

Decision No. 10-401

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of FRESNO TRACTION COMPANY for (a) Authority to abandon certain street railway franchises in Fresno, California, (b) For certificate of public convenience and necessity for the exercise of resettlement franchises, and (c) To execute to Union Trust Company of San Francisco, as Trustee, a supplemental mortgage covering such resettlement franchise rights.

ORIGINAL
Appl. 7705

E. J. Foulds and C. L. Everts for Applicants,
H. M. Johnston, City Attorney of Fresno, for
the City of Fresno.

Rowell, Commissioner:

O P I N I O N

The Fresno Traction Company (hereinafter referred to as the Company) asks, first, for an order under Section 51 (a) of the Public Utilities Act authorizing it to surrender and abandon its existing street railway franchises in Fresno to the City of Fresno (hereinafter referred to as the City) in accordance with Section 6 of Ordinance No. 964 of the City; second, for a certificate that public convenience and necessity require the exercise by the Company of the rights, privileges and franchises granted by Ordinance No. 964 and, third, authority under Section 51 (a) of the Public Utilities Act to execute a supplemental mortgage to Union Trust Company of San Francisco, as Trustee, of the rights so granted to the Company by Ordinance No. 964 of the City, in lieu of the franchise rights to be abandoned and surrendered.

It appears that on February 16, 1922 the City Commission of the City of Fresno adopted an ordinance, designated Ordinance No. 964, such ordinance granting to applicant a resettlement franchise and covering all of the lines owned and operated by the Company in the City in resettlement and adjustment of existing franchises. A copy of franchise Ordinance No. 964 is a part of the application and an exhibit in this proceeding. In Section 6 of said Ordinance No. 964 it is provided that applicant, together with the trustee under its outstanding mortgage shall within ninety days after the sixteenth day of February 1922 file an abandonment and surrender to the City all of its existing franchises as enumerated in said Section 6, to which reference is hereby made. It also appears that applicant has a bond mortgage upon its property bearing the date of July 1, 1904 executed to the Union Trust Company, as Trustee, under which mortgage there are outstanding bonds of the par value of \$680,000. In the acceptance of the resettlement franchise and the abandonment of the prior franchises applicant proposes, in order not to impair the security for the outstanding bonds, to execute to Union Trust Company of San Francisco, as Trustee, a supplemental deed of trust or mortgage, subjecting the rights, privileges and franchises granted to applicant by Ordinance No. 964 to the lien of said indenture in lieu of the prior franchises to be surrendered as referred to above.

Applicant does not propose to construct any new lines or abandon any of the existing lines of street railway in the City of Fresno, but simply to continue the present operation.

The exchange of the several prior franchises,

expiring at various times from four and one-half to twelve years in the future, for the resettlement franchises granted in Ordinance No. 964 is of undoubted advantage both to the City and to the Company and it is my conclusion, therefore, that this application should be granted. This Commission has on several occasions expressed its opinion of the desirability, from the standpoint of the public, of exchanging obsolete and undesirable term franchises for more desirable and more modern indeterminate franchises. While under its charter, Fresno is not in a position to grant a full indeterminate street railway franchise, the franchise before us represents an improvement over the franchise to be surrendered and the City may under the new franchise look forward to improved street car service, able to keep pace with the rapid growth of the city. From the standpoint of the Company's bond holders the franchise exchange is a desirable step and one tending to enhance the value of the security.

The granting of a certificate for public convenience and necessity for a new service is not at issue. All that is necessary is to certify that public convenience and necessity require the continuation of the service that is now being rendered by this Company to the people of the City of Fresno.

Counsel for the City of Fresno stated that the City desired this resettlement franchise to take effect and urged the granting of the Company's application.

The Commission is not asked in this proceeding to approve any of the provisions of the resettlement franchise nor has the City nor the Applicant called upon the

Commission to pass upon the validity of any of the franchise provisions. Inasmuch, however, as this Commission is specifically referred to in several sections of Ordinance No. 964 and, in a sense, made a party to the contract between the Company and the City, it appears desirable to refer briefly to the relevant franchise provisions. These provisions deal, first, with the matter of rate fixing and second, with the terms under which the City can acquire this property in the event the City desires to purchase.

Referring to the matter of rates, Section 1, sub-sections (g) and (h) of Ordinance No. 964 read:

"(g) The words 'Capital Value,' used in this ordinance shall be held and construed to mean the amount which the Railroad Commission of the State of California may lawfully fix from time to time.

"(h) The words 'operating expenses and taxes' used in this ordinance shall be held and construed to include the expenses defined as 'operating expenses and taxes' by the Railroad Commission of the State of California."

These sub-sections should be read in connection with Section 12, which is as follows:

"(12) That the company shall on or before February 15th of each year file with the Commission and the Railroad Commission a full and complete report in such form and containing such matters as required by the Railroad Commission of the State of California and upon such report, subject to the approval of the Railroad Commission of the State of California, the rates of fare to be charged on the lines of this company, in the City of Fresno shall be such as to allow said company to earn gross amount sufficient to pay 'operating expenses and taxes;' and a return at a reasonable rate per annum upon the 'capital value' as such terms are defined in this franchise. When it shall appear that the existing rates of fares are giving a return in excess of a reasonable return per annum as evidenced by the earnings of the whole or proportionate part of the preceding calendar year, during which time said rates were in effect, then on or before the 15th day of February of next calendar year the Company shall notify the Railroad Commission and the

Commission, and if approved by the Railroad Commission it shall lower such fare one cent, such reduction to be effective April 1st following; and if the rates of fares shall fail to yield a reasonable return during the period and under the conditions above specified, then the Company shall on or before the 15th day of February of the next calendar year notify the Railroad Commission and the Commission, and unless objected to by the Railroad Commission shall increase the rate of fare one cent, which increase shall be effective April 1st following. It is the intention that the rate of fare shall not be changed more often than once in twelve months. Except as from time to time otherwise determined by the Railroad Commission as measured by the rates of return found reasonable in connection with the operation of public utilities, such reasonable rate of return shall be deemed to be eight per cent per annum. Nothing in this franchise shall be construed as limiting the right now accorded by law to any person or persons from presenting any applications to the Railroad Commission as are now allowed by law to be so presented to such Railroad Commission."

It will be noted that under Section 12 the Company is required to file with the Commission of the City of Fresno and with this Commission a "full and complete report in such form and containing such matters as required by the Railroad Commission" and that "upon such report" the rates of fare shall be fixed in such manner as to pay the "operating expenses and taxes" and a reasonable rate of return upon the "Capital Value". The Company at present files with this Commission no report that will meet the requirements of this franchise provision. The only report required from the Company under the rules of the Commission is the "Annual Report" and this report embraces the operations of the Company both inside and outside the city limits of Fresno. It will be necessary, therefore, if this franchise provision is to be complied with, to file a new report segregating the Company's operations inside the Fresno city limits from those on the outside. Section 12 apparently is intended to lay down a rule of rate making and of determining the "rate base"

with the rate of return specified at eight per cent.

In my opinion, the most that this section of the franchise can accomplish is to indicate to the Commission the basis on which the City of Fresno is willing to have this Commission proceed in the fixing of street railway fares and the extent of the profit which it is willing the Company should earn from its street railway operation. Under the constitution of the State and under the Public Utilities Act this Commission has sole jurisdiction in the matter of the fixing of rates. It follows that nothing contained in this franchise can absolve the Commission from its duty to fix fair and reasonable rates and it must in the fixing of such rates be controlled, of course, by the facts as they will be developed in any particular case under its own methods of investigation and in its own best judgment. It must be understood, therefore, that the Commission cannot be bound in any rate proceeding by definitions or interpretations of terms such as "capital value", appearing in the resettlement franchise. This matter was discussed in the hearing by the presiding Commissioner with counsel for the City and for the Company and there appeared to be general agreement as to the paramount rate making authority of this Commission.

To carry out the intent of Section 12 of the resettlement franchise it will be necessary for this Commission to make a valuation of this property in order to establish the sum on which earnings should be calculated and usually designated as "rate base" by this Commission and apparently termed "capital value" in the franchise. At the hearing it appeared that such a valuation is desired both by the City

and by the Company. Instructions have been issued by the Commission to its Engineering Department to make such a valuation, the expense to be borne by the parties to the franchise. It would be desirable if the City through its own engineers could participate from the beginning in the making of such a valuation. A decision in the valuation matter can be made in a supplemental order in this proceeding.

Section 19 deals with the City's right to terminate this franchise and to acquire the street railway system. The section reads as follows:

"(19) That this resettlement franchise is granted upon the express condition that the city shall have the right to terminate this franchise, and to acquire by purchase, or otherwise, all property of the Company within said City used and useful in the operation of the railways under this resettlement franchise, and all extensions hereafter granted and made, and such other property within said City of the Company as shall be determined by the City to be of prospective usefulness in the public service, ten years from the adoption of this ordinance, and upon each ten year period thereafter, upon giving the company six months notice of its intention, at a valuation of the said physical properties of the company, agreed on between the company and the city, or if they cannot agree, at a valuation to be lawfully fixed and determined by the Railroad Commission. Should the city elect to terminate this franchise and acquire said property, if the city and company cannot agree, the city shall promptly apply to the Railroad Commission for an appraisement and valuation of said properties. The valuation so lawfully fixed shall be conclusive on the parties, and if the company shall be operating lines of railway outside of the city, but in conjunction with its lines within the city, and shall have a bonded indebtedness hereafter covering the whole, such Railroad Commission shall have the right, on demand of the city, to apportion the bonded indebtedness as between the properties within and without the city. The city, if the valuation of said property within the city shall exceed the bonded debt, or the part thereof apportioned to the property within the city, may assume the bonded debt, as a part of the purchase price, and pay the difference in money. The city must, within one year after the valuation fixed by the Railroad Commission has become final, or in event of litigation within one year after final determination thereof, either pay to the company, in lawful money of the United States, the value fixed by said Railroad Commission, or assume the bonded indebtedness and pay the company such difference, and.

provided further, however, that any and all mortgages or deeds of trust hereafter given to secure the lien of any bonded indebtedness shall contain suitable provisions to carry into effect the clauses contained in this franchise pertaining to the settlement and division of such bonded indebtedness, but, in reference to any deeds of trust or mortgages now existing upon said properties given to secure such bonded indebtedness, the said company shall, in the event of sale, at the request of the city, reduce said bonded indebtedness to a sum not in excess of Thirty Thousand (\$30,000.00) Dollars, and, in the event of such sale and purchase by the city, the said shall have the right and privilege to retain a sum sufficient to cover such bonded indebtedness with interest and to retain the sum until such bonded indebtedness has been liquidated by said company and upon such liquidation, the said sum with interest so retained shall be paid to said company. Any extensions or betterments made by the company after the appraisement, and before completion or purchase, shall be added to value fixed by the Railroad Commission and become a part of the purchase price, but no such betterments or extensions in excess of a total of \$1,000.00 shall be made without the consent of the Commission. Upon payment in full by the city to the company of the purchase price, or payment partly in money and partly by the assumption of indebtedness, the company agrees to execute necessary surrenders, grants, releases and conveyances, and to deliver to said city possession of said property.

"If at the time the city purchases said property the company shall be operating interurban lines in connection with its lines within the city, the company shall have the right to operate its interurban cars over the lines within the city to some definite fixed central point, for the transportation of passengers and United States mail only, upon division of operating expenses and return on investment based on car mileage; but it shall not, except with the consent of the Commission, transport passengers from one point within said city to another point therein.

"In fixing the valuation of the property owned by the company for any of the purposes considered in this franchise, only the value of the property devoted to public service shall be included, provided, however, in case of purchase by the City, property of prospective public use may be included at option of City.

"Should the City fail to complete said purchase within said year, or in event of litigation regarding same within one year after final determination thereof, then the notice electing to terminate said franchise and acquire properties of the company shall be deemed waived, unless the company shall grant an extension of time, and said franchise shall continue in force, subject to all its terms, with the right of the city to again institute proceedings to

acquire the same at any ten year period, it being understood that the right to terminate this franchise and acquire said property at any ten year period is a continuous one, that is never lost during the existence of said franchise.

"It is agreed that the city shall have the right to acquire all private rights of way owned by the company and upon which it is operating street railways, and such private rights of way and street railways constructed thereon shall be deemed to be a part of the property of the company used and useful in the public service and to be operated by it under this resettlement franchise, and shall be taken into account by the Railroad Commission in fixing rates and valuation, in the event the City shall acquire the same.

"It is further agreed that any valuation of the properties of the company by the Railroad Commission for the purpose of fixing rates shall not be binding upon nor estop either the Railroad Commission or the city, whether fixed after a contest or adjudication or by consent of said city, for any purpose except that of fixing rates, and when and if the city demands a valuation for purpose of acquisition, the Railroad Commission shall fix and appraise the physical properties of the company anew as they then are, and no prior adjudication or determination shall be conclusive."

In view of the fact that the Public Utilities Act prescribes a method of procedure under which cities and other political subdivisions of the State may acquire the property of public utilities by condemnation or otherwise, the question was raised of the effect of the franchise provision just quoted. Counsel for applicant and for city, upon the request of the presiding Commissioner, filed briefs upon that point. There appears to be doubt to what extent, if at all, this franchise provision could be construed as impairing the jurisdiction of the Railroad Commission to fix the value of this property for the purpose of eminent domain, under Section 23, Article 12 of the Constitution. To consider in this proceeding the various possible constructions of the section would appear to be a moot discussion. Since the Commission is not at this time called upon to pass upon the

validity of what might be called the restrictive sections of this franchise it will be sufficient if in this decision the question of the validity of Section 19 is expressly reserved for future consideration.

The following form of order is suggested:

O R D E R

Fresno Traction Company having applied to the Commission for authority to abandon certain street railway franchises in the city of Fresno, for a certificate of public convenience and necessity for the exercise of resettlement franchises and for authority to execute a supplemental mortgage covering such resettlement franchise, a public hearing having been held and the Commission basing its findings of fact and its order on the foregoing opinion

IT IS HEREBY ORDERED:-

(a) Authority is hereby granted to Fresno Traction Company under Section 51 (a) under the Public Utilities Act to surrender and abandon its existing street railway franchises in Fresno, California, to the City of Fresno, in accordance with Section 6 of Ordinance No. 964 of the City of Fresno dated February 16, 1922 to which Ordinance specific reference is hereby made;

(b) It is hereby found as a fact that public convenience and necessity require the exercise by Fresno Traction Company of the rights, privileges and franchises granted by said Ordinance No. 964 and a certificate of such public convenience and necessity is granted herewith;

(c) Authority is hereby granted to Fresno Traction Company, under Section 51 (a) of the Public Utilities Act, to execute a supplemental mortgage to Union Trust Company of San Francisco, as Trustee, of the rights granted to Fresno Traction Company by said Ordinance No. 964 of the City of Fresno in lieu of the franchise rights abandoned and surrendered.

The authority herein granted to Fresno Traction Company is granted subject to the condition that nothing contained in said Ordinance No. 964 and in this Order shall be con-

strued to interfere with the exercise of this Commission's regularly constituted authority under the Public Utilities Act in future rate cases or in any other proceeding before this Commission.

The Commission reserves the right to make such further orders as may be necessary in this proceeding.

Dated at San Francisco, California this 3rd day of May 1922.

H. B. ...

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Commissioners