

Decision 82 05 062 MAY 17 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of VIKING FREIGHT SYSTEM,)
INC. requesting exemption from)
Article Five and Sections 851 and 852)
of the Public Utilities Code.)

Application 82-03-70
(Filed March 18, 1982)

O P I N I O N

Under Public Utilities (PU) Code §§ 829¹ and 853² Viking Freight System, Inc. (Viking) requests an exemption from the requirements of §§ 816 to 830 and §§ 851 and 852 of the PU Code for those actions taken by Viking which receive authorization from the Interstate Commerce Commission (ICC) and which have been reviewed by the Commission without objection.

Notice of the filing of the application appeared in the Daily Calendar of March 23, 1982. No protests have been received.

Viking is a California corporation and a public utility principally engaged in the business of providing pickup and delivery service of commercial freight throughout California. For the 12 months ended December 31, 1981, Viking generated total operating revenues of \$47,991,000 and net income of \$2,292,000.

¹ "... The commission may from time to time by order or rule, and subject to such terms and conditions as may be prescribed therein, exempt any public utility...from the provisions of this article if it finds that the application thereof to such public utility...is not necessary in the public interest."

² "... The commission may from time to time by order or rule and subject to such terms and conditions as may be prescribed therein, exempt any public utility...from the provisions of Sections 851 and 852 if it finds that the application thereof with respect to such public utility...is not necessary in the public interest."

Viking requests an exemption from the necessity of obtaining the Commission's approval for the issuance of securities in those instances where it has obtained authorization for such issuance from the ICC. Viking also requests an exemption from obtaining the Commission's approval for the encumbrance of property or acquisition of capital stock of another utility when such actions are effected concomitantly with the issuance of securities and the entire transaction has been approved by the ICC. Viking proposes to send a copy to the Commission of each application that it makes to the ICC relating to the issuance of securities. If the Commission fails to notify Viking of any objections to the proposed issuance of securities, encumbrance of property, or acquisition of capital stock within 21 calendar days of receipt of a copy of the ICC application, the Commission's authorization would be deemed granted effective upon approval of the transaction by the ICC.

Viking falls under the jurisdiction of both the ICC and the Commission and must comply with the rules and regulations of each. Under §§ 11301 through 11304 of the Interstate Commerce Act (Commerce Act), Viking is required to obtain ICC approval and authorization whenever it wishes to issue securities. Under PU Code §§ 816 through 830 a public utility must obtain Commission authority before issuing securities. Under PU Code § 851 a public utility must obtain Commission authority to transfer or encumber utility property. Under PU Code § 852 a public utility must obtain Commission authority to acquire capital stock of another public utility.

Section 11301(b)(1) of the Commerce Act provides that: "A carrier may not issue securities...without the approval of the ICC. No other approval is required." Case law indicates that the Commerce Act has preempted the field of interstate carrier financing, and the states have, accordingly, no power to regulate the issuance of

securities by interstate carriers. (See, e.g. In re Independent Truckers, Inc., 212 F Supp 402 (D. Neb. 1963) and In re St. Louis Southwestern Railway Co., 53 F Supp 914 (D.C. Mo. 1944), affirmed 157 F 2d 337, cert. denied 330 US 836.)

Viking does not cite federal statutory or case law showing that Congress has preempted regulation of utility property transfers and encumbrances or the acquisition of the capital stock of other utilities. Nevertheless, Viking does argue that when such transfers, encumbrances, or acquisitions are part of and concomitant with the issuance of securities approved by the ICC then such transactions ought to be exempt from Commission regulation under PU Code §§ 851 and 852.

For instance, Viking is currently considering borrowing up to \$12,400,000 from a local bank to finance its accounts receivable, to purchase both revenue and nonrevenue equipment, and to construct new trucking terminals. Such indebtedness would be evidenced by promissory notes. Because security interests would be granted in certain Viking property, Commission approval would be required under PU Code § 851 as well as under PU Code §§ 816 through 830.

Viking alleges that the entire financing transaction will be approved by the ICC and that to require Commission approval as well will be unduly burdensome and expensive.³

We agree that when the ICC approves a financing package involving both the issuance of securities and the transfer or encumbrance of utility property or the acquisition of capital stock of another utility, the entire transaction should be subject to a single regulatory approval. Accordingly, the following order will grant the exemptions Viking seeks.

Applications by other interstate carriers for Commission authority to issue securities have typically involved a simultaneous

³ Viking would have to pay a filing fee of \$13,400 and additional attorney fees estimated at \$2,000.

motion by applicants for dismissal of the application for lack of jurisdiction on the ground of federal preemption. These motions have cited sections of the Commerce Act; and the Commission has dismissed these applications for the reasons stated in the motions to dismiss. (See Milne Truck Lines, Inc., Decision (D.) 89702 dated November 23, 1978, as amended by D.89811 dated December 19, 1978 in Application (A.) 58424; Leaseway Transportation Corp., D.90158 dated April 10, 1979 in A.58343; Pasha Truckaway, D.92330 dated October 22, 1980 in A.59645; Bigge Drayage Co., D.93075 dated May 19, 1981 in A.59995; and Bigge Drayage Co., Executive Director's D.93417 dated August 18, 1981 in A.60739.)

In none of the above applications did the applicants cite Article 3, § 3.5(c)⁴ of the California Constitution nor did the Commission consider the effect of that section upon the dispositions sought by applicants.

While in times past, we might have dismissed Viking's application on our own motion for lack of jurisdiction, in the light of Article 3, § 3.5, that disposition would not be consistent with our duty under the California Constitution.

It is apparently for this reason that Viking has sought exemption from §§ 816 through 830 and from §§ 851 and 852 of the PU Code. This is a remedy that §§ 829 and 853 specifically authorize us to provide and one that avoids regulatory duplication.

Findings of Fact

1. Viking is a California corporation operating under the jurisdiction of this Commission.

⁴ "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:"
* * *

"(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or regulations."

2. The application of PU Code §§ 816 through 830 and of §§ 851 and 852 to Viking is not necessary in the public interest except to the extent set forth in the following order.

3. There is no known opposition to this application and no reason to delay granting the exemption requested.

Conclusions of Law

1. A public hearing is not necessary.
2. The application should be granted to the extent set forth in the following order.

O R D E R

IT IS ORDERED that:

1. Viking Freight System, Inc. (Viking) may issue securities upon the approval of the Interstate Commerce Commission (ICC), without express authorization from this Commission.
2. When utility property is encumbered or transferred or capital stock of another utility is acquired concomitantly with the issuance of securities and the entire transaction is approved by the ICC, Viking may encumber or transfer such property or acquire the capital stock of another utility without express authorization from the Commission.
3. Viking shall submit to the Revenue Requirements Division of the Commission staff a copy of each application for authorization to issue securities that it files with the ICC.
4. If Viking has not received an objection to the transaction contemplated by the ICC application within 21 calendar days of receipt by the Commission of a copy of it, Viking shall be deemed to have the Commission's approval to complete such transaction. ✓

5. When Viking proposes action requiring the approval of the Commission but not of the ICC, Viking shall obtain the approval of the Commission as specified in the PU Code.

This order is effective today.

Dated MAY 17 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. CRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

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3. Viking shall submit to the Revenue Requirements Division of the Commission staff a copy of each application for authorization to issue securities that it files with the ICC.

SS 4. If Viking has not ~~have~~ received an objection to the transaction contemplated by the ICC application within 21 calendar days of receipt by the Commission of a copy of it, Viking shall be deemed to have the Commission's approval to complete such transaction.