JONES MAYER
Krista MacNevin Jee, Esq., SBN 198650
kmj@jones-mayer.com
3777 North Harbor Boulevard
Fullerton, CA 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

Attorneys for Defendant,
CITY OF FORT BRAGG

EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT CODE SECTION 6103

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MENDOCINO RAILWAY,

Plaintiff,

v.

JACK AINSWORTH, et al.,

Defendants.

Case No. 4:22-CV-04597-JST

Assigned for all purposes to:
Hon . John S. Tigar, Ctrm. 6

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CITY OF FORT BRAGG'S MOTION TO DISMISS COMPLAINT

Action Filed: August 9, 2022

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that DEFENDANT CITY OF FORT BRAGG requests the Court to take judicial notice pursuant to Federal Rules of Evidence, Rule 201 of the following matters in support of its concurrently filed Motion to Dismiss, true and correct copies of which are attached hereto (*see* Declaration of Krista MacNevin Jee, filed concurrently herewith):

Exhibit A: "Verified Complaint for Declaratory and Injunctive Relief," in *City of Fort Bragg v. Mendocino Railway,* Mendocino County Superior Court Case No. 21CV00850;

Exhibit B: Ruling on Demurrer to the Complaint, in *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court Case No. 21CV00850, filed April 28, 2022;

Exhibit C: Letter from California Public Utilities Commission to Sierra Railroad Company, dated August 12, 2022; and

Exhibit D: B.C.D. 06-42, Railroad Retirement Board (2006), available at *https://secure.rrb.gov/pdf/bcd/bcd06-42.pdf*.

I. LEGAL STANDARD

Federal Rule of Evidence 201(b) entitled "Kinds of Facts That May Be Judicially Noticed" provides as follows:

> The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Rule 201 permits courts to take judicial notice of orders filed in other court cases. *See, e.g., McVey v. McVey*, 26 F. Supp. 3d 980 (C.D. Cal. 2014). Courts also routinely take judicial notice of public information maintained by governmental agencies. *See, e.g., Gerristen v. Warner Bros. Ent.*, 112 F.Supp.3d 1011, 1033 (C.D. Cal. 2015) (taking judicial notice of business entity profiles from California Secretary of State's website). *See also*, Cal. Evid. Code § 1280 (official writing), § 1530 (official writing). It is proper for a court to take judicial notice of public records. *See, e.g., Mack v. South Bay Beer Dist.*, 798 F.2d 1279, 1283 (9th Cir. 1986).

The documents for which judicial notice is sought are properly considered by the Court in ruling on the concurrently filed Motion. They consist of public records, namely Court records (not for the truth of the contents, but for their legal effect), a federal agency decision, a California agency decision, and official correspondence of a California agency regarding the official status of Mendocino Railway. The records are not reasonably in dispute, since they are public records and created by public officers and/or employees in their official duties, or are the official files and records of other courts, for which judicial is also proper.

In fact, "it is well-established that executive and agency determinations are subject to judicial notice." *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000). It is also "a well-settled principle that the decision of another court or agency, including the decision of an administrative law judge, is a proper subject of judicial notice." *Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996). "[A]gency decisions [are] well-regarded as 'a proper subject of judicial notice.'" *Bowers Inv. Co., LLC v. United States*, 104 Fed. Cl. 246, 258 n.9 (2011) (finding agency decision properly considered in support of motion to dismiss). *See also, Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 197 (D. Conn. 2006) (The "Court takes judicial notice of the BIA's Final Determination, including its factual findings therein, thus bringing the Final Determination (including the factual findings) within the scope of materials that can be considered on a Rule 12(c) motion.").

Further, it is proper to consider matter subject to judicial notice in support of a motion to dismiss. *See, e.g., Truhlar v. John Grace Branch # 825*, 2007 U.S. Dist. LEXIS 23875, at *25-26 (N.D. Ill. Mar. 30, 2007) ("a court may take judicial notice of matters in the public record, including materials from proceedings in administrative agencies, without converting a Rule 12(b)(6) motion into a motion for summary judgment").

II. CONCLUSION

For the foregoing reasons, it is requested that the Court take judicial notice of the above-identified exhibits, in support of the Motion to Dismiss, filed concurrently herewith.

Dated: September 22, 2022

JONES MAYER

By: s/Krista MacNevin Jee
Krista MacNevin Jee
Attorneys for Defendant,
CITY OF FORT BRAGG

EXHIBIT A

JONES & MAYER
Russell A. Hildebrand (SBN 191892)
rah@jones-mayer.com
Krista MacNevin Jee, Esq. (SBN 198650)
kmj@jones-mayer.com
3777 North Harbor Boulevard
Fullerton, CA 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

Attorneys for Plaintiff
CITY OF FORT BRAGG

EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation,

Plaintiff,

vs.

MENDOCINO RAILWAY AND DOES 1–10, inclusive

Defendants.

Case No. 21CV00850

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(GOV. CODE, § 11350; CODE CIV. PROC., § 1060)

JUDGE: CLAYTON BRENNAN
DEPT.: TEN MILE

Plaintiff CITY OF FORT BRAGG, CA ("City" or "Plaintiff") files this action seeking judicial declaration regarding the validity of the Mendocino Railway's status as a public utility pursuant to Code of Civil Procedure section 1060 and/or injunctive relief, alleging as follows:

1. The operations of the Mendocino Railway have been reduced over time and now consist of only the operation of out and back excursion trips starting in either Fort Bragg, California or Willits, California and therefore the Mendocino Railway is no longer entitled to status as a public utility, is in fact an excursion only railroad, and therefore is subject to the jurisdiction of the City of Fort Bragg and all ordinances, codes and regulations set forth in the City of Fort Bragg Municipal Code.

PARTIES

2. At all relevant times herein, Plaintiff City of Fort Bragg was and is a municipal corporation organized and existing under and by virtue of the laws of the State of California.

3. Defendant Mendocino Railway is currently listed as a class III railroad by the California Public Utilities Commission ("CPUC"), and as such is subject to CPUC jurisdiction and has all legal rights of a public utility. At all relevant times herein, it has and does own and operate the "Skunk Train," as described herein, within the City of Fort Bragg, as well as owning and thus having maintenance and other responsibilities for real property relating thereto and also situated within the City of Fort Bragg.

4. Plaintiff is currently unaware of the true names and capacities of Does 1 through 10, inclusive, and therefore sues those parties by such fictitious names. Does 1 through 10, inclusive, are responsible in some manner for the conduct described in this complaint, or other persons or entities presently unknown to the Plaintiff who claim some legal or equitable interest in regulations that are the subject of this action. Plaintiff will amend this complaint to show the true names and capacities of Does 1 through 10 when such names and capacities become known.

BACKGROUND FACTS

5. The Mendocino Railway, aka the "Skunk Train," does in fact have a long and storied history of operations between Fort Bragg and Willits. Since the 1980s, Defendant's rail operations consisted primarily of an excursion train between Fort Bragg and Willits.

6. In 1998, the Public Utilities Commission issued an opinion that the predecessor owner of the Skunk Train, California Western Railroad ("CWRR"), was not operating a service qualifying as "transportation" under the Public Utilities Code because in providing this "excursion service, CWRR is not functioning as a public utility." (CPUC Decision 98-01-050, Filed January 21, 1998.)

7. Although the rail lines of the Mendocino Railway and/or the trains it was operating thereafter apparently did or may have had the capacity to carry freight and passengers from point-to-point, no rail lines presently have any such capacity. Moreover, the excursion train, even when it was running previously between Fort Bragg and Willits was exclusively a sightseeing excursion, was not transportation, was not essential, and did not otherwise constitute a public utility function or purpose.

8. On April 11, 2013, Defendant's operations were disrupted following the partial collapse of Tunnel No. 1, which buried nearly 50 feet of its 1,200 feet of track under rocks and soil, the third major collapse in the over 100-year-old tunnel's history. The collapse of the tunnel eliminated the ability of rail operations temporarily to continue between Fort Bragg and Willits. On June 19, Save the Redwoods League announced an offer to pay the amount required to meet the fundraising goal for repair work, in exchange for a conservation easement along the track's 40-mile (64 km) right-of-way. The acceptance of the offer allowed the railroad to resume full service of the whole sightseeing line in August 2013.

9. Tunnel No. 1 was once again closed in 2016 after sustaining damage from the 2015–16 El Niño, but Defendant had equipment at the Willits depot to allow the running of half-routes to the Northspur Junction and back (which had not been the case during the 2013 crisis), as well as trains running loops from Fort Bragg to the Glen Blair Junction and back.

10. Plaintiff is informed and believes the estimates for the repair to reopen the tunnel are in the area of $5 Million, and that Defendant has stated the tunnel repair will happen in 2022, but there are currently no construction contracts in place for that repair.

11. Current operations of the Defendant consist of a 3.5 mile excursion out and back trip from Fort Bragg to Glen Blair Junction, and a 16 mile out and back trip originating in Willits to Northspur Junction – both of which are closed loop sightseeing excursions.

12. In June, 2017, City staff deemed the roundhouse as so dilapidated that it may be necessary to demolish the building and rebuild instead of repairing. The City even offered to assist with funding to assist with those costs. Attempts to inspect the roundhouse by the County Building Inspector were refused and rebutted with a message from the Defendant that the City has no authority over a railroad. In 2019, when the City red tagged Defendant's work on a storage shed on the Skunk Train's property for failure to obtain a City building permit, the Defendant removed the tag and proceeded with the work. More recently in August, the City sent an email to Defendant to inform them that they needed a Limited Term Permit for a special event after 10pm that would create additional noise in the neighborhood surrounding the Defendant's property. Defendant's response was that they are "outside the City's jurisdictional boundaries and thus not subject to a permit".

13. Defendant is directly responsible for the activities occurring as set forth herein in connection with operation of the Skunk Train and the condition of real property in violation of law as alleged herein. Defendant is thus responsible for continuing violations of the laws and public policy of the State of California and/or local codes, regulations and/or requirements applicable to such operations and activities and/or have permitted, allowed, caused, or indirectly furthered such activities/operations in a manner in violation of law, and Defendant's use of and activities in connection with the Skunk Train and the condition of real property relating thereto, including the allowance or maintenance of such activities, operations and conditions in violation of law are inimical to the rights and interests of the general public and constitute a public nuisance and/or violations of law.

FIRST CAUSE OF ACTION

Declaratory and/or Injunctive Relief

[Cal. Civil Proc. Code §§ 1060, 526]

14. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 13 as if fully set forth herein.

15. An actual controversy has arisen and now exists between Plaintiff and Defendant. Defendant has failed to comply with City's code enforcement efforts to have Defendant repair a dangerous building on their property. Defendant also claims its status as a public utility preempts local jurisdiction and provides immunity from the City's Land Use and Development Codes. City disagrees and maintains that, as an excursion-only railroad, Defendant is not a public utility, is not a common carrier, and/or does not provide transportation, and therefore Defendant is subject to the City's ordinances, regulations, codes, local jurisdiction, local control and local police power and other City authority. City is entitled to a declaration of its rights and authority to exercise local control/regulation over the property and Defendant and Plaintiff City has the present right, obligation and need to exercise such control, power and authority for the public interest, benefit and safety.

16. A judicial determination of these issues and of the respective duties of Plaintiff and Defendant is necessary and appropriate at this time under the circumstances because the Defendant continues to resist compliance with City directives to repair and make safe the dangerous building on its property, and to comply with the City Land Use and Development Codes, and/or other valid exercise of City governing authority.

17. No other adequate remedy exists by which the rights and duties at issue herein between the parties can be determined.

18. The City and the public will suffer irreparable injury if the nature of Defendant's conduct, as alleged herein, is not determined by the Court and/or enjoined.

19. Plaintiff City also, or in the alternative, seeks injunctive relief against Defendant and thus brings this action pursuant to California Civil Code Section 526 in order to enjoin or require Defendant to refrain from engaging in the conduct alleged here, cease violations of law, and/or to require Defendant to bring its property and operations into compliance with the law, as applicable.

20. Unless and until restrained and enjoined by this Court's issuance of injunctive relief as requested herein, Defendant will continue to maintain nuisance

conditions and violations of law as alleged, to the substantial harm and risk to the health, safety and welfare of the public, and directly contrary to the lawful and valid authority of Plaintiff City to regulate such nuisance and dangerous conditions, and to compel compliance with applicable law.

21. Unless and until the activities alleged herein are restrained and enjoined by this Court, as requested herein, they will continue to cause great and irreparable injury to Plaintiff City's lawful exercise of jurisdiction and authority over Defendant's operations, activities, and its real property, and the conditions thereof, as well as allowing the continuation of injury and risk to the public.

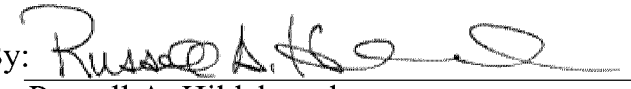
PRAYER

WHEREFORE, Plaintiff prays for relief as follows:

1. For a declaration that the Mendocino Railway is not subject to regulation as a public utility because it does not qualify as a common carrier providing "transportation.";
2. For a stay, temporary restraining order, preliminary injunction, and permanent injunction commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority, as applicable;
3. For costs of the suit; and
4. For such other and further relief as the Court deems just and proper.

Dated: October 28, 2021

JONES & MAYER

By: 

Russell A. Hildebrand
Krista MacNevin Jee
Attorneys for Plaintiff
CITY OF FORT BRAGG

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MENDOCINO, TEN MILE BRANCH

CITY OF FORT BRAGG, a California Municipal corporation **Plaintiff,** **vs.** **MENDOCINO RAILWAY and DOES 1-10, inclusive,** **Defendants.**	**Case No.: 21CV00850** **RULING ON DEMURRER TO THE COMPLAINT**

I. Standard of Review on Demurrer:

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. CCP §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.th 86, 90; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer is directed to the face of the pleading to which objection is made (*Sanchez v. Truck Ins. Exch.* (1994) 21 Cal.App.4th 1778, 1787; and to matters subject to judicial notice (CCP §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 160.

The only issue a judge may resolve on a demurrer to a complaint is whether the complaint, standing alone, states a cause of action. *Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1224. On a demurrer, a judge should rule only on matters disclosed in the challenged pleading. *Ion Equip. Corp. v Nelson* (1980 110 Cal.App.3d 868, 881.

A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. *Cundiff v GTE Cal, Inc.* (2992) 101 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for determining the truth of disputed facts, such as the correct interpretation of the parties' agreement or its enforceability (*Fremont Indem. Co. v Fremont Gen. Corp.* (207) 148 Cal.App.4th 97, 114-115. A judge may not make factual findings on a demurrer, including "implicit" findings. *Mink v Maccabee* (2004) 121 Cal.App.4th 835, 839.

For purposes of ruling on a demurrer, a judge must treat the demurrer as an admission of all material facts that are properly pleaded in the challenged pleading or that reasonably arise by implication, however improbably those facts may be. *Gervase v Superior Court* (1995) 31 Cal.App.4th 1218, 1224; *Yue v City of Auburn* (1992) 3 Cal.App.4th 751,756. A demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the challenged pleading. *Harris v Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149; *Hayter Trucking v Shell W. E&P* (1993) 18 Cal.App.4th 1, 12. For example, a demurrer does not admit the truth of argumentative allegations about the legal construction, operation, or effect of statutory provisions, or the truth of allegations that challenged actions are arbitrary and capricious or an abuse of discretion. *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645.

II. The Complaint:

The plaintiff's (City of Fort Bragg) complaint alleges a single cause of action for declaratory relief. Although the complaint denominates the cause of action as being for "Declaratory and/or Injunctive Relief," the court is construing the pleading as stating a cause of action for Declaratory Relief which seeks injunctive relief as a remedy if appropriate. Injunctive relief is a remedy—not a cause of action.

The City seeks a judicial determination that Defendant (Mendocino Railway), despite being a railroad subject to regulation by the California Public Utilities Commission ("CPUC"), is nevertheless "subject to the City's ordinances, regulations, codes, local jurisdiction, local control and local police power and other City authority." Fort Bragg contends that a judicial determination of these issues and of the respective duties of the parties is now necessary and appropriate because the Defendant continues to resist compliance with City directives to repair and make safe the dangerous building on its property, and to comply with the City Land Use and Development Codes, and/or other valid exercise of City governing authority.

III. The Demurrer:

Defendant, Mendocino Railway (hereinafter "MR"), raises two basic theories in support of its demurrer; namely, lack of subject matter jurisdiction, and preemption.

With regard to subject matter jurisdiction, MR contends that there is a decades long history of the CPUC recognizing and regulating its operations as a public utility. Moreover, MR argues that in the past, the City has vigorously defended MR's status as a "public utility" and thus should not be allowed to disavow those admissions now. More precisely, however, the gravamen of MR's contentions is that this court lacks subject matter jurisdiction based on Public Utilities Code Section 1759 which states:

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court. Pub. Util Code § 1759

In short, MR contends that "the CPUC has exclusive jurisdiction over the regulation and control of utilities and that jurisdiction, once assumed, cannot be hampered or second-guessed by a superior court action addressing the same issue." (citing, *Anchor Lighting v. Southern California Edison* (2006) 142 Cal.App.4th 541, 548). Thus, the City is barred from obtaining a declaration from this court which might nullify Mendocino Railway's status as a CPUC-regulated public utility.

With regard to preemption, Mendocino Railway contends there is no dispute that it is a federally recognized railroad. As such, it is regulated by the federal Surface Transportation Board under the Interstate Commerce Commission Termination Act ("ICCTA") which gives plenary and exclusive power to the STB to regulate federally recognized railroads. Mendocino Railway contends that the STB's exclusive jurisdiction over a federally recognized railroad means that state and local regulatory and permitting requirements are broadly preempted. Mendocino Railway argues that the injunctive relief sought would necessarily confer to the City plenary regulatory authority over railroad operations and facilities and thus is in direct conflict with STB's exclusive grant of jurisdiction pursuant to 49 U.S.C. § 10501(b).

As explained more fully below, the court rules that for the purpose of determining the merits of this demurrer, Mendocino Railway's contentions, embrace an overly broad interpretation of both the subject matter jurisdiction limitation of Public Utilities Code Section 1759 and how the operation of federal preemption that might arise pursuant to 49 U.S.C. § 10501(b) on the facts of this case.

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A. Requests for Judicial Notice:

Mendocino Railway requests that the court take judicial notice of five documents, Exhibits A-E, attached to the declaration of Paul Beard II.

Although courts may notice various acts, law, and orders, judicial notice does not require acceptance of the truth of factual matters that might be deduced from the thing judicially noticed. e.g., from official acts and public records. *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062 Often what is being noticed is the existence of the act, not that what is asserted in the act is true. Cruz v. County of Los Angeles (1985) 173 Cal.App.3d 1131, 1134.

There is a mistaken notion that taking judicial notice of court records means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. The concept of judicial notice requires that the matter which is the proper subject of judicial notice be a fact that is not reasonably subject to dispute. Facts in the judicial record that are subject to dispute, such as allegations in affidavits, declarations, and probation reports, are not the proper subjects of judicial notice even though they are in a court record. In other words, while we take judicial notice of the existence of the document in court files, we do not take judicial notice of the truth of the facts asserted in such documents. *People v. Tolbert* (1986) 176 Cal.App.3d 685, 690.

Furthermore, the hearsay rule applies to statements in judicially noticed declarations from other actions and precludes consideration of those statements for their truth absent a hearsay exception. *Magnolia Square Homeowners Ass'n v. Safeco Ins.* (1990) 221 Cal.App.3d 1049, 1056. A court cannot take judicial notice of the truth of hearsay statements simply because they are part of the record.

1. Exhibit A: Page from CPUC website listing railroads it regulates:

While the court might take judicial notice that the website exists, the court will not take judicial notice of the webpage for the purpose of establishing, as a fact beyond dispute, that Mendocino Railway is a common carrier, engaged in railroad operations in interstate commerce, and regulated in that capacity by the CPUC. Such a factual or legal conclusion is directly contradicted by the CPUC decision in the Matter of the Application of California Western Railroad, Inc. for Authority to Modify Scheduled Commuter Passenger Service and Seek Relief from Regulated Excursion Passenger Scheduling and Fares 1998 Ca. PUC LEXIS 384. Accordingly, the factual content of the website is not a proper subject for judicial notice, and the document is not otherwise relevant to the issues to be decided. Accordingly, request for the court to take judicial notice of Exhibit A is denied.

2. Exhibit B: CPUC Decision 98-01-050:

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a)

3. Exhibit C: January 17, 2019 Letter from Fort Bragg City Attorney to California Coastal Commission:

The contents of the proffered letter are hearsay statements of opinion with respect to a matter of law. The content of the letter is not a proper subject for judicial notice. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, request for the court to take judicial notice of Exhibit C is denied

4. Exhibit D: August 1, 2019 Letter with Coastal Consistency Certification:

While the existence of the letter and certification may be judicially noticed, judicial notice is not proper as to their contents. Mendocino Railway requests the court take judicial notice of the documents because they are "relevant to, inter alia, the City's position on the history of Mendocino Railway's freight and passenger service as well as on whether the railroad is ready, willing, and able to resume full service upon the tunnel's reopening. For purposes of a demurrer, the court must assume the facts in the complaint as true. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, Mendocino Railway's stated purpose for the court to take judicial notice is irrelevant for determining the merits of its demurrer and thus the document is irrelevant to the motion at bar. Accordingly, request for the court to take judicial notice of Exhibit D is denied.

5. Exhibit E: CPUC Decision No. 98-05-054:

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a).

6. Mendocino Railways's Supplemental Request for Judicial Notice filed April 13, 2022:

Mendocino Railway filed a Supplemental Request for Judicial Notice on April 13, 2022. This matter, however, was deemed submitted for decision on February 24, 2022 after the court had reviewed all of the parties' pleading and papers and heard oral argument. The supplemental request for judicial notice, coming 48 days after the matter was deemed submitted is untimely. The supplemental request for judicial notice is denied.

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IV. Discussion:

A. Public Utilities Code Section 1759:

By way of the instant demurrer, MR contends that the City is asking this court to "nullify Mendocino Railway's status as a CPUC-regulated public utility and thus empower the City to seize unfettered control over a state regulated, public-utility." MR characterizes the City's action as an "extraordinary" and "unlawful" attempt to "second guess" and "interfere with the agency's continuing jurisdiction...." In support of its allegations, MR argues that the Public Utilities Code "vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous specific powers for [that] purpose." (citing, *San Diego Gas*, 13 Cal.4th at 915). MR notes that "to protect the CPUC's broad mandate and limit judicial interference with the CPUC's work, the Legislature enacted section 1759(a) of the Public Utilities Code which deprives the superior court of jurisdiction to entertain an action that could undermine the CPUC's authority." (citing Anchor Lighting v. Southern California Edison Co. (2006) 142 Cal.App.4th 541, 548.

While it is true that section 1749(a) grants the CPUC exclusive governing authority over public utilities, application of the jurisdictional limitations of 1749(a) is more nuanced and fact-driven than Mendocino Railway admits. For example, it is well established that a suit is not barred in superior court when it actually furthers the policies of the CPUC. (see, *North Gas Co. v. Pacific Gas & Electric* Company 2016 U.S. Dis.t LEXIS 131684 (N.D. Cal. 2016). In fact, there are several legal issues that need to be evaluated in determining the applicability of Section 1749. These issues include a "careful assessment of the scope of the CPUC's regulatory authority and [an]evaluation of whether the suit would thwart or advance... CPUC regulation." (See, *PegaStaff v. Pacific Gas & Electric Company* (2015) 239 Cal.App.4th 1303, 1318.)

As noted in *Vila v. Tahoe Southside Water Utility*, (1965) 233 Cal.App.2d 469, 477, California courts have frequently proclaimed concurrent jurisdiction in the superior court over controversies between utilities and others not inimical to the purposes of the Public Utility Act. For example, as the Vila court explained,

> "In *Truck Owners, etc. Inc. v. Superior Court, supra*, 194 Cal. 146, the court, after stating that the Legislature under the Constitution had full power to divest the superior court of all jurisdiction, and had exercised that power in denying jurisdiction to "'enjoin, restrain or interfere with the commission in the performance of its official duties,'" and had also vested in the Supreme Court sole power "to compel the commission to act," held that the superior court, nevertheless, had power to hear and determine a cause involving a complaint against a transportation company seeking to enjoin its transportation of freight as a public carrier with a certificate of public convenience. The court noted that the suit did not involve an interference with any act of the commission since the latter had not acted; that if it ever did act any conflicting injunction would be superseded. A contention that

recognition of concurrent jurisdiction in the court and the commission would cause confusion was rejected."

A three prong test to determine whether an action is barred by section 1759 was set forth by the California Supreme Court in *San Diego Gas & Electric Co. v. Superior Court* 13 Cal.4th 893 (*Covalt*). The test is as follows:

(1) Whether the commission had the authority to adopt a regulatory policy;

(2) Whether the commission had exercised that authority; and

(3) Whether the superior court action would hinder or interfere with the commission's exercise of regulatory authority.

Superior court jurisdiction is precluded only if all three prongs of the Covalt test are met.

As described in *Pegastaff, supra,* 239 Cal.App.4th at 1315,:

"The issue in *Covalt* was whether section 1759 barred a superior court action for nuisance and property damage allegedly caused by electric and magnetic fields from power lines owned and operated by a public utility. (citation) The court, considering the third prong of the test, concluded that a superior court verdict for plaintiffs would be inconsistent with the PUC's conclusion "that the available evidence does not support a reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm, and that unless and until the evidence supports such a belief regulated utilities need take no action to reduce field levels from existing powerlines."

Since *Covalt* was decided, courts have had repeated occasion to apply the test it established. In *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, residents brought actions against, among others, water providers regulated by the PUC for injuries caused by harmful chemicals in the water they supplied. Asserting tort and other causes of action, the plaintiffs sought damages and injunctive relief against those defendants. The water companies argued that section 1759 deprived the superior court of jurisdiction over the plaintiff's claims. The Supreme Court found that the first two prongs of the Covalt test were met: The CPUC had regulatory authority over water quality and safety and had exercised that authority. Applying Covalt's third prong, it held that adjudication of some—but not all—of the plaintiff's claims against the regulated water companies would hinder or interfere with the CPUC's exercise of regulatory authority. The plaintiff's injunctive relief claims would interfere with the PUC's exercise of its authority because the PUC had determined that the water companies were in compliance with state water quality standards and impliedly declined to take remedial action against those companies. "A court injunction, predicated on a contrary finding of utility noncompliance, would clearly

conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." Plaintiff's damages claims were also barred by section 1759 to the extent they sought to recover for harm caused by water that met state standards but allegedly was unhealthy nonetheless."

As the Pegastaff court concludes,

"*Hartwell* demonstrates that application of the third prong of Covalt does not turn solely or primarily on whether there is overlap between conduct regulated by the PUC and the conduct targeted by the suit. The fact that the PUC has the power and has exercised the power to regulate the subject at issue in the case established the first and second prongs of *Covalt*, but will not alone establish the third. Instead, the third prong requires a careful assessment of the scope of the PUC's regulatory authority and evaluation of whether the suit would thwart or advance enforcement of the PUC regulation. Also relevant to the analysis is the nature of the relief sought—prospective relief, such as an injunction, may sometime interfere with the PUC's regulatory authority in ways that damages claims based on past harms would not. Ultimately, if the nature of the relief sought or the parties against whom the suit is brought fall outside the PUC's constitutional and statutory powers, the claim will not be barred by section 1759. (Emphasis added).

In the case at bar, it is clear that the superior court jurisdiction of the parties' dispute will not impair, hinder or interfere with the CPUC's exercise of regulatory authority. The reason is simple. As plaintiff contends, MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity.

"The Legislature enacted the Public Utilities Act (§ 201 et seq.) which 'vests the commission with broad authority to "supervise and regulate every public utility in the State."' (*San Diego Gas & Electric v. Superior Court* (1996) 13 Cal.4th 893 (*Covalt*) This broad authority authorizes the commission to '"do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient" in the exercise of its jurisdiction over public utilities." The commissions's authority has been liberally construed, and includes not only administrative but also legislative and judicial powers..." *Pegastaff, supra* at p. 620 .When the CPUC's determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." *People v. Western Air Lines , Inc.,* 42 Cal.2d 621, 629.

As emphasized by the City of Fort Bragg in their opposition, the CPUC has already made judicial findings regarding MR's predecessor, California Western Railroad (CWRR), regarding its status as a public utility. Simply put, the CPUC found that the

railroad is not functioning as a public utility. Its services are limited to sightseeing excursions and do not constitute "transportation under Public Utilities Code section 1007.

The CPUC writes,

> "The primary purpose of CWRR's excursion service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing.... [The Commission [has] also opined that public utilities are ordinarily understood as providing essential services... [But, CWRR's excursion service is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility. Based on the above, we conclude that CWRR's excursion service should not be regulated by the CPUC." (1998 Cal. PUC LEXIS 189 (1998)

Obviously, if the CPUC has already found that the railroad should not be subject to its regulation, it is difficult to imagine how the superior court, by hearing the current dispute, would impair or hinder any exercise of the CPUC's regulatory authority.

City of St. Helena v. Public Utilities Commission (2004) 119 Cal.App.4th 793 lends further support to the conclusion that MR is not subject to regulation as a public utility in a manner that would deprive this court of subject matter jurisdiction. In that case, the City of St. Helena sought annulment of various decisions of the PUC conferring public utility status on the Napa Valley Wine Train. At issue in that case was whether the City was pre-empted, by reason of the Wine Train's public utility status, from exercising its local jurisdiction regarding the placement of a Wine Train station in downtown St. Helena. The case is strikingly similar to the case at bar in that, here, the MR has allegedly asserted any local regulatory authority of the City of Fort Bragg is also pre-empted.

The *City of St. Helena* court writes,

> The Wine Train is not subject to regulation as a public utility because it does not qualify as a common carrier providing "transportation." Additionally, even if an up-valley station were permitted, it could be argued that any transportation provided would be incidental to the sightseeing service provided by the Wine Train. The PUC has previously held that sightseeing is not a public utility function. (*Western Travel*, *supra*, 7 Cal.P.U.C>2d 132 1981 WL 165289.) In *Western Travel*, the PUC found sightseeing is "essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Id.* at p. 135 1981 WL 165289.) Relying in part on *Western Travel*, the PUC previously found the Wine Train was not a public utility. (See, *NVWT IV*, *supra*, 2001 WL 873020, 2001 Cal. PUC LEXIS 407.) We leave for another day the question of whether a sightseeing service is subject to regulation

> under section 216. Rather, we note the PUC's decisions in NVWT IV and Western Travel to illustrate the PUC's internal inconsistency.
>
> This inconsistency is also evident in the California Western Railroad decision, in which the PUC concluded the Skunk Train, providing an excursion service between Fort Bragg and Willits, did not constitute "transportation" subject to regulation as a public utility. (78 Cal. P.U.C.2d at p. 295, 1998 WL 217965.) It is difficult to differentiate this service from that provided by the Skunk Train. The Skunk Train's excursion service involves transporting passengers from Fort Bragg to Willits, and then returning them to the point of origin for purpose of sightseeing. (Ibid.) The PUC does little to distinguish the Wine Train from the Skunk Train. Rather, it simply states the Wine Train would not provide a continuous loop service due to its proposed up-valley stops. As previously discussed, the proposes stops may give rise to public utility status in the future, but presently do not mandate such a determination. Finally, to the extent the PUC has made express findings of fact that that Wine train is a public utility, such findings are not support by substantial evidence. Presently, the Wine Train provides a round-trip excursion that is indistinguishable from the Skunk Train.

It is quite clear from this decision that the correct finding of the CPUC regarding excursion service railroads, is that such railroads are not operating as public utilities and should not by regulated by the CPUC as such. Furthermore, as the City of St. Helena court noted, "The fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." The same holds true for MR. Accordingly, there is no basis for applying the jurisdictional bar of Section 1759 to the instant proceedings.

B. <u>The Application of Federal Preemption Requires a Case-by-Case Factual Assessment Which Cannot Properly be Determined on Demurrer</u>:

Mendocino Railway contends that the injunction sought in this case would grant the City unlimited power over a federally recognized railroad in that the injunction would require Mendocino Railway to submit to "all" local laws and regulations, as well as to the total "jurisdiction and authority of the City." MR claims that "with such vast power, the City could force Mendocino Railway to halt or delay rail-related activities pending compliance with local permitting and other preclearance requirements. Mendocino Railway asserts that the Surface Transportation Board, under the authority of the Interstate Commerce Commission Termination Act, has plenary regulatory power and exclusive jurisdiction over federally recognized railroads. Accordingly, any jurisdiction of this Superior Court is preempted.

This court finds that Mendocino Railways preemption argument is overbroad. It fails to recognize that not all state and local regulations that affect railroads are preempted. It further fails to account for the fact that Mendocino Railway's is not involved in any interstate rail operations. As discussed above, from a regulatory standpoint, Mendocino

Railway is simply a luxury sightseeing excursion service with no connection to interstate commerce. As a result, its "railroad activities", for the purposes of federal preemption, are extremely limited.

Not all state and local regulations that affect railroads are preempted. State and local regulation is permissible where it does not interfere with interstate rail operations. Local authorities, such as cities and/or counties, retain certain police powers to protect public health and safety. *Borough of Riverdale Petition for Decl. Order the New Yok Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999). As the S.T.B. noted, "manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption." (Ibid, at 23)

In the *Borough* decision the Surface Transportation Board issued a declaratory order regarding the "nature and effect of the preemption in 49 U.S.C. 10501(b) as it related to the appropriate role of state and local regulation (including the application of local land use or zoning laws or regulations and other state and local regulation such as building codes, electrical codes, and environmental laws and regulations.)" The Borough decision is particularly instructive because it specifically addresses how preemption might apply in analyzing local zoning ordinances, local land use restrictions, environmental and other public safety issues, building codes and non-transportation facilities. The question at the very core of the preemption analysis is whether local control would interfere with a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. If local control does not interfere with interstate rail operations, then preemption does not apply.

Borough makes clear that,

> "local land use restriction, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are place on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. Austell; City of Auburn. Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question." (Emphasis added)

Mendocino Railway has already been the subject of a CPUC judicial determination that it is not engaged in interstate transportation related activities but rather simply provides a sightseeing excursion loop service. Accordingly, it is difficult to see how any of its non-railroad services could possibly trigger preemption.

Put another way, Mendocino Railway's it is far more likely that Mendocino Railways facilities and activities will be analyzed as "non-transportation facilities.

As noted in *Borough*,

> **"It should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW [the railroad] has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities"**

Accordingly, the applicability of preemption is necessarily a "fact-bound" question, not suitable to resolution by demurrer.

V. Order:

For the reasons set forth above Mendocino Railways Demurrer is overruled. Pursuant to Cal. Rules of Ct. 3.1320(g) defendants shall have ten (10) days from service of this order to file their answer.

SO ORDERED.

DATED: 4/28/2022

Clayton L. Brennan
JUDGE OF THE SUPERIOR COURT

Superior Court of California, County of Mendocino

PROOF OF SERVICE

Case: **21CV00850** **CITY OF FORT BRAGG VS MENDOCINO RAILWAY**

Document Served: **RULING ON DEMURRER TO THE COMPLAINT**

I declare that I am employed by the Superior Court of California, in and for the County of Mendocino; I am over the age of eighteen years and not a party to the within action. My business address is:

☐ Mendocino County Courthouse, 100 North State Street, Ukiah, CA 95482
☒ Ten Mile Branch, 700 South Franklin Street, Fort Bragg, CA 95437

I am familiar with the Superior Court of Mendocino County's practice whereby each document is placed in the Attorneys' boxes, located in Room 107 of the Mendocino County Courthouse or at the Ten Mile Branch, transmitted by fax or e-mail, and/or placed in an envelope that is sealed with appropriate postage is placed thereon and placed in the appropriate mail receptacle which is deposited in a U.S. mailbox at or before the close of the business day.

On the date of the declaration, I served copies of the attached document(s) on the below listed party(s) by placing or transmitting a true copy thereof to the party(s) in the manner indicated below.

Party Served	Ukiah US Mail	Ten Mile US Mail	Ukiah Attorney Box	Ten Mile Attorney Box	Inter Office Mail	Fax	E-mail
JONES & MAYER Atty. Russell A. Hildebrand 3777 North Harbor Boulevard Fullerton, CA. 92835 rah@jones-mayer.com	☐	☒	☐	☐	☐	☐	☒
JONE & MAYER Atty. Krista MacNevin Jee 3777 North Harbor Boulevard Fullerton, CA. 92835 kmj@jones-mayer.com	☐	☒	☐	☐	☐	☐	☒
FISHERBROYLES LLP Atty. Paul J. Beard II 4470 W. Sunset Blvd., Suite 93165 Los Angeles, CA. 90027 paul.beard@fisherbroyles.com	☐	☒	☐	☐	☐	☐	☒
COUNTY COUNSEL COUNTY OF MENDOCINO Atty. Chrsitian M.Curtis 501 Low Gap Road, Room 1030 Ukiah, CA. 95482 curtisc@mendocinocounty.org cocosupport@mendocinocounty.org	☐	☒	☐	☐	☐	☐	☒
	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed at:

☐ Ukiah, California ☒ Fort Bragg, California

4/28/2022 10:22:37 AM

Date: 4/28/2022

KIM TURNER, Clerk of the Court

By: DOROTHY JESS, Deputy Clerk

EXHIBIT C

STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

PUBLIC UTILITIES COMMISSION
Public Advocates Office
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 12, 2022

Via Electronic Mail Only

Michael Hart, CEO
Sierra Railroad Company
1222 Research Park Drive
Davis, CA 95618
E-mail: mike@sierraenergy.com

Re: Public Utilities Commission's Response to Mendocino Railway's Request

Dear Mr. Hart,

This letter is in response to your July 26, 2022 e-mail to the California Public Utilities Commission's (Commission) General Counsel, Christine Hammond.

In your July 26, 2022 e-mail, you request a letter from the Commission stating that Mendocino Railway is a regulated public utility railroad. Your request is similar to one received from Robert Jason Pinoli, General Manager of Mendocino Railway on October 31, 2018.

On December 7, 2018, the Commission responded in writing to Mr. Pinoli, stating that Mendocino Railway is a Class III railroad. Based on Mendocino Railway's representations to the Commission, the Commission considers Mendocino Railway's rail operations largely un-changed since that time.

This letter confirms that Mendocino Railway is a Commission-regulated railroad. The Commission's website lists Mendocino Railway's status as a Class III Commission-regulated railroad.[1] While Mendocino Railway is a Commission-regulated railroad, it is not a public utility within the meaning of the California Constitution, the California Public Utilities Code, and the Commission's orders.

[1] Regulated California Railroads, available at: https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety/regulated-california-railroads

The status of Mendocino Railway has previously been determined by the Commission. In 1997, the California Western Railroad (CWRR) - which was the company operating the excursion service commonly known as the "Skunk Train" at the time - applied to the Commission for status to reduce its commuter passenger services. In the course of this proceeding, the Commission determined that CWRR did not constitute a public utility to the extent it provides excursion rail service, which constituted 90% of its overall business. (D.98-01-050 (January 21, 1998) 1998 Cal. PUC LEXIS 189 ["In providing excursion passenger service, CWRR does not function as a public utility."].)

The Commission found that, while CWRR was not a public utility, it was still subject to Commission regulation regarding the safety of CWRR's rail operations. D.98-01-050, Conclusion of Law 3. CWRR agreed with these findings and did not challenge the Commission's determination that it was not a public utility.

It is my understanding that Mendocino Railway later purchased the CWRR in a bankruptcy proceeding and has continued to provide excursion train service on the Skunk Train. The Commission is not aware of any changes to the excursion services provided by Mendocino Railway that would cause a change to its 1998 determination that Mendocino Railway is a regulated railroad but not a public utility. As such, the 1998 determination is still the applicable law with regard to Mendocino Railway's status.

While some California railroads do constitute public utilities, "railroads" and "public utilities" are not synonymous under the Public Utilities Code. The Public Utilities Code gives the Commission authority to regulate the safety of rail operations in California, regardless of a railroads status as a public utility. (See, *e.g.*, Pub. Util. Code, § 309.7 [The Commission "shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways, and for enforcing state and federal laws, regulations, orders, and directives relating to transportation of persons or commodities, or both, of any nature or description by rail"]; Pub. Util. Code, § 765.5 ("provid[ing] that the commission takes all appropriate action necessary to ensure the safe operation of railroads in this state."].)

The Commission also works in partnership with the Federal Railroad Administration as federally certified inspectors to ensure the implementation of railroad safety laws and regulations. (49 C.F.R. § 212.1, et seq.) The Commission also recognizes the regulatory authority of the Surface Transportation Board pursuant to 49 United States Code section 10501, et seq.

The Commission's jurisdiction is limited to safety oversight over Mendocino Railway's rail operations, to ensure that Mendocino Railway is operating its rail vehicles safely and in compliance with the law. The Commission does not regulate other aspects of Mendocino Railway's operations, such as fare prices or schedules, and the Commission's authority would not pre-empt, for example, generally applicable land-use or environmental rules or regulations as such rules or regulations relate to non-railroad operations.

In addition, your July 26, 2022, e-mail recounts your difficulty with having Commission staff state that Mendocino Railway is a public utility, and also states that at a recent conference that included other California short-line railroads, "[o]ne of the government officials present simply suggested that we throw the next CPUC inspector off the property saying we are not regulated and not subject to his authority."

As explained above, Mendocino Railway is a Commission-regulated railroad, but not a public utility within the meaning of the California Constitution, the California Public Utilities Code, and the Commission's orders. As a Commission-regulated railroad, the Commission is authorized to access railroad property for inspections, as part of the Commission's obligation to ensure the safe operation of all railroads in California. (Pub. Util. Code, § 309.7.)

It is essential that Mendocino Railway have a complete understanding of its obligations as a Commission-regulated railroad, which includes allowing Commission inspectors access to its property. If Mendocino Railway were to throw Commission inspectors off of its property as your e-mail suggests, or otherwise impede or prevent Commission inspectors from accessing Mendocino Railway's property, this would constitute a blatant violation of the Public Utilities Code, punishable by fines or other penalties. Further, obstructing a public officer from carrying out their duties is a crime, as is threatening a public employee to refrain from carrying out the performance of their duties. (Pen. Code §§ 71; 148, subd. (a)(1).)

Ensuring the safety and integrity of Commission inspectors is of paramount importance. Any act of obstructing or attempting to remove Commission inspectors from railroad property will be prosecuted to the fullest extent of the law.

We hope this letter answers your inquiry as the Commission continues to exercise its regulatory mission to ensure safe operations of Sierra Railroad and its related entities.

Sincerely,

Jonathan C. Koltz

Jonathan C. Koltz
Assistant General Counsel
Legal Division, Public Utilities Commission

cc: Christine Hammond, General Counsel, Public Utilities Commission (christine.hammond@cpuc.ca.gov)

Kevin Wheelwright, Legal Counsel, Public Utilities Commission (kevin.wheelwright@cpuc.ca.gov)

Roger Clugston, Director of the Rail Safety Division-Public Utilities Commission (roger.clugston@cpuc.ca.gov)

Glenn L. Block, Attorney for Mendocino Railway (glb@caledlaw.com)

EXHIBIT D

B.C.D. 06-42

SEP 28 2006

EMPLOYER STATUS DETERMINATION
Sierra Entertainment
Mendocino Railway

This is the determination of the Railroad Retirement Board concerning the status of Sierra Entertainment and Mendocino Railway, as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Sierra Entertainment and Mendocino Railway are owned and controlled by Sierra Railroad Company, an employer under the Acts (B.A. No. 2774) and are affiliated with Midland Railroad Enterprises Corporation, also an employer under the Acts (B.A. No. 9750). [1]

Information regarding these companies was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company. Sierra Entertainment was created and began operations on January 1, 2003. It operates dinner and brunch trains and excursion trains over the lines of its common carrier affiliates within California pursuant to an operating agreement. It also provides trains for use in movies, television, and commercials. Its excursion trains include (1) the Skunk Train which operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points); (2) the Sacramento RiverTrain which operates a round-trip excursion train from Woodland, California, to a turning point; and (3) the Oakdale Dinner Train which operates a round-trip dinner/excursion train from Oakdale, California, to a turning point 14 miles out. Sierra Entertainment owns its own equipment and employs its own staff, but does not own any rail lines.

Mendocino was created in 2004 to acquire the assets of the former California Western Railroad (a covered employer under the Acts; B.A. No. 2782), a 40-mile rail line in Mendocino County[2]. The acquisition was authorized by the Surface Transportation Board in a decision dated April 8, 2004 (Finance Docket No. 34465). Mendocino's line runs between Fort Bragg and Willits, California, and connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since Mendocino Railway's only access to the railroad system is over this line, that access is currently unusable.

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[1] Midland is a subsidiary of Sierra Railroad Company.

[2] CWRR, Inc., d/b/a California Western Railroad, was terminated as an employer effective September 30, 2003 (B.C.D. 04-40).

Mendocino's ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," to include

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) & (b)).

Section 10501 of Title 49 of the United States Code provides in pertinent part that the Surface Transportation Board has jurisdiction over rail carrier:

> * * * transportation in the United States between a place in –
>
> > (A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. § 10501(a)(2)(A).]

The rail service provided by Sierra Entertainment may be characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Since passengers are transported solely within one state, under section 10501(a) (2)(A), above, Sierra Entertainment would not be subject to Surface Transportation Board jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act. Therefore Sierra Entertainment is not a carrier by railroad.

The Railroad Retirement Act and the Railroad Unemployment Insurance Act also define the term "employer" to include:

> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) & (b)).

Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

> A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Sierra Entertainment is under common control with a railroad employer by reason of its being owned by Sierra Railroad, which also owns Midland Railroad Enterprises Corporation, a covered employer under the Acts. Therefore, if Sierra Entertainment provides a service in connection with the transportation of passengers or property by railroad it is an employer under the Acts. Section 202.7 of the regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

There is no evidence that Sierra Entertainment provides any service to Midland. Rather, the evidence shows that Sierra Entertainment operates solely to provide public passenger excursion tours within one state. Because Sierra Entertainment does not perform a service in connection with rail transportation, the Board finds that it is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Since Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts. If Mendocino commences operations, the Board will revisit this decision.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever