

No further violation of this Commission's
order be tolerated ~~be~~ in the slightest degree

J.M.C.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

Decision No. 1581

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ORIGINAL

In the matter of the application of
BIG FOUR ELECTRIC RAILWAY, a corpora-
tion, for authority to issue stock in
the amount of \$392,058.00

Application No. 1080.

E. I. Feemster, for applicant

James M. Burke, for protestants.

GORDON, Commissioner:

O P I N I O N.

This is the third application of this applicant asking authority of this Commission to sell stock for the purpose of building an electric railroad in Tulare County, California, the details of which have been fully covered by Applications Nos. 144 and 372 and orders thereon. I deem it proper at this time to refer to some extent to the operations of applicant in reference to orders heretofore granted.

On July 10, 1912, the Commission rendered its decision in Application No. 144, and among other things ordered that applicant be permitted to sell \$100,000.00 par value of its common stock on the following conditions:

- (1) Said stock to be sold to yield applicant not less than 80% of par value in cash;
- (2) Commission paid for selling stock must not exceed 20% of par value, to be paid only on actual cash received;
- (3) Proceeds to be used to pay outstanding indebtedness as of July 31, 1912, aggregating \$5,889.49.

which does not include commissions represented to be due on sales of stock already made. Commission due on sale of stock appearing on books as of July 31, 1912, to be cancelled, except commissions on sales of stock for which actual cash has been received. All commissions paid in excess of the agreed percentage of cash actually received, shall be returned;

(4) After discharging above liabilities of \$5,899.49, no further expenditure shall be made from cash proceeds of sale of stock until all of said 100,000 shares of stock shall have been sold and not less than \$50,000.00 in cash realized.

The applicant apparently being unable to satisfy the conditions contained in that order made another application (No.372) for permission to sell \$400,000.00 par value of its common stock. On April 3, 1913, after hearing having been held on said application in the city of Tulare, Tulare County, California, and the Commission being fully apprised of all matters pertaining thereto, and being of the opinion that the public was interested in having the road built as applied for in the application under consideration, rendered its order, which, among other things, provided:

It is hereby ordered that Big Four Electric Railway Company be, and the same is hereby authorized to issue four hundred shares of its common stock of the par value of four hundred thousand dollars (\$400,000), on the following conditions and not otherwise:

- (1) Stock must be sold to yield 80 per cent of its par value in cash;
- (2) Commissions to be paid only on cash received.
- (3) No commission to be paid Avery Investment Company until the indebtedness of Avery Investment Company to applicant be paid in full;
- (4) Proceeds to be used only for following purposes:
 - (a) To discharge liabilities as of January 31, 1913 amounting to \$8,670.57;

(b) In constructing and equipping applicant's railroad as detailed on estimate submitted.

(5) No expenditures from proceeds of stock sold to be made unless authorized by the Commission. The Commission, however, approves at this time of the grading contract entered into by applicant with Hahn & Sons and authorizes applicant to assign to Hahn & Sons the instalments of stock subscription under the terms of said contract. Applicant is authorized to make a monthly expenditure of \$125.00 for current office expenses.

(6) Applicant shall not enter into any contract nor incur any liability other than is included in said grading contract with Hahn & Sons.

(7) Applicant to keep proper accounts.

(8) The authority herein granted to issue stock shall apply only to stock issued prior to January 1, 1914.

The effective date of this order expired January 1, 1914.

On April 10, 1914, the Big Four Electric Railway Company filed with the Commission its third application asking permission to sell \$392,082.00 par value of its capital stock for the purpose of acquiring further rights of way for applicant's proposed railway and for the construction and equipment thereof; and on May 1, 1914, a hearing was held thereon in the city of Tulare, California.

Attached to this application and made a part thereof is an exhibit marked "Exhibit A", which contains a financial statement of applicant as of November 30, 1913, which in substance is as follows:

ASSETS

Subscribers Accounts Receivable	\$26,596.46
Subscribers Notes Receivable	42,825.00
Cash Citizens Bank of Visalia	.03
Due from Avery Investment Company	1,798.21
Commissions on stock sales	5,756.38
Construction accounts	43,082.86
Notes Receivable Suspense	7,000.00
Woodville Townsite Company	15.66
	<hr/>
	\$127,074.60

LIABILITIES

Capital Stock issued	\$ 25,058.00
Adv. Stock Subscription	82,884.00
Pay Checks	313.35
Accounts Payable	7,648.90
Bills & Notes Payable	3,895.00
Bond Sales, Advance Suspense	7,000.00
Hospital Fund	15.35
Jno. F. Jordan	260.00
	<u>\$127,074.60</u>

This balance sheet shows that \$1,798.31 is due from the Avery Investment Company. This amount represents over payments of commissions for capital stock subscriptions contrary to the Commission's orders, inasmuch as the orders provided that no commissions should be paid on account of stock subscriptions until the stock had been paid for in cash.

At the hearing the following subscribers to the capital stock appeared and protested against the granting of this application, giving as reason therefor that they had no confidence in the present management of the road:

W. H. Hahn	L. E. McCabe
Paul Blankenship	D. J. McKenzie
H. C. Wiley	J. B. Monroe
	M. Click

These protestants testified further that Mr. Frank Avery, the promoter and chief stock salesman of applicant, offered as an inducement for them to take stock, to re-purchase the stock within one year, if the purchasers were not satisfied with their investment. In one instance the record shows that Mr. Avery offered to take the stock back at a premium of fifty cents a share if the purchaser was dissatisfied with the investment at the end of a year. I cannot condemn too strongly this method of disposing of stock. I am convinced also that Mr. Avery had no intention of carrying out these promises.

These protestants, it seems, have refused to pay their subscription to the stock on the ground that they have no confidence

reliable
in the present management. They state, however, that if people take hold of the management of this enterprise they will gladly pay their subscriptions.

An attempt was made at the hearing to analyze the various items in the financial statement above mentioned, and to accomplish this purpose the president and secretary of applicant were sworn and testified at the hearing in relation thereto. The above statement contains an item of \$42,825.00, "Subscribers' notes receivable." Concerning the solvency of these notes President Hitchcock testified that he did not know the value of the W. H. Coffin note for \$8,000.00, the H. C. Coffin note for \$5,650.00 or the Frank Avery note for \$5,000.00. The William G. Hesse note for \$1,000.00 he said he believed was good. In fact, it would be very hard to decide, from Mr. Hitchcock's testimony, how much of the \$42,825.00 worth of notes are solvent. Mr. Dick Lipscomb, secretary of the Company, testified that Frank Avery had settled several bills of the Big Four Electric Railway Company with lumber and to pay for the lumber which was furnished by the Avery Mill and Lumber Company Mr. Avery turned over several notes given to applicant for subscriptions to stock. Mr. Lipscomb later testified that he did not believe that these notes could properly be applied on Frank Avery's indebtedness to the Big Four, because the transaction was really that of the Avery Mill & Lumber Company and not Frank Avery personally.

It appears from the evidence that the following notes, which were evidently the property of applicant, had been transferred to the Avery Mill and Lumber Company:

G. W. Wylie	\$500.00
William Sim	500.00
W. T. Winter	200.00

Mr. James M. Burke testified that he was offered the note of P. Q. Simpson for \$500.00, which is shown on the accounts as in the treasury of the Big Four, in settlement of an account of Daunt & Russell, Portland lumber dealers, against the Avery Mill and Lumber Company.

It is very evident from the testimony adduced at the hearing that the officers of the Big Four had no knowledge that this note was in Avery's hands and not in the treasury of applicant where it belonged. Mr. John F. Jordan, formerly of the Citizens Bank and Trust Company of Visalia, in whose custody applicant's note above referred to appeared to be at that time, stated that he and his cashier were the only ones that had access to these notes. Mr. Lipscomb testified also, as is shown on page 75 of the transcript, in answer to the question, "How do you know these notes are on hand at the present time--when did you count them last?", I counted them the first of every month, with the exception of the time since the Citizens Bank closed." Again quoting from page 82 of the transcript, Mr. Lipscomb was asked: "How did you make out to take an invoice of those notes the first of every month unless you had access to them?" Mr. Lipscomb answered: "I just had the list I left there," and when asked if he thought that was a proper method of taking an invoice of notes, he replied, "That is the only method I could take when they refused to let me have them."

Concerning the notes taken on account of stock subscription, it appears from the testimony that, aside from the three notes above mentioned there should still be on hand notes to the amount of \$41,625.00. These are held by the Citizens Bank and will not be released except on a written demand. It seems to me that it is a singularly strange way of managing the affairs of this company that such a thing should be possible--that this amount of notes should be deposited in any bank anywhere and delivery refused to the officers of applicant.

W. E. Zahn, of Zahn & Sons, contractors, testified that grading done for applicant by Zahn & Sons under contract heretofore entered into and approved by this Commission, amounted to something like \$12,000.00, and that there is still a balance due him of \$6,999.35 on said contract. He testified that he had filed

a lien on the right of way and roadbed of applicant and that he expected in the near future to foreclose on said lien and become the owner of said property.

After considering all the evidence introduced at the hearing I believe that the officers of applicant are open to very severe criticism for the manner in which they have managed this enterprise. They have apparently recognized no responsibility to the stockholders who entrusted money to them in good faith. While I believe the Commission would be justified in not only denying this application, but also in taking drastic steps against the parties at fault, I am of the opinion that the present application ^{should} be granted for the following reasons:

It is evident from the testimony of protestants introduced at the hearing in the City of Tulare on May 4, 1914, that they are unanimous in their desire that the road be built; and further, that if applicant should be successful in selling the amount of stock named in this application, and if the business of the road be under efficient management, they are still willing to pay their subscriptions in full.

I am also impressed with the fact that inasmuch as the proposed location of this road is through a splendid country which is rapidly being settled up, that if said railroad is built it will add much improvement to the passenger and freight facilities and consequently become an important factor in developing the communities along its line.

The most important factor which prompts me to recommend the granting of this application is the testimony of Mr. J. R. Hitchcock, president of said road, wherein he states that negotiations are now pending with parties to whom he expects to sell all of this stock in one lump.

Therefore, in view of the above reasons, I recommend that this application be granted upon the following conditions and terms, and not otherwise:

(1) That arrangements be made by applicant to take up the three notes heretofore mentioned in this opinion, amounting in all to \$1,200.00, which were turned over by Mr. Avery to the Avery Mill and Lumber Company to compensate the latter for paying off in lumber certain debts of applicant. I can see no reason why the makers of these notes should be, as they probably will be, subjected to a suit to compel them to pay their obligations in full while other subscribers, who gave notes for their subscriptions under similar circumstances, may be exempted from paying them.

(2) That the subscribers' notes heretofore referred to as being deposited in the Citizens Bank and Trust Company of Visalia, be withdrawn from said Bank and placed in the treasury of applicant and that a detailed list of same be furnished this Commission and certified as being correct by the president and secretary of the Big Four Electric Railway Company, applicant herein.

(3) That the indebtedness of Frank Avery to applicant in the amount of \$1,798.21 be paid in full before any such stock shall be issued and that the directors of this company be compelled either to collect this sum or to repay it themselves to the company under their liability as directors.

(4) That inasmuch as it is proposed by applicant to sell this stock all in one block, I recommend that no commissions be paid on the sale of this stock until there is at least \$100,000.00 in cash realized therefrom and in the treasury of the Company and evidence of these facts has been furnished to the Commission and the consent of the Commission has been obtained to the payment of commissions, and further, that thereafter no commissions shall be paid on future sales except upon stock, the full par value of which has been paid to applicant in cash. In no case shall the commissions paid exceed 20% of the par value of the stock sold.

(5) That applicant, before attempting to sell any stock shall come to some agreement with Hahn & Sons by which applicant's title to the rights of way shall be cleared of all encumbrances.

(6) That applicant shall not enter into any agreement for the construction of the road without further consent of the Commission.

In conformity with the above suggestions, I recommend the following form of Order:

O R D E R

BIG FOUR ELECTRIC RAILWAY COMPANY having applied to this Commission for permission to issue its capital stock of the par value of \$392,058.00 for the further acquisition of rights of way for applicant's proposed railway and for the construction and equipment thereof and the necessary incidental expenses in connection therewith as shown by "Exhibit D," attached to the application, and for the discharge of applicant's obligations as shown in its financial statement, "Exhibit A" attached to the application, and a public hearing having been held on this application and the Commission being of the opinion that the purposes for which this stock is to be issued are not in whole or in part reasonably chargeable to operating expenses or to income.--

IT IS HEREBY ORDERED that BIG FOUR ELECTRIC RAILWAY COMPANY be, and the same is hereby authorized to issue three hundred ninety-two thousand and fifty-eight (392,058) shares of its capital stock of the par value of three hundred ninety-two thousand and fifty-eight dollars (\$392,058.00), upon the following terms and conditions, and not otherwise, to-wit:

(1) That prior to the issue of any stock, applicant shall take up the three notes heretofore mentioned in this opinion, amounting in all to one thousand two hundred dollars (\$1,200.00), which were given to the Avery Mill and Lumber Company to compensate the latter for paying off in lumber certain bills of applicant.

(2) That subscribers' notes heretofore referred to as being deposited in the Citizens Bank and Trust Company of Visalia in the amount of forty-one thousand six hundred and twenty-five

dollars (\$41,625.00) be placed in the treasury of the applicant and that a detailed list of same be furnished this Commission and certified to as being correct by the president and secretary of the Big Four Electric Railway Company, applicant herein.

(3) That the indebtedness of Frank Avery in the amount of one thousand seven hundred ninety-eight and 21/100 dollars (\$1,798.21) be paid in full before any of such stock shall be issued. The directors of applicant are hereby ordered either to collect this sum within thirty days from date of this order or to repay this amount into applicants treasury under their liability as directors.

(4) That inasmuch as it is proposed by applicant to sell this stock all in one block no commissions be paid on the sale of any stock until there is at least one hundred thousand dollars (\$100,000) in cash realized therefrom and deposited to the credit of said Company and the consent of the Commission has been obtained to the payment of commissions, and that thereafter no commission shall be paid until the full par value of the stock sold has been received by applicant in cash; and

IT IS FURTHER ORDERED that in no case shall the commissions paid for the sale of stock exceed twenty per cent (20%) of the par value thereof;

IT IS FURTHER ORDERED that applicant, before attempting to sell any stock, shall come to some agreement with Hahn & Sons by which applicant's title to the rights of way shall have been cleared of all encumbrances;

IT IS FURTHER ORDERED that applicant will enter into no agreement for the construction of said road without the further order of the Commission;

IT IS FURTHER ORDERED that applicant incur no financial obligations without the prior consent of the Commission;

IT IS FURTHER ORDERED that the Big Four Electric Railway Company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale of the stock hereby authorized to be issued; and on or before the

25th day of each month the Company shall make verified reports to the Commission stating the sale or sales of stock during the preceding month, the terms and conditions of the sale, the moneys realized therefrom, and the use and application of such moneys, all in accordance with this Commission's General Order No. 24, which order, in so far as applicable, is made a part of this order.

IT IS FURTHER ORDERED that the authority herein granted applicant to issue stock shall apply only to stock issued before December 1, 1914.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 18th day of May, 1914.

John W. Ketchum
H. L. ...
...
Max. ...
Commissioners.