhrgr., pp. 10-11.) CCE asserts that, as such, it is completely outside of the Commission’s regulatory authority pursuant to *Monterey Peninsula Water Management District v. Public Utilities Com.* (2016) 62 Cal.4th 693 (*Monterey Peninsula Water District*).

The argument CCE seems to be making is that, because the user fee may only be used to fund the Commission’s “regulatory activities” under section 422(a)(2), the Commission cannot use revenue from unregulated activities to calculate the user fee. This argument is unpersuasive. Section 422(a)(2) only states that “fees” are to be sufficient to support the “regulatory activities” of the Commission. The focus of this subsection is to determine how a budget is to be established. While section 422(c)(1) does address allocation among different classes of carriers (within each class of carrier, fees are to be based on the ratio that each class member’s “gross intrastate revenue” bears to the total revenues of the class), there is nothing in Section 422 mandating that “gross intrastate revenue” only refers to revenue from Commission-regulated activities.

2. The Resolution does not violate Public Utilities Code section 1705 in its treatment of *Monterey Peninsula Water District*.

CCE contends that the Resolution violates Public Utilities Code section 1705, which requires Commission decisions and orders to contain, separately stated, findings of fact and conclusions of law on all issues material to the order or decision. The Resolution does not contain a section on “Findings.” However, CCE’s argument focuses on the Resolution statement that “the facts of *Monterey Peninsula Water District* are distinguishable from those here.” (Resolution, at p. 9.)

Monterey Peninsula Water District addresses the Commission’s authority to review the amount of a user fee imposed on a utility by a public agency. Monterey

³ CCE also states that the City Fees are not included in CCE’s Annual Reports to the Commission because the fees are not derived from transportation services provided by CCE; they are not “Passenger Revenue” reported on Line 13 of Schedule B-1 of CCE’s Annual Report.

Peninsula Water Management District (District) had imposed a fee on customers of California America Water Company (Cal-Am) for the costs of mitigation of environmental impacts caused by the utility. After approving a rate increase for Cal-Am, the Commission ordered Cal-Am to submit an application for the purpose of setting forth a new method of collecting funds to support the mitigation program costs. Instead, Cal-Am filed for authorization to collect the District's usual user fee and remit the amount to the District, as it had done in the past.

After writ was granted in that case, the Commission took a somewhat modified position and conceded it had no power to review a local government fee collected through a public utility's customer bills where the utility simply acts as a billing and collection agent for the government and then remits the funds to the government agency. However, the Commission still asserted a right to review the fees at issue under the facts of this case because of the possible impact on Cal-Am's obligations to perform environmental mitigation.

The court rejected this argument and held that the Commission has no authority to regulate the District fee merely because it appears on the public utility's customers bills. In coming to this conclusion, the court pointed out that neither Public Utilities Code section 451 (requiring utilities to charge just and reasonable rates) nor the constitutional authority conferred upon the Commission to fix rates (Cal. Const., art XII, § 6) authorizes the Commission to regulate fees and taxes assessed by public agencies. (*Monterey Peninsula Water District, supra*, at pp. 699-700; see also pp. 701-702 [the Commission may not treat agency-originated charges as a utility surcharge merely because the agency may be performing work that fulfills a utility's legal responsibility to mitigate environmental impacts].)

In the instant case, the Commission is not attempting to assert any authority over the City Fee. Nor does this case have anything to do with ratemaking. Here, the Commission is merely stating that the City Fee may be used to calculate "gross intrastate revenues" for the purpose of establishing the PUCTRA User Fee. Contrary to CCE's argument, *Monterey Peninsula Water District* is not applicable to the issue here, i.e.,

whether the Commission may include the City Fee in revenue for purposes of calculating PUCTRA user fees.

3. Whether the City Fee falls under the definition of “gross intrastate revenue” or “compensation for transportation.”

CCE contends that the City Fee does not come under the definitions of “gross intrastate revenue” or “compensation for transportation” pursuant to section 424(b), which sets forth the definition of “gross intrastate revenue” for the purpose of allocating and assessing the user fee. Section 424(b) states:

“Gross intrastate revenue” includes all compensation for the transportation or storage of property or the transportation of persons when both the origin and destination of the transportation or the performance of the service is within this state.⁴

As stated in the Resolution, “transportation of persons” includes “every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage.” (Pub. Util. Code, § 208.) The operation and maintenance of the harbor is clearly “incidental” to “transportation.”

The Resolution also finds that the City Fee is “compensation for transportation” as defined in Public Utilities Code section 494(a) because compensation includes not only “fares,” but also other “rates” and “charges.” (Resolution, p. 7, quoting Pub. Util. Code, § 494(a).) As CCE points out, however, section 494(a) applies to tariffed charges. Section 494(a) in full states:

No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, *than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time.*

⁴ Section 424(b) also states that “gross intrastate revenues” as defined here only applies for the purpose of the fees required by this chapter and shall not necessarily constitute gross operating revenues for any other purpose.

(Emphasis added.)

We are not persuaded that section 494(a) necessarily applies to PUCTRA. The statute is in the tariff section of the code, and most carriers are no longer tariffed. However, we acknowledge that the historical regulation of VCCs should be considered in making any changes to the way in which user fees are calculated for such carriers. Given that this change appears to be a departure from forty years of practice, we will modify the Resolution to carve out an exception for VCCs where the charge in question has been excluded from their tariffed fares.

B. Other Issues

CCE raises several other issues that are essentially policy arguments. As stated in the Resolution, basing PUCTRA user fees on revenue that includes wharfage fees, does not increase the overall total dollar amounts collected in user fees. (Resolution, pp. 8-9.) However, CCE points out that the relative shares of the members of that class will change because of the new policy. That is, vessels which use the harbor more will pay increased user fees. Even if the Commission does not increase the budget figure, it will increase the percentage of that figure paid by those VCC's which collect significant taxes and fees for government bodies. (CCE App. for Rhr., p. 17.)

CCE also contends that extending the reach of PUCTRA to all VCC receipts will lead to absurd results. CCE points out that the Resolution states that the PUCTRA fee applies to "gross" revenues as defined in section 424(b) for "transportation of persons" as defined in section 208. Thus, CCE asserts that many vessel companies derive revenues arguably described in section 208 and 424(b), but from services that lie completely outside the Commission's jurisdiction. CCE gives an example of fares for sightseeing tours or excursions that are exempt from Commission regulation (i.e., point A to point A service). According the CCE, the Commission does not incur any costs regulating sightseeing tours that would properly be included in the authorized commission budget to "regulate common carriers." (CCE App. for Rhr., pp. 15-16, citing section 401(b).)

Yet, under the construction of Section 424(b) adopted in Res. M-4865, if such a company obtained a VCC to provide a *di minimus* level of regulated service, all of its “transportation revenue” including that from unregulated sightseeing tours should be included in any PUCTRA report the VCC filed under Chapter 2.5.

(CCE App. for Rhrgr., p. 16, fns. omitted.)

CCE also contends that this policy may require an increase in fares to passengers. CCE explains that if the City Fees increase, and if those fees are considered revenue, CCE would have to increase tariffed rates or absorb the increase itself. “This was a choice the Commission thought it eliminated forty years ago.” (CCE App. for Rhrgr., p. 18, citing *H. Tourist, Inc., supra.*)

Finally, CCE states that in 2020, an initiative was placed on the ballot by the Avalon City Council which would impose an additional tax on passengers and vessels to fund the Catalina Island Medical Center. According to CCE, the initiative was approved by voters on November 3, 2020. (CCE App. for Rhrgr., pp. 9-10.) If the City Fees include money for construction of a hospital, we are of the opinion that such a fee would not be considered “compensation for transportation.”

As stated above, many of these arguments are policy arguments to bolster CCE’s primary specification of error. Because we are modifying the Resolution in response to CCE’s primary argument, we need not reach these other issues.

C. Request for Oral Argument

CCE requests oral argument with respect to its application for rehearing pursuant to Rule 16.3 of the Commission’s Rules of Practice and Procedure. CCE asserts the Resolution and its application satisfy the requirements of Rule 16.3(a).

No PUCTRA resolution has ever extended PUCTRA to government taxes and fees collected for the government body that imposed them. The lawfulness of doing so is question of first impression.

Moreover, the “clarification” embraced in Res. M-4865 will extend statewide not only to government fees but to other revenues not derived from activities subject to the

Commission's jurisdiction. No Rulemaking or other formal proceeding was conducted in advance of the "clarification" in Res. M-4865 nor were any briefs filed. Under these circumstances oral argument is appropriate.

(CCE App. for Rhrgr., p. 16, fns. omitted)

Under Rule 16, the Commission has discretion to allow or deny a request for oral argument. We believe that CCE's application for rehearing has adequately addressed the issues it raises, and we see no reason grant oral argument.

V. CONCLUSION

For the reasons discussed above, Resolution M-4865 is modified as specified below, and rehearing of the Resolution, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. The third sentence in the third full paragraph on page 7 is deleted and replaced with the following:

As such, fees such as bridge tolls, wharfage fees, and similar pass-through charges collected from passengers are considered "gross revenue" derived from "compensation for transportation" and subject to the PUCTRA fee. However, to the extent that tariffed VCCs have excluded pass-through wharfage fees from their tariffs, consistent with the Commission's decision in *H. Tourist, Inc.* (1980) 4 Cal.P.U.C.2d 424, [1980 WL 129080], such fees are not considered "gross revenue" for calculation of the PUCTRA user fee.

2. The application for rehearing of Resolution M-4865, as modified herein, is denied.

3. CCE's request for oral argument is denied.

4. This proceeding, A.23-01-002, is closed.

This order is effective today.

Dated September 21, 2023, at Sacramento, California.

ALICE REYNOLDS

President

GENEVIEVE SHIROMA

DARCIE L. HOUCK

JOHN REYNOLDS

KAREN DOUGLAS

Commissioners