

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1358

IN THE MATTER OF:

Application of D. C. Transit)	Served October 10, 1974
System, Inc., for Authority)	Application No. 613
to Increase Fares.)	Docket No. 216

The United States Court of Appeals for the District of Columbia Circuit (Court) set aside a portion of Order No. 1052, served June 26, 1970, with respect to an application by D. C. Transit System, Inc. (Transit) for authority to increase fares. Democratic Cent. Com. of D. C. v. Washington Met. A. T. Com'n., 485 F.2d 886 (1973). The Court stated that in determining Transit's right to higher fares, the Commission should have inquired into the efficiency of Transit's management and should have been guided by the precept that Transit was entitled to an opportunity to earn a return on its investment but not to a guaranteed return. Likewise, the Court stated that Transit was not necessarily entitled to a fare increase where an examination of its economic health might have revealed that it was incapable of maintaining profitable operations under any reasonable level of fares.

We held a prehearing conference on May 2, 1974, and directed that the parties submit statements of the issues and motions on procedures, and responses thereto. Several parties filed statements, motions and responses. The purpose of this order is to review the filings with respect to the submissions pertaining to the Court's remand in regard to efficiency of management and the capacity to generate a favorable economic return on investment.

The Black United Front (BUF) requests that the Commission consider as a separate topic the theory of the failing enterprise

enunciated in the Market Street decision. ^{1/} BUF contends that this issue and the law governing it are separate and distinct from the question of efficiency of management. BUF requests an opportunity to brief the question and argue it orally, should the Commission decide that the Market Street issue does not warrant separate consideration. The Commission Staff (Staff) supports the request of BUF that the Market Street issue be separately treated. The Staff agrees that this issue and the law governing it are separate and distinct from the question of efficiency of management. In its reply to the BUF statement, Transit states that the issues of efficiency of management and Transit's ability to maintain profitable operation absent regulation are two distinct issues required by the Court to be decided separately.

Efficiency of Management

The Staff submits that the question of efficiency of management is a determination to be made by the Commission. According to the Staff, such a determination properly should be based on the manner in which Transit's business was conducted. The Staff contends that Transit should submit evidence pertinent to its method of operating during the period here concerned.

To enable it to prepare a response, Transit requests clarification of the Staff's position on these issues. Specifically, Transit requests explanation of the phrases "evidence of the method of operating", and "the same procedures should be followed in the instant proceeding as were followed in the rate proceeding which formed the basis of Order No. 1216." Transit contends that the Commission must determine the impact, if any, which the efficiency of Transit's management should have had on its right to fare increases at the time of Order No. 1052. It seeks to reserve the right to respond to the Staff following the requested clarification.

In order to avoid a costly effort on the part of the Commission or Transit, BUF suggests that Mr. Pasquale Loconto

^{1/} Market Street Railway Company v. Railroad Commission,
324 U. S. 548 (1945).

be employed as an independent expert to be paid out of the Restitution Fund. Mr. Loconto would be requested by the Commission to study and prepare a full report in regard to the issue of efficiency of management applying as the principal guideline, the Court's discussion of that topic. Each of the parties allowed to participate in the matter of efficiency of management would be allowed to present a list of written questions beforehand to Mr. Loconto, subject to the approval of the Commission. BUF further suggests that Mr. Loconto also consider appropriate replies to these queries in preparing his report. BUF would have Mr. Loconto submit a written copy of his completed report to the Commission, and to all parties. Thereafter, on a day certain, the parties would be permitted to examine Mr. Loconto on the details of the report before the Commission or its Hearing Officer.

Market Street

With respect to the financial position of Transit, the Court has directed the Commission to analyze Transit in a manner similar to that done in the Loconto Report^{2/}. The Staff recommends that the same procedure be followed in the instant proceeding as was followed in the rate proceeding that formed the basis of Order No. 1216, served May 19, 1972.

Transit contends that the Commission must determine whether the financial condition of Transit, at the time of Order No. 1052, could possibly have enabled it to consistently maintain a profitable mass transportation system under any reasonable rate of return. Transit submits that this determination would include the following: (1) If, and to what extent, Transit would have been able to make a profit if there were no regulation over it at all; and (2) if, and to what extent, Transit could then have earned a sufficient return to make it an attractive investment at any reasonable level of fares.

The Staff argues that the concept expressed in Market Street did not embrace the hypothetical facet of considering the utility in a nonregulated environment. The Staff contends

^{2/} Pasquale Loconto is the author and sponsor of the "Loconto Report" dated March 31, 1972, formally entitled Financial Analysis of Transit and Subsidiaries, in Application No. 752, Docket No. 241 and submitted at the subsequent hearing as Staff Exhibit No. 17.

that whether Transit would have been able to make a profit if unregulated, is not necessary or essential to a determination of whether Transit, at the time of Order No. 1052, would have been able to maintain a profitable mass transportation system under any reasonable rate of return.

BUF suggests that an identical procedure be followed by the Commission with respect to the Market Street issue as with the efficiency of management issue. BUF suggests that Mr. Loconto be the sole witness on the Market Street issue and that his report constitute the sole record; that Mr. Loconto be paid out of the Restitution Fund; and that he be authorized to make tentative findings of fact based on Section IV of the Court's opinion. BUF recommends, that subject to the approval of the Commission, the parties submit additional questions, in writing, to Mr. Loconto, prior to his undertaking the fact-finding project; that subsequent to his rendering a report the parties to the proceeding be permitted to interrogate Mr. Loconto upon the content of his report, and that the report and examination thereon be the entire record with respect to this issue.

The District of Columbia (District) indicates that it has no objection to the retention of Loconto as an expert witness on the matters of management efficiency or the Market Street issue. However, District contends that it should be determined at the outset whom Loconto represents as a witness, District opines that Loconto should be the witness of the Staff.

Transit submits that the 1972 Loconto Report is not part of the record of the instant proceeding. If the prior Loconto report should be introduced as evidence, Transit argues that it must be supplemented to give effect to the increase in the shareholder equity which would have resulted from reflecting on the books of Transit the appreciation in market value of the relevant properties, and the increase in purchase price paid nunc pro tunc for the assets acquired August 15, 1956. The latter would arise as a result of the assertion by the District of a franchise obligation on the part of Transit for the cost of track removal and street repairs in the amount of \$3,290,000. Transit also contends that the current Loconto Report should not be introduced at the hearing unless and until each part is subjected at the hearing to cross-examination and

appropriate objections of the parties, including but not limited to the objection that the evidence contained therein is not relevant or material to any of the issues in the hearings.

Other Matters

Transit requests that the Democratic Central Committee of the District of Columbia (Committee), and BUF be required to submit with respect to the issues of efficiency of management and the ability to maintain a profitable mass transportation system under any rate of return, a copy of all statements, memoranda, letters, studies, analyses, appraisals, and reports in their possession. It also desires production of all relevant work papers, supporting materials and drafts thereof made by these parties, for them, or submitted to them by others, which may bear upon or relate to each such issue in any manner.

DISCUSSION AND CONCLUSIONS

We believe that the Court's remand herein involves two separate issues. These issues are (1) the efficiency of Transit's operations and (2) the Market Street issue. The issues shall be considered and disposed of separately.

We accept the recommendations of the BUF. With respect to the Market Street issue, the Court has clearly directed that a second Loconto Report be prepared. We also shall direct that a report be prepared with respect to the efficiency of Transit's operations.

We direct the Staff to coordinate the preparation and presentation on the record of the Loconto reports. To this end, the Loconto reports should be prepared and circulated to each party prior to the submission of prepared direct and rebuttal testimony by the parties.

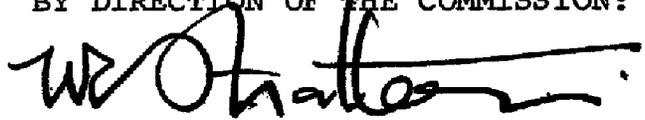
THEREFORE, IT IS ORDERED;

1. That a public hearing be, and it is hereby, scheduled for Tuesday, January 7, 1975, at 10:00 a.m., in Hearing

Room 314, 1625 Eye Street, N.W., Washington, D. C. 20006.

2. That the Commission Staff, D. C. Transit System, Inc., and Democratic Central Committee of the District of Columbia, and the Black United Front, shall file with the Commission and serve upon the parties prepared direct testimony on or before Tuesday, December 3, 1974, and prepared rebuttal testimony on or before Tuesday, December 17, 1974.

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "W. R. Stratton", written over a horizontal line.

WILLIAM R. STRATTON
Vice Chairman