

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-261
Administrative Law Judge Division
November 19, 2010

RESOLUTION

RESOLUTION ALJ-261. Affirming in part, and dismissing in part, Citation F-5182 issued to James Brice dba Surf City Shuttle, and Surf City Shuttle, Inc.

SUMMARY

This resolution resolves the appeal of Citation F-5182, issued to James Brice an individual dba Surf City Shuttle (TCP 20114-B, revoked July 30, 2009) and Surf City Shuttle, Inc. (TCP 25495-B, effective December 23, 2009) (jointly referred to as "Respondents") by the Commission's Consumer Protection and Safety Division on May 25, 2010, pursuant to its authority under Resolution ALJ-187.

Citation F-5182 issues a fine of \$15,000 for eight violations (331 counts) of the Public Utilities Code, the Commission's General Order 157-D and the California Vehicle Code during the period from May 19, 2009, through November 9, 2009.

James Brice, as Chief Financial Officer of Surf City Shuttle, Inc., submitted an appeal of Citation F-5182 on June 11, 2010. An evidentiary hearing was held in the Commission's Courtroom in San Francisco on September 15, 2010, and the matter was submitted upon the opportunity to offer late-filed exhibits on September 20, 2010. Based on the record, we affirm the citation and order payment of the \$15,000 fine, except that we calculate 2,388 counts of violating the Public Utilities Code, rather than 331 counts. We order Respondents James Brice an individual dba Surf City Shuttle, and Surf City Shuttle, Inc. to pay the fine and to cease and desist from continuing each and every cited violation.

VIOLATION

1. Consumer Protection and Safety Division (CPSD) alleges 160 counts of operating as a charter-party carrier without a valid authority, in violation of Pub. Util. Code § 5371, based on trip records provided by Brice showing 1253 trips conducted over 160 days between May 19, 2009, and November 9, 2009.

Brice stipulates to these violations.

2. CPSD alleges 160 counts of operating without evidence of personal liability and property damage insurance coverage in effect and on file, in violation of Pub. Util. Code § 5391 and General Order 115-F, based on Surf City Inc.'s trip records showing 1253 trips conducted over 160 days between May 19, 2009, and November 9, 2009 and the absence of evidence of insurance coverage on file with the Commission's License Section.

Brice stipulates that evidence of insurance coverage was not on file, but testified that Surf City Shuttle, Inc. had insurance coverage in effect during the investigation period. The administrative law judge allowed Brice to provide evidence of coverage by late-filed exhibit to be provided by September 20, 2010; Brice did not do so.

3. CPSD alleges two counts of advertising as a charter-party carrier without a valid authority, in violation of Pub. Util. Code § 5414.5. In support of these counts, CPSD presented evidence of advertising by Surf City Shuttle in three issues of the Santa Cruz Weekly and at its registered websites www.surfcityshuttle.com and www.surfcityshuttles.com.

Brice testified that he had contracted for the Santa Cruz Weekly advertisements before the investigation period and that he could not have cancelled the contract to obtain a refund. Brice testified that he did not ask to have the advertisement removed from the issues in the remaining term of the contract because he had already paid for them.

Brice confirmed that the phone contact number shown in the advertisements for James Brice dba Surf City Shuttle was the phone contact number used by Surf City Shuttle, Inc. during the investigation period.

4. CPSD alleges two counts of engaging employees without evidence of workers' compensation insurance coverage in effect and on file, in

violation of Pub. Util. Code § 5378.1. As evidence, CPSD presented an excel spreadsheet of trip records furnished by the company, which listed two persons (Clavello and Hernandez) as drivers other than Brice, and the Commission's License Section records showing respondents' declarations dated June 15, 2008, and August 20, 2009, that it does not have employees. Specifically, the excel spreadsheet shows Clavello as a driver on a fairly regular basis between May 19 and September 9, 2009, and then on October 9, 2009, and shows Hernandez as a driver on September 16, 17, and 18, 2009.

Brice testified that, during the investigation period, the enterprise engaged one driver (Clavello), not two, and that the entry of Hernandez as a driver in three instances in the excel spreadsheet was an error. Brice testified that Hernandez was a temporary worker engaged from a temporary employment agency to perform administrative work only. The administrative law judge allowed Brice to provide a copy of the temporary employment contract as evidence of Hernandez's duties and relationship with Surf City Shuttle and/or Surf City Shuttle, Inc. by late-filed exhibit to be provided by September 20, 2010; Brice did not do so.

Brice further testified that, notwithstanding the fact that it is registered as a corporation with the Secretary of State, Surf City Shuttle, Inc. operates as cooperative in the sense that its workers are company shareholders.

5. CPSD alleges two counts of failure to enroll drivers in a Department of Motor Vehicles (DMV) Employer Pull Notice (EPN) Program in violation of Pub. Util. Code § 5374(a)(1)(D) and 5381 and General Order 157-D, Part 5.02 and California Vehicle Code § 1808.1. As evidence, CPSD presented an excel spreadsheet of trip records furnished by the company, which listed two persons (Clavello and Hernandez) as drivers other than Brice, and the January 6, 2010, affidavit of the DMVs' custodian of records showing that Brice, and no other person associated with the respondents, was enrolled in the EPN as a driver for Surf City Shuttle during the investigation period.

As discussed above, Brice testified that the enterprise did not engage Hernandez as a driver and that the entry of Hernandez as a driver in three instances in the excel spreadsheet was an error. Brice noted that, in each of the three instances where Hernandez is shown as a driver, Brice is shown as driving the same vehicle at the same time in a separate trip.

Brice further testified he believed that the enterprise met the requirements

of Pub. Util. Code § 5374(a)(1)(D) and 5381 by conducting an in-house monitoring program, because the plain language of the code requires “a program” and does not specify that it must be the DMV’s EPN program. Although General Order 157-D, Part 5.02, specifically requires enrollment in the DMV’s EPN program in satisfaction of Pub. Util. Code § 5374(a)(1)(D), and CPSD witness Suong Le testified that a copy of General Order 157-D is provided to all applicants for charter-party carrier or passenger stage corporation authority, Brice testified that he had not been aware of the general order.

6. CPSD alleges two counts of failure to pre-employment test and enroll drivers in the Controlled Substance and Alcohol Testing Certification program in violation of Pub. Util. Code § 5374(a)(1)(I) and 5381, and General Order 157-D, Part 10. As evidence, CPSD presented an excel spreadsheet of trip records furnished by Brice which listed two persons (Clavello and Hernandez) as drivers other than Brice, and a written statement from Bob Hobbs of Monterey Regional Compliance Service indicating that Brice, and no other person associated with the respondents, was enrolled under Surf City Shuttle’s permit TCP 20114-B until November 5, 2009.

As discussed above, Brice testified that Surf City Shuttle, Inc. did not engage one of those two persons as a driver.

7. CPSD alleges two counts of advertising individual fares without a Passenger Stage Corporation authority in violation of Pub. Util. Code § 1034.5. As evidence, CPSD presented the transportation rate information advertised on www.surfcityshuttles.com specifying that the rates shown are for parties of one or two, and that additional passengers will incur additional charges of \$5.00 per passenger, and the terms of service, also shown on www.surfcityshuttles.com, stating as follows:

Passengers are Aware that a Shuttle is Able to Carry More Than One Party at a Time and Can Make Intermediary Stops Along The Route for any Reason. The Passenger Agrees to this and Agrees to Allow Enough Time When Making a Reservation to Allow for Other Pickups and or Drop offs. The Management Will Assist the Passenger in Determining the Appropriate Timing of Pick up/Drop off When the Reservation is Made and Make Known Immediately, if Other Reservations Have Been Made for the Time/Date in

Question. An Additional Fee for a Private Trip is Possible. (Sic.)

Brice contests these alleged violations. With respect to the per-passenger charge of \$5.00 for more than two passengers, Brice testified that this is not an individual fare, but rather a service charge to compensate for the additional labor associated with additional luggage; Brice testified that \$5.00 cannot reasonably be viewed as a passenger fare from Santa Cruz to a Bay Area airport.

With respect to the terms of service advising of the possibility of multiple parties and intermediate stops, Brice testified that it is sometimes necessary to carry multiple parties and/or make intermediate stops in order to avoid stranding reserved customers who would otherwise be left without service due to unanticipated accidents and traffic on Highway 17 that regularly interfere with travel between Santa Cruz and Bay Area airports. Brice testified that Surf City Shuttle, Inc. only did so under such circumstances and that, as shown on the excel spreadsheet of trip records, it only did so infrequently. Specifically, the trip records shows approximately six or seven instances of multiple parties carried on the same trip out of the 1253 trips conducted over the investigation period.

8. CPSD alleges one count of operating as a Passenger Stage Corporation without a valid authority in violation of Pub. Util. Code § 1031. As evidence, CPSD presents a complaint from Alice Colby alleging that she contracted for charter-party carrier service and instead was provided with share-ride service when Surf City Shuttle picked up her party at San Francisco Airport. CPSD's witness Kahrs also cited to the excel spreadsheet showing approximately six instances where multiple parties were carried on the same trip. Kahrs also testified that it was not possible, based on this information alone, to conclude that the trips were conducted as Passenger Stage Corporation service as opposed to Charter-Party Carrier service.

Brice testified that the spreadsheet is not reliable evidence of the manner that the trips were conducted as, for example, one of the entries shows Brice to be the driver for two simultaneous trips.

CALCULATION OF FINE:

Pursuant to Pub. Util. Code § 5413, charter-party carriers are subject to a penalty of not more than \$1,000 for each violation of Pub. Util. Code § 5351 *et seq.*

(concerning Charter-Party Carrier of Passengers) may be fined up to \$1,000 for each violation of the code, with each day of a continuing violation constituting a separate violation pursuant to Pub. Util. Code § 5415.

Pursuant to Pub. Util. Code § 5414.5, every corporation or person who advertises or holds itself out as a charter-party carrier without having a valid permit is guilty of a misdemeanor punishable, if an individual, by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than six months or by both, or, if a corporation, by a fine of not more than \$5,000, with each day of a continuing violation constituting a separate violation pursuant to Pub. Util. Code § 5415.

In determining whether to impose a fine and, if so, at what level, the Commission historically considers five factors, namely, the severity of the offense, the carrier's conduct, the financial resources of the carrier, the role of precedent, and the totality of circumstances in furtherance of the public interest. (See, e.g., the *Affiliate Transactions Rulemaking Decision*, Decision 98-12-075, Appendix A.)

(Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships between Energy Utilities and Their Affiliates Adopted by the Commission in Decision (D.) 97-12-088, 84 CPUC2d 155, 188 (D.98-12-075, App. A.)

assessing fines, the Commission generally considers the following factors: (1) the severity of the offense, including physical and economic harm to others, economic gain to the respondent, and harm to the regulatory process; (2) the respondent's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation; (3) the amount of fine that will achieve the objective of deterrence based on the respondent's financial resources; (4) fines or sanctions that the Commission has imposed under reasonably comparable factual circumstances; and (5) the totality of circumstances.

1. The severity of the offense includes consideration of harm imposed as well as the economic benefit gained. Here, James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. imposed significant risk of physical and economic harm on customers by failing to enroll its drivers in the DMV's EPN program and the Controlled Substance and Alcohol Testing Certification program, and significant risk of economic harm on customers by failing to maintain personal liability and property damage insurance. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. gained an economic benefit of approximately \$100,000 in revenue

over the 160-day investigation period.

2. The record reflects that Surf City Shuttle, Inc. now has a valid authority to operate as a charter-party carrier and that it has evidence of personal liability and property damage on file at the Commission. The record reflects that Brice and another officer of Surf City Shuttle, Inc. are enrolled in the DMV's EPN program and in the Controlled Substance and Alcohol Testing Certification program (although it appears that Brice is enrolled under his revoked TCP permit). Brice asserts his opinion (that should be disabused by this order) that other drivers engaged by the enterprise are exempt from workers' compensation by virtue of holding shares in the corporation and from the DMV's EPN program by virtue of Surf City Shuttle, Inc.'s internal monitoring program. The record reflects that James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. continue to advertise individual fares without a passenger stage corporation authority on its websites www.surfcityshuttle.com and www.surfcityshuttles.com and Brice's opinion (that should be disabused by this order) that it is appropriate to operate as such in view of the difficulties of providing charter-party services to all customers in the event of accidents or traffic emergencies on Highway 17.
3. The enterprise earned approximately \$100,000 over the 160-day investigation period. Extrapolating from this, the enterprise's revenues are approximately \$200,000 per year.
4. CPSD witness Kahrs testified to his belief that the Commission has levied fines of up to \$20,000 for similar violations as alleged here.

LIABLE PARTY:

Brice asserts that, in the event that the Commission imposes a fine in this matter, Surf City Shuttle, Inc., and not James Brice dba Surf City Shuttle, is individually liable for it, because James Brice dba Surf City Shuttle allegedly ceased doing business before the start of the investigation period. In support of this assertion, Brice cites to the undisputed facts that (1) a business checking account for James W. Brice and Surf City Shuttle, dated April 17, 2009, showed a zero balance and no deposits (other than a single deposit of \$146.86 apparently to cover an overdraft) between March 19, 2009, and April 17, 2009, and (2) Surf City Shuttle, Inc. incorporated on January 1, 2009.

Record evidence conflicting with Brice's assertion that James Brice dba Surf City Shuttle should be jointly liable for a fine includes the fact that (1) James Brice dba

Surf City Shuttle advertised in the Santa Cruz Weekly and on two websites during the investigation period, and (2) while the trip records provided by Brice refer to company vehicles "SRFCTY3" and "SRFCTY4," and DMV records show a vehicle with license plate "SRFCTY3" as registered to Surf City Shuttle, Inc., the DMV records also show a vehicle with license place "SRFCTY5" as registered to James W. Brice dba Surf City Shuttle (there is no record evidence of DMV registration for a vehicle with license plate "SRFCTY4.")

COMMENTS ON DRAFT RESOLUTION

The draft resolution of the Administrative Law Judge Division was mailed to the parties in accordance with Public Utilities Code Section 311(g). CPSD submitted comments on November 1, 2010; Respondents did not submit any comments.

CPSD asserts that the draft resolution's findings that Hernandez was not an employee and was not a driver are incorrectly based on a late-filed exhibit from Respondents that failed to materialize. To the contrary, the findings are based on the weight of the evidence, which has been more fully described in response to CPSD's comments. CPSD identifies other factual errors in the draft resolution, which have been corrected.

FINDINGS OF FACTS:

1. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. operated as a charter-party carrier without authorization by conducting 1253 trips over 160 days during the investigation period.
2. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. operated without evidence of personal liability and property damage insurance coverage on file throughout the 160-day investigation period.
3. James Brice dba Surf City Shuttle advertised as a charter-party carrier without a valid authority in three publications of the Santa Cruz Weekly during the investigation period, and on www.surfcityshuttle.com and www.surfcityshuttles.com throughout the 160-day investigation period.
4. The phone contact information shown in the advertisements was Surf City Shuttle, Inc.'s phone contact information during the investigation period.
5. The weight of the record evidence suggests that James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. did not directly employ Hernandez, and did not engage her as a driver for the enterprise.

6. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. employed Clavello as a driver without providing evidence of workers' compensation insurance.
7. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. failed to enroll its driver Clavello in a DMV's EPN Program during the investigation period.
8. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. failed to pre-employment test and enroll its driver Clavello in the Controlled Substance and Alcohol Testing Certification program in violation of Pub. Util. Code §§ 5374(a)(1)(I) and 5381, and General Order 157-D, Part 10.
9. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. advertised individual fares without a Passenger Stage Corporation authority in violation of Pub. Util. Code §§ 1034.5 and 5401.
10. The record evidence that James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. operated as a passenger stage corporation without Passenger Stage Corporation authority consists of hearsay statements of a non-witness and circumstantial evidence.

CONCLUSIONS OF LAW:

1. James Brice dba Surf City Shuttle and Surf City Shuttle, Inc. should be jointly and severally liable for any fine imposed for charter-party carrier violations during the investigation period.
2. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for operating as a charter-party carrier during the 160-day investigation period in violation of Pub. Util. Code § 5371 (160 counts).
3. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for operating throughout the 160-day investigation period without evidence of personal liability and property damage coverage on file with the Commission in violation of Pub. Util. Code § 5391 and General Order 115-F (160 counts).
4. Each advertisement in each of three publications of the Santa Cruz Weekly by James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. constitutes a separate count of violating Pub. Util. Code § 5414.5.

5. James Brice dba Surf City Shuttle may be fined up to \$3,000 and/or Surf City Shuttle, Inc. may be fined up to \$15,000 for advertising in three publications of the Santa Cruz Weekly as a charter-party carrier without a valid authority in violation of Pub. Util. Code § 5414.5 (three counts).
6. Each day's continuance of advertising on www.surfcityshuttle.com and www.surfcityshuttles.com constitutes a separate count of violating Pub. Util. Code § 5414.5.
7. James Brice dba Surf City Shuttle may be fined up to \$320,000 and/or Surf City Shuttle, Inc. may be fined up to \$1,600,000 for advertising on www.surfcityshuttle.com and www.surfcityshuttles.com as a charter-party carrier without a valid authority in violation of Pub. Util. Code § 5414.5 (320 counts).
8. There is no authority for exempting workers from workers' compensation on the basis that they hold shares in their employer's company.
9. Each day's continuance of employing an employee without evidence of workers' compensation insurance coverage in effect and on file constitutes a separate count of violating Pub. Util. Code § 5378.1.
10. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for employing an employee (Clavello) without evidence of workers' compensation insurance coverage in effect and on file, in violation of Pub. Util. Code § 5378.1 (160 counts).
11. Each day's continuance of failing to enroll a driver in a DMV's EPN Program constitutes a separate count of violating Pub. Util. Code § 5374(a)(1)(D) and 5381 and General Order 157-D, Part 5.02 and California Vehicle Code § 1808.1.
12. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for failing to enroll a driver (Clavello) in a DMV's EPN Program in violation of Pub. Util. Code § 5374(a)(1)(D) and 5381 and General Order 157-D, Part 5.02 and California Vehicle Code § 1808.1 (160 counts).
13. Each day's continuance of failing to pre-employment test and enroll a driver in the Controlled Substance and Alcohol Testing Certification program constitutes a separate count of violating Pub. Util. Code § 5374(a)(1)(I) and 5381, and General Order 157-D, Part 10.

14. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for failing to pre-employment test and enroll a driver (Clavello) in the Controlled Substance and Alcohol Testing Certification program in violation of Pub. Util. Code § 5374(a)(1)(I) and 5381, and General Order 157-D, Part 10 (160 counts).
15. The advertised per-passenger charge of \$5.00 for more than two passengers is not an “individual fare” within the meaning of Pub. Util. Code § 5401.
16. Subjecting fares to terms and conditions of service specifying that customers may encounter multiple parties and intermediate stops renders them “individual fares” within the meaning of Pub. Util. Code § 5401.
17. Each day’s continuance of advertising individual fares without a Passenger Stage Corporation authority constitutes a separate count of violating Pub. Util. Code §§ 1034.5 and 5401.
18. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$160,000 for advertising individual fares without a Passenger Stage Corporation authority in violation of Pub. Util. Code §§ 1034.5 and 5401 (160 counts).
19. All told, James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. may be fined up to \$2,575,000 for violations of the Public Utilities Code.
20. In consideration of the totality of circumstances, it is reasonable to impose a \$15,000 fine for these violations.

THEREFORE, IT IS ORDERED that:

1. Citation F-5182 is affirmed, except that:
 - a. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. are cited for 323 counts of violating Pub. Util. Code § 5414.5, rather than two.
 - b. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. are cited for 160 counts of violating Pub. Util. Code § 5378.1, rather than two.
 - c. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. are cited for 160 counts of violating Pub. Util. Code § 5374(a)(1)(D) and 5381 and General Order 157-D, Part 5.02, rather than two.

- d. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. are cited for 160 counts of violating Pub. Util. Code § 5374(a)(1)(l) and 5381 and General Order 157-D, Part 10, rather than two.
 - e. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. are cited for 320 counts of violating Pub. Util. Code § 1034.5, rather than two.
 - f. The cited violation of Pub. Util. Code § 1031 is dismissed.
- 2. James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. must pay a fine of \$15,000 in full within 30 days of this resolution. All checks must be made payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office, Room 3000, 505 Van Ness Avenue, San Francisco, CA 94102, and must state on the face of the check, "For deposit to the General Fund per Resolution ALJ-256."
 - 3. If James Brice dba Surf City Shuttle and/or Surf City Shuttle, Inc. fail to pay the fine as provided herein, the Consumer Protection and Safety Division shall take any and all action provided by law to recover the unpaid fine and ensure compliance with applicable statutes and Commission orders.
 - 4. The appeal process for this citation 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 November 19, 2010, the following Commissioners voting favorably thereon:

/s/ PAUL CLANON

PAUL CLANON
Executive Director

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners