

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1354

IN THE MATTER OF:

REMANDS from United States Court) of Appeals for the District of) Columbia Circuit of D. C. Transit) System, Inc., Proceedings:)	Served: October 10, 1974
Application of D. C. Transit) System, Inc., for Authority to) Increase Fares)	Application No. 453 Docket No. 156
Application of D. C. Transit) System, Inc., for Authority to) Increase Its Fleet in Lieu of) Purchasing Buses)	Application No. 436 Docket No. 156
Application of D. C. Transit) System, Inc., for Authority to) Increase Fares)	Application No. 226 Docket No. 32
Application of D. C. Transit) System, Inc., for Authority to) Increase Fares)	Application No. 344 Docket No. 101
Application of D. C. Transit) System, Inc., for Authority to) Increase Fares)	Application No. 573 Docket No. 201
Application of D. C. Transit) System, Inc., for Suspension) of the Program for the Purchase) of New Buses)	Application No. 553 Docket No. 201
Application of D. C. Transit) System, Inc., for Authority to) Increase Fares)	Application No. 613 Docket No. 216

At the Prehearing Conference held May 2, 1974, we stated that persons could submit statements of issues and motions on procedures and file responses thereto. As a result of our review of these submissions, we have determined that separate treatment should be accorded the several statements of issues and the motions on procedures. The contents of the motions on procedures, including the motion to strike filed by D. C. Transit System, Inc. (Transit), are reported herein. In separate reports, we shall discuss the many issues involved in the proceeding currently pending before us as a result of the remand by the United States Court of Appeals for the District of Columbia Circuit (Court) of several prior applications by Transit for approval of fare increases.

Separation of Hearings

The Commission's Staff (Staff) requests that the consolidated proceeding ordered by the Commission in its Order No. 1317, served April 4, 1974, be divided into separate hearings, including filing schedules for each of the several categories listed therein. The District of Columbia (District) agrees that the consolidated proceeding should be divided into separate hearings. District also requests that separate treatment be accorded the issue of management efficiency and the Market Street issue when considering the remand of Order No. 1052, served June 26, 1970.

The Staff does not agree that the hearings with respect to the remanded orders must be arranged chronologically so that figures and numbers to be used as the departure point or base in each prior case would be determined. Although to some extent the Commission has been directed to consider similar aspects of valuation in the remand of different orders, the Staff contends that the determination of the sum pertaining to one remand case has no relevancy to the other remand cases, except to the limited extent of the overlap of the remand of Order Nos. 773 and 1052. The Staff urges that the Commission consider similar issues in separate hearings.

Transit argues that any proposal to consolidate the separate cases should be disregarded and the matters separately considered and decided. The reasons advanced are that different facts are

applicable to the issues involved in each of the remanded Commission orders and that these would have different legal implications for each of the periods involved. Transit further argues that the separate rights and equities of the respective parties could be properly evaluated. Transit submits that confusion and delay could be avoided by having separate hearings on each order.

Transit argues that the hearing or hearings as to each of the remanded Commission orders should be arranged chronologically in the order of the service dates of the remanded orders. Under this procedure, the hearing or hearings as to the first remanded order would be concluded and the new Commission order entered before convening the hearing or hearings as to the next remanded order. The reason advanced for adopting this procedure is that it would make known before commencing each hearing what figures and numbers are to be used as the departure point or base in each succeeding case. Any other procedure, Transit asserts, would require the preparation of evidence on the basis of numerous assumptions as to prior period results, none of which might be accurate or applicable. Transit further asserts that it could not possibly prepare for more than one hearing at a time because it has a limited staff.

The Washington Metropolitan Area Transit Authority (WMATA) 1/ opposes Transit's request that a separate hearing be held on each of the remanded orders with a new order entered before the next hearing is commenced. WMATA asserts that such a procedure probably would span a period of three or more years and that such a delay is not reasonable. WMATA contends that there is no validity and merit in Transit's statement that it lacks personnel to assist counsel in presenting its position.

1/ Pursuant to the provision of the National Capital Area Transit Act of 1972, the Washington Metropolitan Area Transit Authority has replaced D. C. Transit System, Inc., as the operator of regular route bus operations.

Limitations on Participation

The Staff requests that only certain parties be permitted to participate in each of the several hearings. The proceeding with respect to the Transferred Properties would be limited to the Staff, Transit, the Democratic Central Committee of the District of Columbia (Committee), District, the Black United Front (BUF), and the Washington Construction Area Industry Task Force (Task Force). The hearing on the Riders' Fund, or any of its several facets, would be limited to the Staff, Transit, and Leonard N. Bebchick, et al., (Bebchick). With respect to the hearing on the Efficiency of Management and Market Street issues, those participating would be the Staff, Transit, District, Committee, BUF, and the Task Force. Finally, any hearing on Restitution would be limited to the Staff, Transit, District, WMATA, BUF, Bebchick, and the Task Force.

Transit opposes this suggestion, contending that the parties participating in each hearing should be limited to those who were parties to the prior hearings and/or to the appeals therefrom in the Court of Appeals. Transit submits that this limitation would be preferable to the Staff's suggested procedure of combining parties of different cases in the same hearing.

A. Motion by Bebchick

Bebchick seeks to be made a party with full rights of participation in the remands as respects the gains realized by Transit upon the transfer of properties to nonoperating status. Bebchick submits that review of the materials filed to date indicates that the rights of the transit riding public may not be fully and adequately represented by the present parties to certain cases. In justification, Bebchick states that the opinion of certain of the parties of the manner in which Transit's gain on transfer should be calculated is not acceptable. Bebchick believes the Commission is not the only party which should develop the essential record. Bebchick states that a positive contribution in these proceedings, including the offering of expert testimony, would be made. Bebchick also submits that the overlap of the remand cases with respect to the Riders' Fund and

the Transferred Properties justifies the requested participation by Bebchick in the latter proceeding.

B. Motion by District

District requests the Commission to permit it to participate as a party in all the remanded cases before the Commission in which it is not a named party. District contends that the ultimate issue to be determined is the amount of restitution, if any, which Transit shall be required to pay as a consequence of the legal error made in the exercise of the Commission's rate making responsibilities. District adds that the Commission also should determine the manner and mode of payment of the restitution, if such is found warranted. District argues that it suffered direct financial harm from fare overcharges that resulted from the Commission's erroneous decisions, and that similar financial harm was suffered by residents and citizens of the District. District further relies on the request of several parties that District records be used as a practical basis for determining the value of the transferred properties in question. For that reason, District believes that it has an interest in the final determination of valuation of such properties and that this interest justifies participation in this portion of the remand proceedings.

District requests that if the Commission does not permit participation as requested, it be permitted to participate as a party in the remand case in which it was a petitioner on appeal with respect to the Market Street issue. District submits that factors considered on the Efficiency of Management issue would involve matters considered in determining whether, under any circumstances, Transit could have operated successfully. District argues that this relationship justifies participation by the District.

C. Motion by Transit

Transit seeks an order striking Section 6 of the Response of Bebchick, in which Bebchick moves the Commission to be made a party with full rights of participation in connection with the issue of market value appreciation of properties, and Section 1

of the Response of the District, in which the District seeks permission to participate as a party in all the remand cases. As an alternative, Transit requests that in the event the foregoing is denied, an order be entered granting Transit three weeks from the date of such order within which to reply to the above mentioned sections of the Bebchick and District responses.

Transit notes that the Commission gave all parties to the remand cases, including Bebchick and the District, the opportunity to file statements of issue and motions on procedure in connection with such remand cases, and documents in response to the statements filed by the other parties. Transit points out that Bebchick served a Motion on Procedure and that the District did not serve a statement of issues or motion on procedures. Transit submits that Section 6 of the Bebchick response and Section 1 of the District raised, for the first time, the question of whether permission to participate in remand cases in which they were not originally parties would be granted. Transit argues that by injecting this issue as part of the responding pleadings instead of in initial statements, Bebchick and the District have circumvented the Commission's procedure of allowing all of the parties to be heard on all issues.

Transit further submits that the time in which the parties were to file their responding documents had expired. Thus, Transit contends that the untimely filing of entirely new matters by Bebchick and the District has effectively denied Transit its right to provide the Commission with Transit's views on the crucial question of whether nonparties to certain remand cases should now be permitted to participate in those cases. Transit concludes in this regard that it is clear if such an unique procedure is adopted, then the hearings on the remand cases would become unduly complex and cumbersome.

Bebchick submits that Transit's motion to strike is not in order because Transit's sole right is to file an Answer pursuant to the Commission's Rule of Practice and Procedure 15-02. Bebchick argues that Transit's pleading should be treated as an Answer. Then Bebchick contends that Transit has wholly failed to make a showing of good cause which would justify an extension of time under Rule of Practice and Procedure 7-05 in which to file its Answer.

Bebchick asserts that the motion it included in the response is proper and should be granted. Bebchick states that the request to participate in other proceedings could not have been set forth in the initial motion on procedure because one of the reasons for seeking participation did not exist at that time. That reason was the belief that the farepayers' rights would not be adequately represented by other parties. This opinion is based on the motions and other filings made by the parties as respects the issue of gains realized upon the transfer of properties.

District objects to Transit's motion to strike paragraph 1 of the District response. The District contends that it has a clearly defined interest in the ultimate determination of all issues now before the Commission. In support the District states that in its own right, it probably is the largest single fare-payer of all parties to this proceeding and, beyond that, the welfare of District citizens and residents who are farepayers would be affected. District submits that its request to be permitted to participate in all of the remand cases before the Commission was made in response to Transit's proposal to limit the participation of each party to those matters encompassed by the appeal in which each party participated.

Discovery

Transit requests that the Commission adopt the Federal rules applicable to discovery in the United States District Court for the District of Columbia. Under this procedure, all discovery initially would proceed by written interrogatory. Thereafter, any party seeking discovery by oral examination of witnesses could do so only to the extent permitted by the District Court's discovery rules.

The Staff does not agree that the Commission should adopt the discovery procedures of the District Court for the District of Columbia. Rather, the Staff submits that the Commission's Rules of Practice and Procedure should be followed. To the extent the current rules do not provide adequate procedures for discovery, the Staff recommends that the Commission formulate unique rules and procedures for the remand proceedings.

Bebchick rejects the suggestion that the District Court's rules of discovery be adopted and submits that the governing rules in these and other respects should be those contained in the Commission's Rules of Practice and Procedure. Bebhick also rejects the suggestion that discovery should first proceed by written interrogatory and submits that oral examination is a speedier and more fruitful source of discovery to the extent that a party may establish the need therefor.

District submits that the rules of discovery of the Commission and not the District Court's rules of discovery should apply to all discovery procedures. District states that discovery, in the first instance, ought to be attempted by information requests, rather than written interrogations.

The BUF has no objections to the use of the Federal Rules of Civil Procedure.

Evidentiary Submissions

Transit submits that each of the parties intending to introduce evidence at a hearing be required to prepare and serve upon all other parties, in written form, all of the direct testimony and exhibits which the party intends to offer in evidence. Transit also submits that the respective protestants and intervenors should be the first to offer evidence in the record. This procedure would require the submission of evidence and cross-examination of witnesses in the same order that the appearances by attorneys for protestants and intervenors were entered at the May 2, 1974, Prehearing Conference. The Staff of the Commission and Transit would follow the protestants and intervenors.

For the purpose of cross-examination of witnesses, Transit submits that the protestant(s)-intervenor(s) should be deemed to be representing the public interest collectively as a single party. Adoption of this fiction would mean that a witness sponsored by one protestant-intervenor could not be cross-examined by the other protestant(s)-intervenor(s) and a witness not so sponsored could be cross-examined by only one attorney acting for all protestant(s)-intervenor(s).

The Staff does not believe that the order of presentation of evidence proposed by Transit should be adopted and urges the Commission to establish an order of presentation in which the Staff's submissions would be presented at the outset. It also should be accorded the right to close the record. The Staff also urges the Commission to reject Transit's request that all protestants-intervenors be deemed to be representing the public interest collectively as a single party.

Bebchick contends that no limitation should be placed on the right of all parties to cross-examine each other's witnesses. WMATA submits that Transit's recommendation as to cross-examination of witnesses by one protestant-intervenor whether the witness is sponsored by one protestant-intervenor demonstrates Transit's desire to limit the effective representation of the public interest.

Burden of Proof

Transit asserts that the burden of proof should be upon any party seeking to cause Transit to pay any amount to the Court-Ordered Reserve, or to make restitution in any other manner. The Staff does not believe that Transit's characterization of the remand proceeding implied by this request is correct. According to the Staff, to the extent that funds have been paid by the riding public in excess of that which should have been paid, Transit holds the funds as a constructive trustee. The Staff argues that the purpose of the remand proceedings is to determine the amount improperly paid to Transit by the farepayers and that the remand proceedings should not be considered an action against Transit.

Bebchick contends that it is inappropriate to place the burden of proof upon the public. Bebhick states that the Commission has a mandate from the Court to make specified findings.

District submits that the burden of proof should not be upon the intervening parties. District asserts that it would be appropriate to require Transit to file its direct testimony, if any, on each of the issues now before the Commission, as would

have been the case had these proceedings been before the Commission for the first time. Then the direct testimony of the other parties would follow. District believes that it is essential at the outset to determine that the burden of proof to develop a record on the cases remanded by the Court is not upon the intervenors.

WMATA states that additional information or evidence should be submitted to the Commission in writing with a copy to all parties. After an opportunity for cross-examination of the witnesses, simultaneous brief should be filed without a right to rebuttal brief. WMATA asserts that this limitation is proper in view of the tremendous amount of discussion that has previously transpired.

With respect to the submission of testimony and exhibits, Transit objects to the wholesale incorporation of records of prior remand proceedings, until each proposed exhibit or source of evidence is subjected to cross-examination and appropriate objections of the parties. Transit argues that the prior proceedings were not conducted on the same premises as the instant proceeding, that certain specific issues must be decided pursuant to the direction of the Court, and that the Court has provided its guidance by means of specific statements on the issues in question. Transit asserts that many of the issues on which evidence was presented in the prior remand proceedings on the Riders' Fund are not present herein, and that the current record should not be encumbered by such extraneous and irrelevant evidence.

Transit contends that it should be required to produce documents in the separate remand cases only on a case-by-case basis. Under that format, Transit believes it should be required to produce, initially, only those documents related to the issues to be decided at the hearing. It submits that findings made in the first case heard may affect the nature of the issues to be decided at subsequent hearings.

Transit submits that it would expedite the processing of these cases to require the parties to obtain from WMATA any relevant files and records in WMATA's possession. Transit further submits

that the Commission should divide the job of obtaining and producing the documents between Transit and WMATA. Transit asserts that WMATA should be directed by the Commission to place WMATA employees familiar with Transit's files at the disposal of Transit for the purpose of assisting Transit in producing documents from Transit's files.

Other Requests

Transit requests that oral argument be held. Transit believes that oral argument would provide an opportunity for the parties and the Commission to achieve clarification of the issues. WMATA asserts that there is no need for oral arguments on the instant statements and responses inasmuch as the Commission has already framed the issues in Order No. 1317.

DISCUSSION AND CONCLUSIONS

We believe that separate hearings by category, as set forth in Order No. 1317, should be held. The issues involved in the remands of the several cases are for the most part distinct. To the extent that the remand of separate orders may involve the same issue, we shall direct that the material be treated in the same proceeding. This directive will require the consolidation of the remand of Order Nos. 773 and 1052 for the determination of appreciation in market values of properties transferred from operating to nonoperating status.

With respect to transferred properties, the remand of the proceedings involving the Riders' Fund includes as a facet the transfer of certain properties which would be embraced by the remand of Order No. 773. We are of the opinion that it would be administratively more efficient to retain the separate treatment of the Riders' Fund. Accordingly, the consideration of the six identified properties, which form the basis for the remand of the depreciation deficiency issue, will be considered as part of the hearing on the Riders' Fund. The appreciation in market value found to be present in that proceeding will be included in the consideration of the remands of Order Nos. 773 and 1052.

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The remand of Order No. 1052 also involves the separate issues of the efficiency of Transit's operations and the Market Street issue. 2/ These issues should not be considered as part of the question involving the transfer of properties. Accordingly, two separate hearings will be involved in the remand of Order No. 1052.

We believe that only those parties who appeared in the Court appeals of the remand orders should be permitted to participate in the hearings. This decision effectively renders moot Bebhick's motion and District's motion to be made parties, and Transit's motion to strike.

With respect to discovery procedures, we shall follow our own rules of practice. To the extent that these rules are not adequate, it would be possible to formulate special rules restricted to the remand proceedings. As the discussion hereinafter indicates, at this time, there is no apparent reason for formulating any special rules.

We shall require the parties to submit statements of testimony in advance of the hearing. We are cognizant that the preparation of meaningful testimony might require individual parties to seek additional information from other persons or parties. The Commission's Rules of Practice 18 and 19 provide for the issuance of subpoenas and the taking of depositions. Where appropriate, the parties may rely upon the use of depositions to develop material for the filing of adequate statements of testimony.

The Commission's Rule of Practice 20-05 provides for the order of presentation of evidence at a hearing. That rule states, in part:

2/ Defined by the United States Supreme Court in Market Street Railway v. Railroad Commission, 324 U.S. 548 (1945).

In proceedings where evidence is peculiarly within the knowledge or control of a party, this fact may be taken into account in designating the order of presentation of evidence.

With this guideline in mind, we have decided that the Staff should make the initial presentation and shall present the closing evidence in each hearing. The appellate petitioners should follow the Staff. The order of presentations to follow the Staff would depend on the position of the parties involved. Unless otherwise formally ordered, the precise order of the presentation of any intervenor on appeal shall be determined by the presiding officer after discussion by the parties. Each of the parties and the Staff shall have the rights of presentation as fully set forth in the Commission's Rule of Practice 20-06.

Each party shall be permitted to submit that testimony and supporting documents which it believes essential to justify the findings urged upon the Commission. Any matter contained in files and records in other proceedings before this Commission or other Commissions may be offered in evidence as provided in Rules of Practice 23-05 and 23-06.

We do not intend to incorporate into this proceeding all the prior records of proceedings involving Transit. Rather, the parties may specify the portions of the record sought to be incorporated, and shall assert the general relevance and reasonable scope of its intended use.

We believe that the request by Transit for oral argument with respect to the several submissions of the various other parties should be denied. In view of the foregoing, at this time, there is no need for further clarification of the issues or motions on procedure.

THEREFORE, IT IS ORDERED:

1. That the subject remands from the United States Court of Appeals for the District of Columbia Circuit, decided June 28, 1973, be scheduled for hearing by separate orders of this

Commission and that the persons indicated hereinafter be made parties to the specific hearing, as follows:

A. The remands in D. C. Cir. Nos. 21865, 24398, and 24428, Democratic Cent. Com. of D. C. v. Washington M. A. T. Com'n., 485 F.2d 786 and 886 (1973), involve the Commission, Black United Front, Democratic Central Committee of the District of Columbia, D. C. Transit System, Inc., and the Washington Construction Area Industry Task Force, unless otherwise ordered.

B. The remands in D. C. Cir. Nos. 23720 and 23747, Bebchick v. Washington Metropolitan Area Transit Com'n., 485 F.2d 858 (1973), involve the Commission, Leonard N. Bebchick et al., and D. C. Transit System, Inc., unless otherwise ordered.

C. The remand in D. C. Cir No. 23958, D. C. Transit Sys., Inc. v. Washington Met. A. Transit Com'n., 485 F.2d 881 (1973), involves the Commission and D. C. Transit System, Inc., unless otherwise ordered.

D. The remands in D. C. Cir. Nos. 24398, 24415 and 24428, Democratic Cent. Com. of D. C. v. Washington Met. A. T. Com'n., 485 F.2d 886 (1973), involve the Commission, Black United Front, Democratic Central Committee of the District of Columbia, District of Columbia, D. C. Transit System, Inc., and the Washington Construction Area Industry Task Force, unless otherwise ordered.

2. That the motion of Leonard N. Bebchick, et al., to be made a party in the remands of D. C. Cir Nos. 21865, 24398, and 24428, Democratic Cent. Com. of D. C. v. Washington M. A. T. Com'n., 485 F.2d 786 and 886 (1973), be, and it is hereby, denied.

3. That the motion of the District of Columbia to be made a party in the remands of D. C. Cir. Nos. 21865, 24398 and 24428, Democratic Cent. Com. of D. C. v. Washington M. A. T. Com'n., 485 F.2d 786 and 886 (1973), be, and it is hereby, denied.

4. That the motion to strike by D. C. Transit System, Inc., be, and it is hereby, dismissed without prejudice.

5. That the request for oral argument by D. C. Transit System, Inc., be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "WR Stratton", written over the typed name below.

WILLIAM R. STRATTON
Vice Chairman