WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1216-A

IN THE MATTER OF:	Served May 25, 1972
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	Application No. 752 Docket No. 241

Following is the opinion of Vice Chairman Sullivan, dissenting from the majority views expressed in Order No. 1216.

As a reasonable alternative, the Commission can assume, for rate-making purposes, what it deems to be an appropriate equity-debt ratio and project revenue requirements on this assumed capital structure and set rates accordingly. The approach taken by the majority has left Transit literally "dangling," by simply stating "Put in more capital - irrespective of its source and moreover, irrespective of the very probable lack of potentiality of any such source."

This attitude, in my judgment, amounts to an encrouchment on the prerogative of Management and thereby preempts the inviolate right of the Company to manage its own affairs.

Great weight has been placed upon the "findings and recommendations" of Mr. Loconto, the "financial expert" engaged by the Staff to analyze the structure of the Company, so much so, that one might very well conclude that the decision of the majority, as expressed, considered only his "evidence", in arriving at their decision.

Overlooked, however, is the fact, developed, on cross-examination, that Mr. Loconto is not an expert of sufficient stature in the realm of transit finance to justify the majority relying almost exclusively on his recommendations to arrive at their decision. Assuming, arguendo, his testimony, has probative value, the majority, nevertheless, incredibly ignores the most fundamental premise of his conclusion, ergo; "The selection of sufficient actual sources from among the potential sources presented is left with management and the Commission." (Transcript P.1967)

The short answer to the testimony of this "prime" witness for the Staff is simply that he articulates, throughout his entire testimony, the financial plight of the Company, which situation has already been recognized by this Commission on a number of occasions in both decisions and many public utterances.

Here, of course, I refer to the pleas expressed to governmental bodies for "subsidy" assistance to "forestall a fare increase."

The "rationale" of the majority, as a justification for refusing any increase - - - at this time, is, of course, the Commission's determination to force the Company to "inject" more equity into its capital structure. However, we have provided no guidelines nor have we determined what the debt-equity ratio is that the majority seeks to impose. If the Company cannot look to this Commission for underlying guidelines to achieve the financial stability desired by the Commission, then to whom must it turn?

As I analyze the decision of the majority, I must conclude that I am constrained to believe that the same was determined, inter alia, that we, in the past, have proven to be "impotent in implementing and enforcing our Orders. While this may or may not be the case, if, in fact, it is, then this Commission, and its Staff, have been negligent in the performance of its duties and responsibilities, and perhaps, as has been suggested by some of the intervenors in the instant case, "responsible" (at least in part) for the present financial plight of the Company.

Though this may be true, no Applicant for justifiable relief should ever be penalized for the past failures of this Commission to act affirmatively upon a showing of non-compliance of its Orders. Here too, appears to be another "reason" for "keeping the record open for ninety days."

The remedy of any Administrative and/or quasi-judicial body -- including this Commission -- is to avail itself of the Court in the enforcement of its Orders.

In the field of regulation of public utilities, the law is abundantly clear. We need look only to the holding of the United States Supreme Court in the "Bluefield" case,[1] and I quote:

"Rates which are not sufficient to yield a reasonable

(1) Bluefield Water Works and Improvement Co. vs. West Va. P.S.C. 262 U.S. 679, 690, (1923)

> return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary."

In the instant case, I fear that we have departed from the principles of public utility regulation as set forth above and have, in fact, embarked upon a course of public utility regulation, by "plebiscite". Such a course can only lead to chaos, and a complete breakdown of our duly constituted regulatory agencies.

Finally, I turn to that part of the majority decision wherein the "record - - - remain open for ninety (90) days - - - for evidence - - -", indicating compliance with financial requirements of this Order. (the pre-condition) I interpret the provisions of Sec. 6 (a) (2) of Article XII of the Compact to make it mandatory upon this Commission to make a final adjudication of the issues involved on the basis of the present record and to do so within a period of "no later than one hundred and twenty (120) days." The attempted extension for an additional ninety (90) days, as provided in the Order is, in my judgment, a usurpation of legislative prerogative by the Staff and Commission.

The Commission needs no additional evidence of the financial condition of the Company. As stated in the decision of the majority, there is "the very strong likelihood that the fare will have to be raised." I assume this is based upon the evidence already in.

For the foregoing reasons, I dissent.

Sullivan, Vice Chairman, dissenting.

My colleagues, in their majority Opinion, have decided to forego for a period of 90 days, and perhaps permanently on the record in this proceeding, a determination of the need for a fare increase for D. C. Transit System, Inc. (Transit). The basis for this action is their expressed concern of Transit's financial condition which has resulted in their directing that certain corporate financial steps be taken as a prerequisite to a consideration of the need for a fare increase.

In only one instance in their Opinion do the majority mention that present expenses exceed revenues, a condition which requires corrective action by the Commission.

Both the Compact and the body of case law dealing with regulation of Transit make it abundantly clear that it is mandatory for our Commission to permit Transit the opportunity to earn a reasonable profit on its operations.

My colleagues have appropriately enough, quoted for inclusion in the majority Opinion, the applicable section of the Compact which relates to the statutory law and then have chosen to ignore the evidence adduced in these hearings that Transit is, in fact, in a serious financial crisis, due to lack of proper revenues. Transit has proven beyond any doubt, in this proceeding at least, that its expenses exceed revenues. In my view, the action of the majority to delay or reject consideration of the need for a fare increase in order to effect changes in capital structure and financing amounts to nothing more than an attempt to "blackjack" Transit, by subjecting a portion of the property of the Company to "confiscation," which, in itself is violative of the Constitution.