

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1356

IN THE MATTER OF:

Application of D. C. Transit System,)	Served October 10, 1974
Inc., for Authority to Increase)	Application No. 226
Fares)	Docket No. 32
)	
Application of D. C. Transit System,)	
Inc., for Authority to Increase)	Application No. 344
Fares)	Docket No. 101

The United States Court of Appeals for the District of Columbia Circuit (Court) set aside a portion of Order No. 981, served October 17, 1969, with respect to applications by D. C. Transit System, Inc. (Transit) which were initially considered in Order No. 245, served April 12, 1963, and subsequently became the basis of Order Nos. 563 and 564, served January 26, 1966. Bebchick v. Washington Metropolitan Area Transit Com'n., 485 F.2d 858 (1973). The Court stated that the Commission erred when it considered various facets of the prior remands ^{1/} and their effect on the reserve on Transit's books for the benefit of its customers. The aforesaid reserve constitutes a fund (Riders' Fund) established pursuant to the decision in Bebchick v. Public Utilities Commission, 318 F.2d 187 (en banc) cert.denied 373 U.S. 913 (1963).

We held a prehearing conference on May 2, 1974, and directed that statements of the issues and motions on procedures and responses thereto be submitted. Several parties filed statements, motions and responses. The purpose of this order is to review the submissions pertaining to the Court's remand for further consideration of several aspects of the Riders' Fund.

Excess Earnings

The Staff states that the actual earnings, defined as the difference between operating revenues and operating revenue deductions during the

^{1/} D. C. Transit System, Inc. v. Washington Metro. Area Trans. Com'n., 350 F.2d 753 (en banc 1965) and Williams v. Washington Metropolitan Area Transit Com'n., 415 F.2d 922 (en banc 1968), cert. denied, 393 U.S. 1081 (1969).

effective period of Order No. 245 was \$4,086,813.87. The Staff asserts that the conceded return by protestants for the period of Order No. 245 was \$3,084,435.21. The Staff concludes that Transit had excess earnings of \$1,002,378.66 during the effective period of Order No. 245.

Leonard N. Bebchick et al. (Bebchick) contends that the Court found that Transit was required to pay into the Riders' Fund the excess between what Transit earned during the period of Order No. 245 and the return conceded to be proper. Bebchick states that the calculations involved were determined by the Commission in the prior remand proceeding and have been adopted by the Court.

Bebchick submits that the Commission has only a single action to perform as respect the current remand of this subject. Bebchick requests the Commission to enter an order vacating paragraph IX.3 of Order No. 981, and directing Transit within 30 days to pay into the Treasury of the Commission the amount of \$1,461,756 to be employed in such manner as the Court determines. Bebchick also requests that the Commission invest this sum in short term United States Treasury Bills pending the Court's determination as to how the monies ultimately are to be utilized.

Bebchick's motion on procedure contains a statement which notifies all parties that, with respect to the amount of \$1,461,756, the riding public is entitled to compensation for their loss in the use of these funds since the time when the riding public's entitlement was established by the Court. Bebchick believes the matter should be raised before the Court in the first instance.

Transit argues that the excess earnings during the effective period of Order No. 245 should be the difference between actual operating revenues and operating expenses during the period, less the amount conceded to be the fair return for the period. Transit asserts that the amount of conceded fair return must be recomputed for the period. The computation would require giving effect to the addition to the shareholder equity resulting from the appreciation in fair market value of the properties transferred to non-operating status and the increase in the purchase price paid nunc pro tunc for the assets acquired on August 15, 1956, as the result of the assertion by the District of Columbia government of an obligation for track removal and repaving costs in the amount of \$3,290,000.

Transit further argues that the net operating income for the effective period of Order No. 245 must be adjusted by subtracting the allocable portion of the appreciation in market values from the actual net operating income. According to Transit, the allocation would be made on the basis of prorating the applicable appreciation in market values to the portion of the future annual period during which the order was effective. Transit contends that the difference between the actual operating income and the appreciation in

market values represents the amount of recomputed allowable net operating income which Transit would have been entitled to recover from the farepaying public in addition to all of its gross operating expenses.

Transit states that the recoverable recomputed allowable net operating income should be compared with the actual net operating income of Transit. Transit submits that to the extent the actual net operating income was greater than the recomputed allowable net operating income, the difference should be the maximum amount to be considered as excessive earnings and, to the extent it was less than the recomputed allowable net operating income, the deficit should be considered as a possible offset to any excess earnings in a later period.

Transit contends that the Commission's determination of the amount of excess earnings should include consideration of two factors. First, the amount by which the allowable bus maintenance expense was calculated in computing the operating revenue deductions for the future annual period involved in Order No. 773, served January 26, 1968, should be recalculated in accordance with the method set forth under the Court's opinion. Second, a determination should be made of the amount by which the allowable operating revenue deductions for the annual period involved in Order No. 773 were deficient because of the failure to include as an allowance the increased incremental cost of wages attributable to the cost-of-living index formula in the wage contract of Transit.

The Staff does not agree that the amount of return conceded by Bebchick should be reduced. Further, the Staff does not accept the conclusion that the net operating income should be increased by recalculating the bus maintenance expense and the labor expense.

Bebchick opposes as unlawful any effort to redetermine the amount of excess earnings realized by Transit during the effective period of Order Nos. 245 and 563. Bebchick submits that Transit's actual earnings and petitioners' conceded return for the period were fully litigated in the prior remand proceeding. Bebchick asserts that the Court's findings are res judicata on the issues of Transit's actual earnings and the conceded return and that these issues may not be reopened and made the subject of further remand proceedings.

Transit disagrees with Bebchick's contention that no issue remains to be decided on this point. Transit disputes the contention that the amount to be credited to the Court Ordered Reserve (Reserve) should be \$1,461,756. Transit does not agree that it can be or should be required to deposit with the Commission, or anyone else, whatever sum is determined to be the amount of its excess earnings. Transit argues that such a requirement would be contrary to the orderly procedure of first determining all adjustments to be made to the Reserve and then deciding the method of disposition of such

Reserve. Transit contends that Bebchick's position on this point is the same one repeatedly rejected by the Court. It is Transit's opinion that no monies would be payable until the Court enters its final order setting forth the amount, if any, to be credited to the Reserve. Transit believes that it is not required to deposit with the Commission or anyone else any amount pending the final resolution by the Court of all the remand issues which could in any way have a bearing on the Reserve.

Transit opposes Bebchick's assertions that the riding public is entitled to compensation for the loss of the use of the amount of the excess earnings to be credited to the Reserve. It disputes the position that Transit enjoyed benefits from employing such excess earnings since the time when the riding public's entitlement to the amount in question was established by the Court. Transit contends that the alleged issue does not belong in the remand proceeding because the remand instructions of the Court do not form a basis for raising the issue. Transit reserves the right to respond more fully to the issue at such time in the future that Bebchick makes the submission referred to in the pleading. However, Transit asserts that the issue must be raised before the Commission in the first instance. Transit contends that a failure by Bebchick to raise the issue before the Commission will result in a waiver of any right to have it considered.

Depreciation Deficiency

Bebchick submits that the Court directed the Commission to determine the net gain constructively realized by Transit on the removal from operating status of six specified properties. The calculation of net gain requires a determination of the fair market value of the depreciable portion of the six properties at the time of transfer, the depreciated book value, and the taxes and other costs that would have been incurred in the event of actual sale.

Bebchick asserts that there can be no dispute as to what transferred properties are involved in the Commission's calculation of gain on remand as the Court has specified the six properties to be examined. Bebchick rejects any contention that the gain be calculated on any basis other than the difference between the fair market value of the properties on removal from operating status and the unrecovered cost to Transit. According to Bebchick, unrecovered cost means the net depreciated value at the time of removal from operating status.

Bebchick takes the position that the gross gain realized from the transfer of the six properties amounts to \$1,739,403 as opposed to the \$1,568,149.62 estimated in the Staff statement. Bebchick contends that the Staff failed to reduce the book unrecovered cost of \$978,368 by the requisite acquisition adjustment allocation. Bebchick, therefore, asserts that the

unrecovered costs after deducting the acquisition adjustment allocation should be \$807,114. Bebchick also contends that the depreciation deficiency is \$1,058,856 rather than \$1,182,326 suggested by the Staff.

Bebchick argues that, to the extent that the gain is greater or less than the depreciation deficiency of \$1,058,856, the Commission must make an appropriate adjustment by ordering payment or offset as respects \$252,688 of the deficiency for which Transit has not been given compensation and \$806,168 of the deficiency removed from the Reserve by Order No. 564.

Transit indicates that it is not willing to concede or stipulate that the amount of the appreciation in market value of the properties at issue exceeded the depreciation deficiency which the Commission in Order No. 381, served September 11, 1964, found to have existed as of August 15, 1963. According to Transit, the issue involved concerns the extent to which Transit is entitled to recoup from the Reserve all or a part of the \$252,688 representing the under-accruals on properties while used in transportation operations. Transit argues that the Court has directed the Commission to accord the same treatment to this amount as previously given to the \$252,688.

Transit contends that the Court's opinion mandates that the Commission identify the properties and calculate the amount of appreciation in market values. Transit submits that the properties to be considered would be either those transferred to nonoperating status during the three years prior to the date of Order No. 564 or those properties transferred to nonoperating status prior to the date when the deficiency in the depreciation reserve was determined to have existed by Order No. 381.

Transit argues that the claims of protestant are subject to the Statute of Limitation. Transit contends that the Statute of Limitation is three years under the applicable section of the District of Columbia Code and that this limitation should restrict the period to be considered by the Commission. Transit alternatively argues that the Court's opinion requires the Commission to determine only whether Transit's investors had been reimbursed for the depreciation deficiency by appreciation in value of the depreciable properties which were transferred prior to August 1963.

Bebchick contends that the Statute of Limitation prescribed by the District of Columbia Code in §12-301 has no application. Bebchick argues that the Commission has been directed to make certain inquiries as trustee of the Court for the purpose of implementing a decree of restitution arising out of a judicial proceeding timely initiated by the invocation of the appellate review provisions of the Compact.

In order to determine the appreciation in market value of the relevant properties, Transit contends that it is necessary to determine the market value of the properties as of the date transferred to nonoperating status, the

market value of the properties as of the date first devoted to operating status, the deductions from each market value for the value of all improvements made on the properties by Transit, and the deductions for allocable taxes and other costs and expenses. Transit emphasizes its conviction that book value at the time of acquisition does not fairly or accurately reflect the extent of the appreciation in market value of the properties while devoted to public service by Transit. Transit argues that market value at the time of acquisition is the only appropriate standard of comparison with market value on the date of removal from service.

Transit believes that the depreciation deficiency facet involves only the extent to which an adjustment must be made to the Riders' Fund with respect to \$252,688 of the depreciation deficiency. Transit submits that the Court did not direct any further adjustments as between the Depreciation Reserve and the Reserve concerning the \$806,158 referred to by Bebchick. Transit asserts that Bebchick reargued to the Court the alleged failure of the Court to direct any relief as to the \$806,158. Transit states that Bebchick's motion and reargument were denied by the Court of Appeals.

The Staff opposes Transit's assertion that the only issue remaining for the Commission's consideration is the proper disposition of the \$252,688. Nor does it agree that only those properties transferred to nonoperating status either during the Statute of Limitation period preceding Order No. 564 or during the period preceding Order No. 381 should be considered. The Staff also disputes the position that the calculation of appreciation in property values involves the market value of the properties as of the date first devoted to operating status and the deductions from each market value for the value of all improvements made on the properties by Transit.

Bus Maintenance Expense

The Staff asserts that the Commission's estimate of bus maintenance expense for the effective period of Order No. 564 was \$4,138,008.47. It also states that the actual bus maintenance expense for the same period was \$4,594,149.53. According to the Staff, Transit should be permitted to recover \$456,141.06.

Bebchick contends that the Staff statement that the Commission's annual allowance in Order No. 564 was \$3,674,875 is in error. Bebchick submits that, in fact, the Commission allowed Transit \$3,822,915 on an annual basis comprised of \$3,674,875 of maintenance expense and \$148,040 of increased maintenance payroll. Bebchick further submits that this calculation was affirmed by the Court which expressly found that the Commission's allowance was only \$462,538 less than Transit's projection of \$4,249,452, or an allowance of \$3,822,914.

Bebchick argues that the Commission must determine the amount by which the recorded bus maintenance expense in accounts 1304, 1305, 1306, 1315, and

1316 during the period of Order No. 564 exceed \$3,822,914. Bebchick believes that Transit's book figures for these accounts must be adjusted to reflect any Commission mandated adjustments in audit, fuel tax or rate proceedings and to delete items attributable to limousine operations. Bebchick submits that items of limousine expenses were deleted for ratemaking purposes and that similar deletions are required in calculating Transit's actual maintenance expense for the period of Order No. 564.

Bebchick requests that after the Commission has considered the views of all parties, it enter an order to show cause why the amount should not be fixed in the sum proposed by the Commission; that the parties be given 30 days in which to respond or to take exception to the Commission's proposal; and that the matter then be set for hearing limited to the related issues in dispute.

Transit contests the procedure suggested by Bebchick for determining the bus maintenance expense issue. Transit asserts that no logical explanation is given by Bebchick as to why there should be a departure in the remand of this facet of the Riders' Fund from the prior accepted procedure of a full hearing before the Commission. Transit further submits that it is entitled to recover in the form of a recoupment from the Reserve the difference between the amount of bus maintenance expense allowed by Order No. 564 and the actual amount of bus maintenance expense incurred while that order was in effect.

Counsel Fees and Witness Expenses

The Staff recommends that the Commission require Leonard N. Bebchick, Esquire, to submit a statement of the fee to which he claims entitlement. The statement should indicate the amount and the method of its determination; a statement of expenses incurred for copying documents, printing of documents, telephone calls, and filing fees. Bebchick also should submit a statement of his normal billing practices during the period for which he requests compensation, indicating any change in such practices and the reason for such change or changes. With respect to the expert witness expenses, the Staff asserts that the best evidence would be the original statement of expense by the witness. Thus, the Staff recommends that the Commission require the submission of such statement or statements. The Staff takes the position that any requests for fees or expenses by Leonard N. Bebchick, Esquire, or Bebchick's expert witnesses may be opposed to determine whether work shown to have been done and the cost thereof are just and reasonable.

Bebchick requests that the matter of fees be deferred until consideration of other facets of the Riders' Fund have been completed. Bebchick contends that the value of counsel's services, and a calculation of the time entailed and costs incurred in his representation, cannot be accurately assessed until everything else has been finally adjudicated. Bebchick also requests that

Transit and its counsel be put on notice that a full statement of Transit's legal fees and expenses be provided in regard to each of the proceedings for which Bebchick seeks compensation and reimbursement.

Transit requests that counsel be required to submit the allowance proposed and that a public hearing be held.

Other Matters

Bebchick seeks to have the Commission make the record in the remand proceedings in Docket Nos. 32 and 101 a portion of the record herein and direct Transit to produce within 30 days the material requested of it. Bebchick requests that General Services Administration and the District of Columbia supply the material specified. Bebchick asks that the Commission set dates for the filing of exhibits, rebuttal exhibits and hearing, with the date for filing exhibits being not earlier than 60 days following the date upon which protestants are supplied with all of the data specified.

Transit requests of Bebchick, with respect to the value of the properties involved, a copy of all statements, memoranda, letters, studies, analyses, appraisals, reports, accompanied by work papers, supporting materials, and drafts made by or for Bebchick or submitted to Bebchick by others. Transit further requests all such documents furnished, given, or made available to Bebchick by Mr. Zane Cole, who testified for Bebchick at the July 17, 1969, hearing before the Commission in Docket Nos. 32 and 101, Application Nos. 226 and 344.

Transit also requests of Bebchick all time records, diary entries, invoices, cancelled checks, statements and other documents concerning the period from December 7, 1962, to the latest available date in connection with the proceedings resulting in Order Nos. 245, 563, and 564. Transit asks that Bebchick submit a statement of expenses incurred in connection with these proceedings including fees for expert witnesses.

DISCUSSION AND CONCLUSIONS

The Court directed us to perform certain specified actions with respect to the excess earnings facet of the Riders' Fund and we shall enter an appropriate order to effect this directive:

The Commission will cancel the adjustment of the riders' fund predicated upon the combination of the operative periods of Order Nos. 245, 563 and 564, and the use of actual interest and equity figures; and must then, in lieu of that adjustment, add to that fund \$1,461,756 representing Transit's earnings, in excess of the protestants' conceded fair return, under Order Nos. 245 and 563. Bebchick v. Washington Metropolitan Area Transit Com'n., 485 F.2d at 880 (footnote omitted).

With respect to the cancellation of the adjustment to the Riders' Fund predicated upon the combination of periods, Bebchick has filed a motion requesting that the Commission vacate paragraph IX.3 of Order No. 981. That paragraph merely set forth a summary of the prior discussion and concluded that no adjustment to the Court-Ordered Reserve need be made. We do not believe that this paragraph should be vacated. It set forth a conclusion that has been found to be erroneous by the Court. The motion by Bebchick will be dismissed without prejudice.

With respect to the depreciation deficiency facet of the Riders' Fund, we believe that the following should be considered at the hearing.

1. The market value of the properties at the time of their transfer to nonoperating status, referred to in the record as Georgia Avenue Estates, Fourth Street Estates, M Street Estates, L Street Estates, 3600 M Street and Grace Street Shops.

2. The amount paid by the investors for the aforesaid properties when acquired by Transit.

3. The amount of depreciation expense paid by the farepayers and amortization for each of the said properties during the period such properties were used as operating properties by Transit.

4. The cost of all improvements to the said properties made by the investors during the period such properties were used as operating properties by Transit.

5. The taxes and sale expenses that would have been paid by the investors at the time of transfer to nonoperating status if the properties had been sold at arms length rather than transferred.

We believe that the Statute of Limitation set forth in District of Columbia Code §12-301 is inapplicable to this remand proceeding. The amount of restitution properly belonging to the farepayers results from the Commission's error in developing the initial record on the applications of Transit for authority to increase fares. In effect, the remand proceeding is merely a continuation of the prior Commission determinations. In this respect, the action to be taken by the Commission does not involve a civil action. Rather, the findings to be made are ratemaking activities. Clearly, these actions are not embraced within the Statute of Limitation. Furthermore, the actions of this Commission are not governed by that portion of the Code of the District of Columbia.

With respect to the bus maintenance expense facet of the Riders' Fund, we believe that the actual amount expended for bus maintenance expense

during the effective period of Order No. 564 should be determined from the appropriate accounts of Transit. The same adjustments must be made to the amounts recorded in the bus maintenance expense accounts as made in estimating the bus maintenance expense in Order No. 564. The adjustments to be considered necessarily must include corrections resulting from audit, fuel tax, rate proceedings, and the deletion of items attributable to limousine operations.

We have decided to defer consideration of the legal fees to be allowed Leonard N. Bebchick and the expert witness fees to be allowed to witnesses retained by Bebchick. However, we believe that the Staff's recommendations with respect to expense statements should be adopted. Accordingly, Leonard N. Bebchick will be required by a subsequent order of this Commission to submit that information which is essential for determining the value of his services and those of his expert witnesses.

Bebchick's motion to make the record in the remand proceedings in Docket Nos. 32 and 101 a portion of the record herein will be denied. In Order No. 1354, served simultaneously herewith, we have stated that we will not incorporate into this proceeding the entire prior record of proceedings involving Transit. Furthermore, any portion of the record sought to be incorporated would be included only after the proper showing of relevance has been made. No showing has been made of the general relevance and reasonable scope of the intended use of Docket Nos. 32 and 101.

Bebchick's requests for submissions by Transit, General Services Administration, and District, and Transit's request for submissions by Bebchick will not be discussed herein. The directives set forth in Order No. 1354, served simultaneously herewith shall govern such issues.

THEREFORE, IT IS ORDERED:

1. That D. C. Transit System, Inc., deposit with the Commission the amount of \$1,461,756, being the amount of excess earnings realized by D. C. Transit System, Inc., during the effective period of Order No. 245, served April 12, 1963, on or before Tuesday, November 12, 1974.

2. That the motion of Leonard N. Bebchick et al., to vacate paragraph IX.3 of Order No. 981, served October 17, 1969, be, and it is hereby, dismissed without prejudice.

3. That a public hearing be, and it is hereby, scheduled for Tuesday, February 4, 1975, at 10:00 a.m., in the Hearing Room of the Commission, Room 314, 1625 Eye Street, N. W., Washington, D. C. 20006.

4. That the Commission Staff, Leonard N. Bebchick et al., and D. C. Transit System, Inc., shall file with the Commission and serve upon the parties

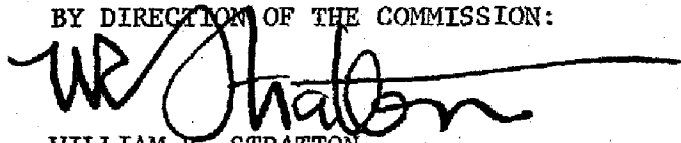
prepared direct testimony on or before Tuesday, January 14, 1975, and prepared rebuttal testimony on or before Tuesday, January 28, 1975.

5. That the motion by Leonard N. Bebchick et al., to defer consideration of the legal fees to be allowed Leonard N. Bebchick, Esquire, and the expert witnesses fees to be allowed be, and it is hereby, granted.

6. That consideration of the legal fees to be allowed Leonard N. Bebchick, Esquire, and the expert witnesses fees to be allowed be, and it is hereby, postponed until further order of the Commission.

7. That the motion by Leonard N. Bebchick et al., to make the record in the remand proceedings in Docket Nos. 32 and 101 a portion of the record herein be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "W. R. Stratton", with a long horizontal line extending to the right.

WILLIAM R. STRATTON
Vice Chairman