WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1005

IN THE MATTER OF:	Served January 9, 1970
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

On October 17, 1969, we issued our Order No. 981, disposing of the issues remanded to us by the court of appeals in Williams, et al. v. WMATC, 415 F2d 922, decided October 8, 1968. On October 30, 1969, protestants filed an application for reconsideration of that order. We held oral argument on their petition on November 10, 1969; on November 17, 1969, D. C. Transit System, Inc. (Transit) filed an application for reconsideration. On November 20, 1969, additional oral argument was presented. On November 28, 1969, we issued Order No. 995 denying both applications. The press of business prevented us from commenting in detail on the applications at the time we issued Order No. 995. We have now had an opportunity to prepare our comments and set them forth herein.

The principal thrust of protestants' argument on reconsideration involved the question of the depreciation reserve deficiency. At the remand hearings, protestants had urged that Transit's investors had realized a "gain" on the transfer of certain properties to below-the-line status and that this "gain" precluded charging the depreciation reserve deficiency to the riding public. In seeking reconsideration, they pressed essentially the same theory. We indicated in Order No. 981 that we saw insurmountable obstacles to acceptance of

protestants' position. We felt that it was not in accord with the court's directive. In fact, we felt that the court had expressly rejected the theory. We also concluded that protestants' argument was an untimely collateral attack on Order No. 381, in which the depreciation reserve deficiency was determined to exist. Finally, we felt that the theory itself was questionable because it was based on a faulty premise as to the provisions of the Uniform System of Accounts applicable to the property transfers in question.

Protestants stated in seeking reconsideration that we had not met the essence of their contention in Order No. 981. We feel, however, that we have. Therefore, only limited further comment is necessary.

Perhaps the most serious obstacle to acceptance of protestants' argument is the fact that the court has, in our judgment, already rejected their position.1/ We have reference to the court's ruling that Transit could charge riders for the deficiency on property placed below the line after the existence of the deficiency was determined. This, it seems to us, is a direct rejection of the theory on which protestants rely, particularly since the court knew of protestants' claim that a gain had been realized on this below-the-line transfer. Protestants professed not to understand our position on this point. They argued that the court had, in effect, ruled that losses on the below-the-line property could be charged to the riding public; hence, they claimed, gains on such property should be used to benefit the public. We think this argument misconstrues the court's ruling. The argument assumes that the depreciation deficiency which, according to the court, can be charged to the rider, is the reciprocal of the "gain" which protestants allege to exist. There is, in fact, no such parallel relationship between the depreciation deficiency and the "gain." The reciprocal of the capital "gain" to which protestants refer would be a capital loss, such as would result from a sale or transfer at

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1/ We reemphasize that our primary objective on remand has been to discern the court's intent and carry it out. Our analysis of the court's ruling indicated to us that they did not contemplate that the "gains" to which protestants refer, the existence of which the court was aware, would be taken into account as "actual earnings." See Order No. 981, pp. 17 and 18.

less than book value. The depreciation deficiency is not a "loss" in this sense. Thus, the court's ruling that the deficiency can be charged to the riders in no way indicates that the "gain" on which protestants rely should be taken into account. Indeed, as previously noted, the court made this ruling knowing of protestants' alleged gain.

Protestants' primary claim on reconsideration was that we had overlooked the "actual economic fact" of the "gain" which Transit's investors had realized on transfer. The difficulty with this argument is that, as a matter of actual fact, there has been no realized gain. The properties remain under the ownership of Transit. In several cases, they have been mortgaged and the proceeds used to support mass transit operations. The actual gain which might result on sale is a matter of conjecture and subject to the impact of future events and economic trends. We find no basis for concluding that this theoretical "gain" on which protestants rely was intended by the court to be considered as "actual earnings in excess of a fair return."

Further, protestants remain, at best, ambivalent on the question whether the deficiency actually existed. At one point in the oral argument on reconsideration, protestants conceded that the deficiency in the depreciation reserve had been properly determined in accordance with applicable principles of accounting. At another point, however, they argued that the "gain" to which they refer should have been credited to the depreciation reserve, thus eliminating the deficiency. We believe that it must be taken as established that the deficiency did exist. Order No. 381 determined this fact and that order must be considered final. The ambivalence which protestants exhibit on the question merely highlights the fact that their argument is, in fact, a collateral attack on that order. This is a further bar to acceptance of their theory.

Next, we pointed out in Order No. 981 that, in the remand hearings, protestants had relied solely on their theory of "gain" in arguing that there had been earnings in excess of a fair return. Having rejected their theory, we considered the evidence on actual earnings and authorized return offered by the other parties and concluded that the staff presentation on this subject was correct. We adopted that presentation as our findings. On reconsideration, protestants took exception to this action.

Protestants asserted that for the period September 1, 1956 to August 31, 1958, the authorized return should have been computed in accordance with certain tax certification orders of the Public Utilities Commission instead of computing it in accordance with PUC Order No. 4052 for that period.

PUC Order No. 4052 was a rate order issued by our predecessor Commission in a rate case involving the transit company under the ownership which preceded its present owners. The staff used that order as a basis for determining allowable return for the period after D. C. Transit took over from Capital Transit until a new rate schedule was authorized for D. C. Transit itself. Protestants argued that a rate order for Capital Transit could not properly be used as a basis for a determination of the authorized return for D. C. Transit since the two companies were wholly different entities.

We believe that it was appropriate to calculate an allowable return from the findings in PUC Order No. 4052. That was the latest rate order in effect at the time in question. The tax certifications, even though containing findings concerning rate base, uniformly applied 6-1/2 percent return, a formula called for by the D. C. Transit franchise provision on tax forgiveness but not followed in the rate-making process. Moreover, we believe there is merit in Transit's argument that the provision in Section 5 of the franchise, 70 Stat. 598, that the fares in existence at the time of the D. C. Transit takeover should remain in effect for one year provides further support for using the return on rate base set in the last rate order involving Transit's predecessor company.

Protestants also contended that we improperly computed allowable return for the period August 31, 1958 through April 13, 1963, when PUC Orders No. 4480, No. 4631 and No. 4735 were in effect.[2/] They argued that we should take the dollar amounts which were determined in those orders to be the proper return for the respective future annual periods and multiply them by the number of years covered by the particular

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2/ PUC Order No. 4480 was effective from August 31, 1958 to March 5, 1960; PUC Order No. 4631, from March 6, 1960 to January 17, 1961; PUC Order No. 4735, from January 18, 1961 to April 13, 1963.

rate order. The staff analysis that was presented, and which we adopted, computed the allowable return on the average rate base that actually existed during the rate periods in question.

The method suggested by protestants involves use of a dollar amount that, it was anticipated, would be earned on a rate base estimated to exist at the end of the annual period which was still in the future at the time the estimate was made. Thus, it was a speculative amount. Further, it took into account an estimated rate base for only a one year period out of the total period covered by the rate order. In this remand proceeding, we have better information available in retrosepct than the PUC had to rely on in attempting to predict matters then in the future. The staff use of average actual rate base seems to us to be far the superior method. Further, it is the standard method used by regulatory commissions in their surveillance of operating results of utility companies; actual operating income is related to actual rate base, rather than the estimated base used in rate cases, to arrive at actual rate of return experienced.

In any event, protestants' argument on this point is moot. It developed at the oral argument that the figures on which they relied were erroneously computed by them and that when their arithmetic error was corrected, their own figures showed that there was no excess of actual earnings over the authorized return as they themselves computed it.

At that juncture, protestants stated that they had not determined their position on the proper rate of return and that all of their calculations on the authorized return for this period had not yet been made. Protestants apparently believe that they are not required to submit to us the data and theory they rely on in claiming Commission error on the point. What this amounts to, in our view, is a deliberate refusal on the protestants' part to make a record upon which their contention of error must be based. We certainly find no basis on which to reconsider our earlier determination in the face of such an argument.

There is little that needs to be said on the other subjects discussed in Order No. 981. As we understand the petition for reconsideration, protestants' position on the

question of excess return raises no new points. They are in essence taking exception to our rejection of the arguments urged upon us at the remand hearings. We believe we have stated our position on those arguments fully in Order No. 981.

The only new point in this regard raised on reconsideration was protestants' reference to our refusal to admit in evidence a document proffered by protestants at the remand hearings. It was alleged at that time that the document contained a statement of the testimony which would be given by the gentleman who had been protestants' rate of return expert at the original rate hearings preceding Order No. 245. The man in question was in Switzerland at the time of the proffer. The document was plainly inadmissible since no cross-examination of his alleged assertions would have been possible. We mention the matter only to make the further point that, even had the statement been admissible, we would not be inclined to give much weight at this juncture to assertions as to the position which the witness in question would have taken many years earlier. There is no way for us or the witness to know at this time what his views would then have been.

With one exception, there is nothing that needs to be said on the subject of the acquisition adjustment issue. We found no merit in the position taken by protestants in seeking reconsideration of that issue.

The only point requiring comment is protestants' reference to our figures in Appendix B for the year 1968. Protestants summarized net operating income figures from Staff Exhibit No. 1, as follows:

	Net Operating Income
January 28 through October 30, 1968	$185,413.41
October 31 through December 23, 1968	($109,587.56)
Net	$ 75,825.85

Protestants had difficulty reconciling the above profit figure with two other figures which they attempted to use as guideposts. First, they noted that in another proceeding

(Docket No. 201), the Commission had found that, for the 12 months ended February 28, 1969, Transit had experienced a net operating loss of $25,950. The net operating loss alluded to in Docket No. 201 is a rate case figure involving adjustments for non-recurring items, made solely for the purpose of forecasting operating results in the future period. The second figure pointed to by protestants was a "$216,000 figure in Appendix B." That figure can be reconciled as follows:

Net operating income, 1/28/68 through 12/23/68, per tabulation above	$ 75,825.85
Net operating loss, 1/1/68 through 1/27/68	(210,366.95)
Net operating loss, 12/24/68 through 12/31/68	(142,945.76)
WMATC Staff audit adjustments	35,493.25
WMATC-ordered adjustments establishing escrow for special projects	(141,674.00)
Net operating loss for calendar year 1968, per Appendix B of Order No. 981	$(383,667.61)
Net effect of acquisition adjustment via depreciation dollar method	167,523.92
Net operating loss for 1968 referred to by protestants, per Appendix B	$(216,143.69)

It should be clearly understood that none of the substantive determinations made in Order No. 981 made use of the operating income figure for 1968. The determination of the amount to be placed in the court-ordered reserve

was based upon the difference between the amount of acquisition adjustment actually amortized and the amount which should have been amortized under the depreciation dollar method. See Order No. 981, Appendix A. Neither of these figures was related to net operating income for 1968. The only point as to which the income figure is germane is our observation on page 10 of Order No. 981 as to the propriety of placing the entire amount not previously amortized in the court-ordered reserve. This comment was merely an observation and we did not apply it in setting up the reserve.

In seeking reconsideration of our refusal to set a fee for protestants, it was made clear that protestants base their claim that we have this power, not on any statutory authority, but because it was within the ambit of the issues remanded to us. We cannot accept this view. We have reviewed the court's opinion and find nothing therein suggesting that we should set a fee. The language relied on by protestants, concerning the purposes for which the riders' fund is to be applied was not, in our judgment, intended to vest us with the power to fix a fee and require it to be paid. It is significant in this regard that in Washington Gas Light Co. v. Baker, 195 F2d 29 (D.C. Cir. 1958), the court of appeals remanded the case all the way back to the PUC for determination of certain issues but remanded the fee issue to the district court. We remain convinced that we have no power, whether by statute, or by virtue of the remand, to fix a fee for protestants.

Most of the matters raised by Transit as constituting Commission error were discussed in Order No. 981 and our reasons for reaching our various conclusions are set out there. With respect to the contention that we should have debited the Special Court-Ordered Reserve by the amount of the difference we found to have represented the proper level of earnings for the period April 14, 1963, to March 14, 1967, and the amount Transit actually earned, we can find no basis for concluding that the court intended that result.

BY DIRECTION OF THE COMMISSION:

Melvin E. Lewis

MELVIN E. LEWIS
Executive Director