

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1394

IN THE MATTER OF:

Application of D. C. Transit)	Served January 7, 1975
System, Inc., for Authority to)	
Increase Fares)	Application No. 613
		Docket No. 216

The Commission has been requested by several of the parties to this proceeding to direct the preparation and presentation of evidence with reference to both the efficiency of management issue and the Market Street issue. Several motions, answers, and replies filed by the Black United Front (BUF), D. C. Transit System, Inc. (Transit), and the Commission's staff are the basis for this order.

DIRECTIVES OF THE COURT

The United States Court of Appeals for the District of Columbia Circuit (Court) in Democratic Cent. Com. of D. C. v. Washington Met. A. T. Com'n., 485 F.2d 886 (1973), concluded that Order No. 1052, served June 26, 1970, was invalid for three reasons:

"First, the Commission should have credited to Transit's farepayers, to the extent not exhausted by its prior similar obligation, the amount by which the company's lands increased in value up to the time they were removed from operating status. Second, in determining Transit's right to higher fares, the Commission should have inquired into the efficiency of Transit's management -- a necessary prerequisite, under the terms of the Compact, to considering any fare raise. And finally, the Commission's decision 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, nor necessarily to a fare increase where an examination of its economic health could have revealed that it was incapable of maintaining profitable operations under any reasonable rate of return allowed." Supra at page 913 (footnote omitted).

The first reason for the invalidity of Order No. 1052 is being considered as part of the question of transferred properties. See Order No. 1355, served October 10, 1974. The other two reasons form the subject-matter of this order and Order No. 1358, served October 10, 1974. The Court has provided explicit directives to the Commission with respect to these defects in Order No. 1052.

"One is the determination of the impact, if any, which the efficiency of Transit's management should have had on its right to fare increases at the time of the order. The other is the evaluation, which Market Street Railway required, as to whether Transit's then financial position would have enabled it to consistently maintain a profitable mass transportation system under any rate of return." Supra at page 914 (footnotes omitted).

The Court's directives clearly frame the issues on remand to the Commission. With respect to the efficiency of management issue, 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. With respect to the Market Street issue, the question for the Commission is whether Transit's then financial position would have enabled it to consistently maintain a profitable mass transportation system under any rate of return.

The Court's opinion specified certain sources which the Commission could draw upon for assistance in performing its duties on remand. In particular, the Court stated the following:

"The Commission has the benefit now of the Loconto report and the other evidence adduced in the hearings on Order No. 1216 -- evidence which convinced the Commission that Transit was operating inefficiently and under perilous economic circumstances two years after the faresetting in Order No. 1052." Supra at page 914 (footnotes omitted and emphasis added).

The Loconto report referred to by the Court dealt with the financial condition of Transit. It was prepared and presented as part of the record in the proceeding leading to Order No. 1216, served May 19, 1972. In the opinion on the validity of the Commission's Order No. 1216, the Court described that First Loconto Report in the following manner:

"Loconto probed into Transit's financial history, analyzed its capital and debt structure, reached conclusions as to the need for improvements and formulated recommendations as to the steps by which financial stability might be achieved." D. C. Transit Sys., Inc. v. Washington Met. A. Transit Com'n., 466 F.2d 394, 398 (1972) (footnote omitted).

In Order No. 1216, the Commission found on the basis of the First Loconto Report that Transit's seriously unstable and risky financial condition bred an uneconomical and inefficient transportation operation and a resulting deterioration in service. The Commission further found in that proceeding that Transit's uneconomical and inefficient method of operation, and the resulting deterioration in service, could not be remedied merely with a fare increase. In this regard, the Court has referred to its prior decision reviewing the basis for the Commission's Order No. 1216, as follows:

"Underlying Order No. 1216 was an extensive study of Transit's operations and financial condition carried out by a consultant employed by the Commission for that purpose. On the basis of the consultant's report, the Commission concluded that Transit's seriously unstable and risky financial situation bred such an uneconomical and inefficient transportation operation that merely to increase fares would not cure either of those conditions." Supra, 485 F.2d at page 904 (footnote omitted).

Therein the Court also makes clear that the issue of the efficiency of Transit's management involves two separate considerations, "financial condition" and "transportation operation". The Court clearly indicates that an analysis of the "financial situation" is relevant to consideration of the "transportation operation".

With regard to the "transportation operation" aspect of Transit's efficiency of management, the Court has held "that in failing to investigate the caliber of the company's management on the grounds that the formal parties had not produced evidence of bad management, the Commission violated the Compact." Supra, 485 F.2d at page 903. The Court stated that the Commission should have directed an inquiry to the staff concerning the efficiency of Transit's management.

"Such inquiry presumably would have brought a response which, for example, could have pointed to innovations which Transit had or had not made to reduce expenses or to increase revenues. Once this sort of evidence was in the record, the Commission could rationally have taken Transit's efficiency into account in setting fares." Supra, 485 F.2d at page 905.

This inquiry obviously would relate to the responsibility of Transit's management for the "transportation operation".

The Court's remand of the Market Street issue mandates that the Commission develop a record on the financial position of Transit at the time of Order No. 1052 and then determine whether that financial position would have enabled Transit to maintain a profitable mass transportation system under any rate of return. The requirement to determine the financial position of Transit is based on the Court's discussion of the Supreme Court's decision in Market Street Railway Company v. Railroad Commission, 324 U.S. 548, 65 S.Ct. 770, 89 L Ed. 1171 (1945). The Court summarized the Market Street case in the following finding of error by the Commission.

"Market Street's theme, in short, is that there is no requirement that regulation be used to bolster and make profitable a company which would not otherwise be successful. That is the principle which the Commission should have followed, but did not. We do not say that, in actual fact, the circumstances of Market Street Railway were those of Transit. What we do say is that there certainly were sufficient indications that Transit might have been ailing to have alerted the Commission to have investigated (a) if and to what extent the company would have been able to make a profit if there were no regulation at all, and (b) if and to what extent Transit could then earn a sufficient return so as to make it an attractive investment at any level of fares which could have been deemed 'reasonable.'" Supra, 485 F.2d at page 911.

The Court then defined the term "reasonable" as follows:

"We do not think it can be said, under the Compact and the Franchise Act, that any fare was 'reasonable' no matter how high it was or how few riders were able to pay the fare, so long as Transit was able to show a technical excess of gross income over expenses

"Reasonableness entails a consideration of the value of the service to the riders, the numbers who can use the service at the fares set, and the burden of those fares upon the riding public or important segments of it. Similarly, in appraising whether an operation is economical, account must also be taken of the relationship between the level of the fares and the worth of services rendered to the riders. Service is not economical simply because it is honest, mechanically efficient, and as thrifty as it can be under the circumstances; it is not economical if the charge for the service must be set at inordinately high levels in order for the transit company to obtain a profit." Supra, 485 F.2d at pages 911 and 912.

OUTLINE OF THE ISSUES

Based upon the foregoing analysis, largely consisting of the actual words and directives of the Court, the Commission has developed an outline pertaining to the remand proceedings dealt with herein and in Order No. 1358. The outline, as set forth below, is intended to eliminate any possible confusion on these issues.

- A. EFFICIENCY OF MANAGEMENT ISSUE
 - 1. FINANCIAL MANAGEMENT
 - 2. MANAGEMENT OF TRANSPORTATION OPERATION
- B. MARKET STREET ISSUE
 - 1. FINANCIAL CONDITION
 - 2. CAPABILITY OF MAINTAINING PROFITABLE OPERATIONS

ROLE AND SCOPE OF THE LOCONTO REPORTS

In Order No. 1358, the Commission directed the staff to coordinate the preparation and presentation of a Second Loconto Report. This report will be similar to the First Loconto Report which was prepared and presented as part of the record in the proceeding leading to Order No. 1216. The Second Loconto Report will be presented by the staff on the record together with the First Loconto Report. Like the First Loconto Report, the Second Loconto Report will involve a probe into Transit's financial history and

will include an analysis of its capital and debt structures. The Second Loconto Report will be a retrospective study to the extent that it involves an analysis of Transit's financial condition at the time of the proceeding leading to Commission Order No. 1052. In this respect, the report will be relevant to both the efficiency of management issue and the Market Street issue. The scope of the Second Loconto Report will be the same as that of the First Loconto Report.

In Order No. 1358, the Commission anticipated that parties preparing evidence on these issues would be interested in the precise material to be covered by the Second Loconto Report. The Commission believed that parties should be permitted to inquire of the staff concerning the information to be embraced by the Second Loconto Report. This procedure was designed to avoid what the parties might consider to be unnecessary duplication of effort in the preparation of a financial analysis.

The Second Loconto Report relating to Transit's financial condition is the only new report the Commission has directed to be prepared in connection with the issues in this particular proceeding. This directive by the Commission does not foreclose any party so desiring from presenting on the record its own evidence with respect to any of the issues, including Transit's financial condition. Any party may present any evidence relevant to the efficiency of management issue and/or the Market Street issue.

MOTIONS

In light of the foregoing discussion of the directives of the Court, outline of the issues, and discussion of the role and scope of the Loconto Reports, the Commission now turns to a consideration of each of the motions currently pending in the remand of this proceeding.

A. Staff's Motion

On November 8, 1974, the staff filed a motion for presentation of evidence on the efficiency of management issue. On November 13, 1974, BUF filed an answer in opposition and the staff replied to the answer on November 18, 1974. The staff seeks to have the Commission direct each party to present its own evidence on the efficiency of management issue. BUF answers that the Commission directed otherwise in Order No. 1358, and argues that the use of a single expert witness, Loconto, on this subject would be the most economical method of developing the remand record.

The Commission interprets the Court's directives, as previously discussed, to suggest the preparation of a Second Loconto Report similar to the First Loconto Report. The Commission has directed the staff to coordinate the preparation and presentation of the Second Loconto Report. The Commission

has done nothing to preclude any party from preparing and presenting its own evidence. Furthermore, the Commission believes it would be inappropriate to direct the parties to prepare and present evidence, but it should be understood that the Commission permits, invites and encourages the parties to prepare and present any relevant evidence on the efficiency of management issue. Accordingly, the staff's motion that the Commission direct each party to present its own evidence concerning any facet of the efficiency of Transit's management shall be denied.

B. BUF's Motion

On November 13, 1974, BUF filed a motion for the presentation of evidence on the Market Street issue. The staff filed an answer on November 20, 1974, and Transit filed an answer on November 27, 1974. BUF contends that the Court's opinion requires the Commission to make findings on each of the questions stated in the Market Street case. BUF seeks to have the Commission direct that a study be prepared by Loconto with respect to the several questions set forth in the Market Street case. The suggested study by Loconto would contain tentative findings of fact. The proposal by BUF further seeks to have the Commission direct that Loconto be the sole witness, and his study and any cross-examination of him by the parties be the entire record with respect to this issue. In addition, BUF requests the Commission to direct Loconto to answer certain specified questions submitted by BUF. The staff answers that no tentative findings of fact should be made by Loconto and that no questions beyond the reasonable scope of the Second Loconto Report should be permitted. Transit answers that the Market Street issue deals exclusively with the subject described by the Court under heading No. IV of its opinion, titled "Viability of Transit's Business", and that the First Loconto Report dealt solely with the subject described under the Court's heading No. III, titled "Efficiency of Management". Transit further answers that the First Loconto Report was not intended to deal with and did not deal with the Market Street issue.

With respect to the Market Street issue, as with the efficiency of management issue, the Commission intends to consider the then financial condition of Transit in accordance with the directives of the Court. The preparation of the Second Loconto Report has been directed for the purpose of determining Transit's then financial condition. The prior discussion concerning the role and scope of the Loconto Reports need not be repeated here. It is definitive. Again, the Commission has done nothing to prevent preparation of additional evidence by any party and will accept relevant presentations with respect to the Market Street issue. Accordingly, the motion of BUF shall be denied.

C. Transit's Motion

On November 27, 1974, Transit filed a motion for the presentation of evidence on the Market Street issue. On December 5, 1974, an answer in opposition was filed by BUF and an answer was filed by the staff. Transit submits that confusion has resulted from the Commission's failure to establish guidelines, define specific issues or provide specific instructions to control the preparation of reports and from the staff's failure to have the reports prepared. Transit requests the Commission to issue an order regulating the procedures by which Loconto, or any expert, is to prepare a report relevant to the Market Street issue. Transit believes that, before the expert commences any work, proposed instructions by which he is to proceed should be submitted to counsel for all of the parties involved and that each party should be entitled to comment upon the proposed instructions and submit counter-proposals. A hearing then would be conducted for the determination of the proper instructions to be given the outside expert prior to preparation of a Market Street study. Each party would be entitled to submit questions to the outside expert to be answered by him in preparing a Market Street study. As an alternative procedure, Transit requests that it be given four weeks to submit a brief on the issues of law and matters of fact involved. BUF answers that there is no confusion in Commission's Order No. 1358 and that the guidelines for the preparation of a Market Street study are clear. The staff's answer indicates its opinion that a Second Loconto Report would deal with both the efficiency of management issue and the Market Street issue. The staff submits that the First Loconto Report gave consideration to, among other things, the financial condition of Transit, its revenue requirements, and whether Transit was being operated economically and efficiently.

The Commission does not believe that confusion has resulted from failure to establish guidelines, define specific issues or provide specific instructions. Order No. 1358 was clear and concise and the Court's opinion provides suitable and adequate guidance. To the extent that any party may desire an expression by the Commission of the Court's remand directives, this order contains a thorough analysis. The Commission's directive to the staff is clear. The staff has been directed to coordinate the preparation of a Second Loconto Report relating to the financial condition of Transit at the time of the proceedings leading to Order No. 1052 and to present the Second Loconto Report and the First Loconto Report, submitted in the proceeding leading to Order No. 1216, on the record.

As previously stated, the Commission does not believe it is proper to mandate a procedure requiring the parties to agree to the selection and use of a single expert. To preclude presentation of additional evidence would not assure the Commission that the best record has been developed. Accordingly, each party to this proceeding will be permitted to submit testimony and any other evidence which is relevant to the issues pending on remand from the Court.

The alternative request by Transit to be permitted four weeks in which to file a brief on these matters shall be rejected. The Court's opinion is clear. The matters on remand for this Commission's determination have been set forth hereinbefore. The Commission believes that its directives permit each party a reasonable opportunity to submit testimony and any other evidence in support of its position. Accordingly, the Commission shall deny Transit's motion.

CONCLUSIONS

Judging from the motions filed by BUF and Transit as discussed herein, there was apparently some confusion with respect to the correct interpretation of the Commission's directives in Order No. 1358. This order directly addresses these areas of apparent misunderstanding, and again sets forth those directives in the clearest and most unequivocal terms.

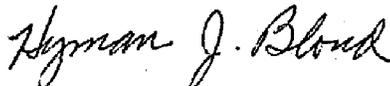
Accordingly, the motions of BUF and Transit discussed hereinbefore shall be denied. They are inconsistent with the directives and intentions of the Commission. The motion of the staff discussed hereinbefore shall also be denied. It asks that the Commission do again what it has already done.

The Commission has considered the other matters pressed by each of the parties in their individual pleadings but does not believe that any of those matters warrant action contrary to that which is now directed.

THEREFORE, IT IS ORDERED:

1. That the motion for the presentation of evidence on efficiency of management issue filed by the staff of the Commission be, and it is hereby, denied.
2. That the motion for the presentation of evidence on the Market Street issue filed by the Black United Front be, and it is hereby, denied.
3. That the motion by D. C. Transit System, Inc., on preparation and presentation of evidence on the Market Street issue be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:



HYMAN J. BLOND
Executive Director