

Decision No. 37350

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
MARKET STREET RAILWAY COMPANY,  
a corporation,

for an order authorizing (a) the sale of all of its operative properties within the City and County of San Francisco and County of San Mateo, and all of its franchises, permits and licenses of any kind or character necessary or desirable in connection with the operation of said operative properties to City and County of San Francisco, a municipal corporation; (b) applicant to incur a temporary indebtedness in the amount of not to exceed \$2,000,000 and to enter into a bank loan agreement and to make, execute and deliver a mortgage, deed of trust, assignments and other instruments securing such indebtedness; (c) and the cancellation of all tariffs of applicant now in effect and on file with the Commission, effective September 29th, 1944, at 5 o'clock A. M. Pacific War Time.

ORIGINAL

Application  
No. 26323

Samuel Kahn, President, Market Street Railway Company  
and Cyril Appel, Attorney, for Applicant.

John J. O'Toole, City Attorney, Dion R. Holm, Counsel  
for Public Utilities Commission, and Paul Beck, Rate  
Engineer, for City and County of San Francisco.

James C. Purcell for Dennis A. Lang, et al., Protestants.

Robert Scott for Division 1004 of Carmen's Union.

BY THE COMMISSION:

O P I N I O N

In this application, Market Street Railway Company, hereinafter referred to as the Company, asks permission to sell and transfer all of its operative properties to the City and County of

San Francisco, hereinafter referred to as the City; to enter into a bank loan agreement, to make, execute and deliver a promissory note, first mortgage or deed of trust, chattel mortgage, collateral pledge agreement and assignment, securing the same, as in said bank loan agreement provided, or in the alternative, a disclaimer by the Railroad Commission of any jurisdiction over the execution of said bank loan agreement or the borrowing of moneys thereunder or the securing of the same as in said bank loan agreement provided; and to cancel all tariffs of the company now in effect and on file with the Commission, effective September 29, 1944, at 5 o'clock A.M. Pacific War Time.

At a special election held in the City and County of San Francisco on May 16, 1944, a majority <sup>(1)</sup> of the qualified electors voting at such election voted to amend the Charter of the City by adding thereto a new section, to-wit: 119.1, providing a plan for the purchase and acquisition of the operative properties of the Company. The Charter amendment was approved by the State Legislature on June 7, 1944.

On July 27, 1944, the Board of Directors of the Company adopted a resolution authorizing the sale of the Company's operative properties to the City for \$7,500,000, payable as provided in said Charter amendment. On August 3, 1944, the holders <sup>(2)</sup> of more

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(1) Votes in favor of amendment, 108,621; votes against amendment, 84,078.

(2) At the stockholders' meeting, the owners of 232,533 shares of stock voted in favor of the sale of the Company's properties, while the holders of 4,867 shares opposed the sale.

than two-thirds of the Company's outstanding stock approved and consented to the sale.

A copy of said Section 119.1 of the Charter of the City, and a copy of the contract between the City and the Company are on file in this application as Exhibit "A" and Exhibit 1, respectively. Exhibit 1 contains a description of the properties which the Company has agreed to sell and transfer to the City. They comprise all of the properties used by the Company in rendering transportation service.

As stated, the City has agreed to pay \$7,500,000 for the properties. Of this sum, \$2,000,000 is to be paid concurrently with the transfer of the properties and \$5,500,000 is to be paid out of the earnings of the combined railway operations, or otherwise as provided in said Section 119.1 of the Charter of the City. Any unpaid balances are to bear interest at the rate of 4% per annum.

The Company agrees to transfer to the City all of its operative properties free and clear of all claims, liens and encumbrances. Before it can convey title to the City, the Company must make provision for the redemption of its outstanding first mortgage bonds amounting to about \$3,500,000. It has called the bonds for payment on October 1, 1944. In order that Wells Fargo Bank & Union Trust Co., trustee under the Company's deed of trust securing the payment of the bonds, can release the properties from the lien of the deed of trust on September 29, the Company will deposit with the trustee, prior to that date, sufficient funds to pay the bonds and the accrued interest thereon. However, the \$2,000,000 initial

payment by the City, plus the Company's cash on hand, is not enough to pay the bonds. To provide itself with additional money to pay the bonds and a \$255,000 note held by The Anglo California National Bank of San Francisco, the Company has entered into an agreement with the Bank of America National Trust and Savings Association for a loan of not exceeding \$2,000,000 to be evidenced by a demand note. The note bears interest at the rate of 4% per annum, payable semi-annually, subject to a reduction of the interest rate if the principal or any part thereof is paid within one year after the date of the note. As security for the payment of the note to Bank of America National Trust and Savings Association, the Company agrees to assign to the bank its interest in the contract between it and the City, and further agrees to mortgage to the bank its nonoperative properties and comply with the provisions of the loan agreement. No operative properties are being mortgaged to secure the payment of the note.

The Company asks the Commission to approve the execution of the bank loan agreement and the documents referred to therein or make a finding that it has no jurisdiction over said bank loan agreement or the borrowings of money thereunder or the securing of the same as in said agreement provided. The testimony shows that the bank loan agreement has been signed and that the demand note to which reference is made therein will be issued prior to the transfer of the Company's properties to the City. The only phase of the agreement which may come under our jurisdiction is the issue of the demand note. The Commission has heretofore taken the position

that it had no jurisdiction over the issue of demand notes. But those were notes issued for purposes other than the refunding of indebtedness previously authorized by the Commission. In this case the record clearly shows that the Company will use the proceeds of the demand note to pay in part its outstanding bonds and the note held by The Anglo California National Bank of San Francisco. It occurs to us that such payment may be deemed a refunding of indebtedness which without Commission authorization would be prohibited by Section 52 of the Public Utilities Act. To avoid the raising of any question as to the validity of the demand note on the ground that its issue was not authorized by the Commission, the Order herein will authorize its issue. The Commission's authority over the bank loan agreement is derived from Section 52 of the Public Utilities Act and extends only to the issue of the note. We do not regard the assignment of the Company's interest in the contract with the City as an assignment of public utility property, for it will become effective only if and when conveyance of its utility property is made to the City. Under Section 51 of the Public Utilities Act, we are given no control over the mortgaging of nonoperative property.

A protest to the granting of this application has been filed by Dennis A. Lang and three other persons who are plaintiffs in damage actions now pending in the Superior Court of the City and County of San Francisco. These protestants allege that the granting of the application by the Commission would enable the Company to render itself in-

solvent, and that thereby the protestants would be hindered and delayed in any attempt to collect moneys due them should they recover judgments in their Court actions. They make no claim that the Company's undertaking to convey its utility properties to the City was conceived with the purpose of defrauding creditors, but they do allege that the purpose of the Company in giving a note to the Bank of America National Trust and Savings Association, secured by a transfer of assets, is to hinder, delay and defraud protestants and other creditors of the Company. This Commission does not have jurisdiction, of course, to determine what disposition shall be made of the assets of a corporation after it is permitted to cease its public utility operations. Nor would the Commission have authority to refrain from approving the acquisition of a utility property by a municipality, under such circumstances as here presented, merely because some dispute may arise between claimants to the assets of the continuing nonutility corporation. However, we may appropriately point out that the evidence presented to the Commission in this proceeding refutes the claim of the protestants that the Company's intent and purpose in securing a temporary bank loan is to avoid the payment of any of its liabilities. The loan is made so that the Company can pay its bonds and deliver its operative properties to the City free and clear of all encumbrances. If the consolidated operations result in the earnings indicated in Exhibit 2, the bank loan will be paid within one year after date and the properties and rights put up as collateral to

secure the loan will be returned to the Company. In the meantime, the Company is retaining \$400,000 in cash to meet current expenses. Moreover, provision is made in the bank loan agreement for increasing the Company's budgeted operating expenses by an amount of the judgments obtained against the Company in excess of the estimated amount allowed in the Company's budgeted expenses filed with the bank. The testimony of Samuel Kahn, President of the Company, shows that it is the intention of the Company to pay all of its indebtedness and that no dissolution of the corporation will be considered until the Company's obligations are taken care of. We believe that the request of the protestants should be denied.

The transfer of the operative properties of the Company is in the public interest in that it is the only means at hand for improving public transportation service in the City and County of San Francisco. By consolidating the Company's operative properties with the City railway properties, better utilization can be made of the four tracks on Market Street, universal transfers will be issued, unnecessary service can be abandoned, new service added, and additional equipment purchased.

The Company, as stated, proposes to transfer all of its operative properties to the City on the 29th day of September, 1944, at the hour of 5 o'clock A.M. Pacific War Time. At that time the City will commence to use said properties and to furnish street railway and coach service to the general public in San Francisco and the County of San Mateo by means of said properties. The Company, therefore, desires to cancel all tariffs now in effect and on file with the Commission, such cancellation to be effective on the date and hour mentioned herein. Upon the sale of its operative properties to the City, the Company ceases to be a public utility.

O R D E R

A public hearing having been held on this application, and the Commission having considered the evidence submitted at such hearing and it being of the opinion that the money which Market Street Railway Company will obtain through the issue of the note herein authorized is reasonably required by said Market Street Railway Company to refund indebtedness; that the expenditures for said purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income, and that this application should be granted as herein provided, therefore,

IT IS HEREBY ORDERED as follows:

1. Market Street Railway Company may, after the date hereof, issue to Bank of America National Trust and Savings Association, in accordance with the terms of the agreement filed in this application as Exhibit "B," its promissory demand note for the principal sum of not exceeding \$2,000,000, and use the proceeds to pay in part its outstanding bonds and its note held by The Anglo California National Bank of San Francisco.

2. Market Street Railway Company may, after the date hereof, sell and transfer to the City and County of San Francisco, all of its operative properties, more particularly described in the contract filed in this application as Exhibit No. 1, said sale and transfer to be made pursuant to the terms of said contract.

3. Concurrently with the sale and transfer of said operative properties to the City and County of San Francisco, Market Street Railway Company may cancel all of its tariffs now in effect and on file with the Commission, and cease to engage in the public utility business.



4. Market Street Railway Company shall pay the fee prescribed by Section 57 of the Public Utilities Act.

5. Market Street Railway Company shall within ten (10) days after the sale and transfer of its operative properties to the City and County of San Francisco file with the Commission a copy of the note issued under the authority herein granted and a statement showing the date and hour when said sale and transfer was made.

6. The effective date of this Order shall be the date hereof.

Dated at San Francisco, California, this 26<sup>th</sup> day of September, 1944.

Justice F. Casper  
Francis D. Havenner  
Francis D. Havenner  
Francis D. Havenner  
Commissioners

