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Decision No. 90470 JUN 19 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)	
(a) Leeco Enterprises, Inc., a corporation, to acquire stock of IML Freight, Inc., a corporation operating as a highway common carrier, pursuant to Sections 851-854 of the Public Utilities Code; and)	Application No. 57163 (Filed March 22, 1977)
)	and
)	Amendment to Application (Filed April 26, 1979)
(b) IML Freight, Inc., a corporation operating as a highway common carrier, for authority to issue evidence of indebtedness payable at periods more than 12 months after the date thereof, pursuant to Sections 816-830 of the Public Utilities Code.)	

O P I N I O N

By the instant verified application, Leeco Enterprises, Inc. (Leeco) and IML Freight, Inc. (IML) jointly seek authority under Sections 851-854 of the Public Utilities Code (Code) for the former to acquire all of the issued and outstanding stock, 807,654 shares (except for 20 shares), of the latter. By motion filed with the original application, applicants request that the application be dismissed for lack of jurisdiction.

By verified amendment, the parties also seek Commission approval of a Credit Agreement directly related to said transaction pursuant to Sections 816, et seq., of the Code. Alternatively, applicants request that the Commission exempt the Credit Agreement from the provisions of the Code pursuant to Section 829 of the Code.

At the time of the filing of the application, Leeco was a corporation duly organized and existing under the laws of the State of Oklahoma, with principal place of business in

Oklahoma City, Oklahoma. Leeco was a nonutility holding company organized for the purpose of acquiring the stock of IML. On May 26, 1978, Leeco Enterprises, Inc. was merged into A & W Investments, Inc., a Utah corporation. All further references herein to Leeco are to A & W Investments, Inc., which is the surviving corporation.

IML is a corporation duly organized and existing under the laws of the State of Utah, with principal place of business in Salt Lake City, Utah. IML is a transcontinental motor carrier operating in interstate commerce pursuant to authority granted by the Interstate Commerce Commission. IML operates as a highway common carrier within California pursuant to a certificate of public convenience and necessity issued in Decision No. 83371, dated August 27, 1974; as corrected by Decision No. 83512, dated October 1, 1974.

The Gates Rubber Company (Gates) is a Colorado corporation and the parent and owner of Gates Corporation (Gates Corp.), also a Colorado corporation. Gates Corp. was the owner of 807,654 shares (i.e. all but 20 shares) of the total issued and outstanding capital stock of IML.

Leeco, Gates and Gates Corp. entered into a stock purchase agreement whereby Gates and Gates Corp. agreed to sell, and Leeco agreed to buy, all of the issued and outstanding capital stock of IML (amounting to 807,654 shares), except for 20 shares.

Pursuant to the agreement as filed, Leeco sought to purchase all of 807,654 shares for a total consideration of \$30,000,000 of which \$22,000,000 was payable in cash or certified check upon the closing date, and with the remaining \$8,000,000 to be paid in accordance with a schedule set forth in the agreement. Of the \$22,000,000 paid by Leeco to the sellers at consummation, \$17,000,000 was furnished as an advance from IML to Leeco, the funds being obtained from the First National Bank of Boston pursuant to the Credit Agreement presently before the Commission for approval.

IML's operations have been, and are, related primarily to the interstate transportation authorized by the Interstate Commerce Commission. Operations pursuant to its California intrastate certificate authority are de minimis by comparison. In fact, most of the California intrastate activities which have been conducted have been performed as an adjunct to, or related to, its interstate operations. For example, in 1977 only .008835 percent, and in 1978 only .002990 percent of its systemwide revenue was related to California intrastate traffic. IML's emphasis on interstate operations, coupled with little real public need for its intrastate services, has resulted in little demand of IML by the California shipping public. This is so even though IML has consistently been ready, willing, and able to render full and complete service under the certificate issued by this Commission.

Based on the above set of facts, applicants filed their motion to exempt the issuance of the Credit Agreement pursuant to Section 829 of the Code.

We must first address ourselves to the motion concurrently filed with the application to dismiss the application for lack of jurisdiction. The applicants argue that Leeco, the purchaser, is not a public utility as defined in Section 216(a) of the Code, and it does not possess any authority from this Commission. According to the applicants, Sections 851-853 of the Code are therefore inapplicable because those sections govern the sale, lease or encumbrance of assets, rights, or stock between two public utilities. Applicants also argue that Section 854 is inapplicable because IML is a corporation not organized in California as is required within the meaning of this section. We do not agree with this latter contention.

Applicants' position is that the meaning of the word "organized" should be limited to the creation of a corporation under the laws of another state. This would lead to and require an inference that the legislature intended to exempt foreign corporations from the provisions of the statute. We believe that

the statute itself negates such an intention. Section 854 of the Code opens with the words "No person or corporation, whether or not organized under the laws of this state,...". It seems clear that the legislature would not use such forceful wording to apply to an outsider coming into the state to operate as a public utility, and then reverse itself merely because the carrier being acquired (and, presumably, the carrier in which the state would have no interest after the transaction) was not created as a corporation in California. The state has indicated, on the contrary, that it is interested in foreign corporations proposing to do business in California by requiring them to secure a permit to operate in the state.

We believe that the legislature intended only that the phrase "organized and doing business" require the existence of a formal business organization for the purpose of providing public utility services. We do not believe the legislature intended to exempt corporations from the statutory requirements simply because they were organized in another state.

We will, therefore, deny applicants' motion to dismiss on the jurisdictional issue.

We next turn to the merits of the request for authorization to transfer 807,654 shares from Gates to Leeco and the transfer of control associated therewith. In support of the proposed transfer of control, the applicants state that the purpose of the instant transaction is to place all of the capital stock of IML in the hands of Leeco with no immediate change intended in the quality of IML's interstate or intrastate service. IML states that it has been and will consistently be ready, willing, and able to render full and complete service under the certificate by this Commission.

Applicants allege that IML is financially sound and will remain so after the proposed sale. They submitted various financial statements to support their position.

By its amended application, applicants seek approval from this Commission pursuant to Section 816, et seq., of the Code for authorization to issue evidence of indebtedness payable at periods of more than 12 months after the date thereof (the Credit Agreement). Alternatively, applicants request that we exempt the issue of indebtedness pursuant to Section 829 of the Public Utilities Code.

The type of credit agreement for which applicant seeks either approval or exemption from approval is often referred to as an upstream loan. It is a credit arrangement in which a loan based on the assets of a subsidiary, in this case IML, is used to finance the activities of a parent corporation. In this case the acquisition of IML is the activity of the new parent, Leeco, which is being financed. The utility subsidiary is securing a loan to assist in carrying out the acquisition of itself.

This is a credit practice of which the Commission strongly disapproves. It is clear that it is a credit practice which fails to meet any of the proper purposes for which equity or long term debt securities may be issued pursuant to Section 817 of the Public Utilities Code.

Applicants have alleged without dispute that IML's California intrastate operations have been, at best, de minimis by comparison to its overall systemwide transportation service. Therefore, in spite of the failure of the credit agreement to conform to the allowed purposes of Section 817 and in spite of this Commission's concern over the type of credit agreement involved, there does not appear to be any public interest the protection of which requires the disapproval of the credit agreement in question.

This conclusion is based on the specific facts of record in this proceeding and the particular circumstances related to the transaction and the nature of IML's operations. Section 829 of the

Code requires that we review each case on its own merits to determine its applicability or lack thereof. We also conclude that the Credit Agreement does not fall within one of the purposes enumerated in Section 817 of the Code.

The Transportation Division has reviewed the application and agrees with the Finance Division that applicants' request should, under the circumstances, be granted.

The attorney for Leeco and IML has informally requested that the application be expeditiously granted and put in effect so that the transaction may be completed without further delay. Accordingly, the effective date of this order will be the date hereof.

Findings of Fact

1. Leeco seeks authority to acquire control of IML by acquiring all except 20 shares of the issued and outstanding capital stock of IML.
2. IML requests that the credit agreement, dated December 3, 1976, to issue evidence of indebtedness be exempt pursuant to Section 829 of the Public Utilities Code.
3. In 1977 only .00835 percent and in 1978 only .00290 percent of IML's systemwide revenue was related to California intrastate operations. Leeco has been merged into A & W Investments, Inc.
4. IML's California intrastate operations have been de minimis by comparison to its overall systemwide transportation service.
5. There is no known opposition.

Conclusions of Law

1. The control of IML is subject to the jurisdiction of this Commission and requires our approval pursuant to Section 854 of the Public Utilities Code.
2. The control of IML by Leeco would not be adverse to the public interest.

3. It is proper under the circumstances to exempt the credit agreement which provides for the issuance of evidence of indebtedness, from the requirements of Section 829 of the Public Utilities Code.
4. The application should be granted to the extent set forth in the order which follows.
5. A public hearing is not necessary.
6. There is no reason to delay granting the authority requested.

The action taken herein shall not be construed as a finding of the value of the capital stock of IML.

O R D E R

IT IS ORDERED that:

1. Authority is granted to Gates Corporation to transfer to A & W Investments, Inc. as successor of Leeco Enterprises, Inc., 807,654 shares of the capital stock of IML Freight, Inc., representing all of the issued and outstanding capital stock of IML except for 20 shares, pursuant to the terms and conditions of the agreement dated November 1, 1976.
2. Within one year after the effective date of this order, A & W Investments, Inc. may control IML Freight, Inc. pursuant to Section 854 of the Public Utilities Code.
3. Within sixty days after the actual transfer of control, IML Freight, Inc., shall notify this Commission in writing, of the date upon which the transfer of control was consummated.
4. The amended application for authority to issue evidence of indebtedness payable at periods more than 12 months after the date thereof is denied.
5. The motion of applicants that the evidence of indebtedness associated with the November 1, 1976, agreement be exempt from the provisions of the Public Utilities Code according to Section 829 is granted.

6. The motion to dismiss said application for lack of jurisdiction is denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 19th day of JUNE, 1979.

John E. Gurne
President
James L. Stegeman
Richard P. Hovell
Clair T. DeBrie
Edward W. Gurne
Commissioners