ORIGINAL

Decision No. 36821

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Investigation upon the Commission's own motion into the reasonableness of the rates and charges, and into the sufficiency and adequacy of the operations, service, and facilities of the Market Street Railway Company. | ) ) ) ) ) | Case No. 4680 |

Cyril Appel, Ivores R. Dains, and Samuel Kahn, for the Market Street Railway Company

Angelo J. Rossi, Mayor, John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Paul Beck, for the City of San Francisco

Mrs. Helen Negrin, in propria persona

Additional Appearances on Petition for Rehearing:

Felix T. Smith and Henry G. Hayes, for Market Street Railway Company

Douglas Brookman, for Congress of Industrial Organizations (CIO), and George Wilson, President of CIO.

OPINION ON
PETITION FOR REHEARING

BY THE COMMISSION:

Petition for rehearing of the Commission's decision No. 36739 rendered November 30, 1943, was filed by the company on December 9, 1943. On December 15, 1943, we made our order granting oral argument before the Commission en banc and extending the effective date of decision No. 36739 until further order by the Commission. Argument was heard on December 21 and 22, 1943, Mr. Felix Smith arguing for the company, Mr. Dion R. Holm for the City and County of San Francisco, and Mr. Douglas Brookman for the Congress of Industrial Organizations, which has in excess of 35,000 members in San Francisco, who with their families constitute a very substantial group of riders on the street railway system of the company. Permission was granted to representatives of various organizations and

to individuals present at the hearing to express their views on the matter before us.(1)

According to its petition the company seeks a rehearing on the following grounds:

(1) that due process of law has been denied the company "in that the Commission has ordered the company to reduce its rates or fares without giving notice that it was being charged with the maintenance of rates that were unreasonably high, or in any other respect unlawful, and without according a fair and complete hearing upon that issue";

(2) that the Commission "has acted arbitrarily and capriciously, in that it has ordered a reduction in the company's rates without having any substantial evidence before it that the rates now charged are in any respect unreasonable";

(3) that the Commission's order reducing the company's rates from seven cents to six cents "amounts to a taking of its property without compensation and the confiscation of its property."

In general, our order is alleged to be in violation of the Constitution of the State of California and of the 14th amendment to the Constitution of the United States.

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(1) Dr. L. W. Hosford, President of Jefferson Lafayette Improvement Club, et al.
Mrs. Gertrude Lincoln, for Women's Welfare League, et al.
Eugene E. Pfaeffle, President of San Francisco Retailers' Protective Association.
George W. Gearhard, Secretary of Civic League of Improvement Clubs and Associations of San Francisco.
J. F. Calverley, President of Southern Council of Civic Clubs.
Mrs. Sulvina Ratto, Financial Secretary of Central Mission Improvement Association.
Adolph Petry, Chairman of Transportation and Traffic Committee of the Central Council of Civic Clubs.
Erwin C. Easton, Attorney for North Central Improvement Association.
Mrs. Rose Walker, President of Greater Mission Improvement Association.
R. J. O'Rourke, President of San Francisco Property Owners' League.
Lloyd Taylor, Executive Secretary of Market Street Association.

These three allegations are subdivided and elaborated in the petition for rehearing and it is the purpose of this decision to consider them on the basis of the present record in some detail.

THE COMPANY DID HAVE NOTICE THAT THE REASONABLENESS OF ITS STREET RAILWAY FARES WERE AT ISSUE IN THIS PROCEEDING AND WAS ACCORDED A FAIR AND COMPLETE HEARING UPON THAT ISSUE.

The petition alleges that "At no time during the hearing was any statement made by the Commission which would put the Company upon notice that the reasonableness of its rates was an issue or that it must be prepared to meet that issue." This is an astounding statement in view of the record and is completely contradicted by the nature, scope, and course of the present proceeding. The title of the proceeding, the text of our order instituting this investigation on the Commission's own motion,(2) the opening statement of the presiding commissioner on May 10, 1943, the first day of the hearing,(3) all gave clear, definite, and unmistakable notice to the company that the reasonableness of its rates and charges, as well as its service and facilities, would be investigated by the Commission.

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(2) The first two paragraphs of the Order Instituting Investigation read as follows:

> "The Commission believing that public interest demands an inquiry into the reasonableness of the rates, as well as the sufficiency and adequacy of the service rendered by the Market Street Railway Company; therefore, good cause appearing,
> "IT IS ORDERED that an investigation be and hereby is instituted upon the Commission's own motion into the reasonableness of the rates, charges, classifications, rules and regulations of the Market Street Railway Company, and also into the reasonableness, sufficiency and adequacy of the operations, service and facilities of said company."

(3) "COMMISSIONER HAVENNER: The Commission will be in order. This is the time and place set for the hearing in Case No. 4680, in the matter of the Commission's investigation into the reasonableness of the rates and charges and into the sufficiency and adequacy of the operations, service and facilities of the Market Street Railway Company." (tr. 2)

We proceeded with this case in method and in form exactly as in other similar proceedings involving rates and service of transportation and other utilities.(4) It may be said that this form of procedure in rate and service cases brought upon the Commission's own motion, has over a period of more than thirty years been a regularly established and recognized practice of this Commission. This same practice is regularly followed by other state and federal commissions.

The company's management and its counsel understood that this was a rate as well as a service investigation and recognized that service and rates were inseparable and interdependent and must necessarily be considered together. Mr. Kahn, the company's president, appearing as the company's first witness, testified from a prepared statement, commenced his testimony with a review of the rate situation since 1937 when the 5-cent fare was in effect. He reviewed several rate changes authorized by the Commission and their effect upon the company's traffic, revenue, and service (tr. 235 et seq). He similarly reviewed (tr. 246) the company's experience with

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(4) Among proceedings on the Commission's own motion into the reasonableness of rates and service have been the following:

Case 4688, Vallejo Electric Light & Power Company (current proceeding).
Case 4672, Vallejo Bus Company, decision 36242, 3-23-43.
Case 4612, Bay Cities Transit Company, decision 36042, 12-15-42.
Cases 4621-2, Pacific Gas & Electric Company (gas service), decision 36082, 12-29-42.
Case 4478, Interurban Electric Railway Company, Key System, East Bay Transit Company (1940) 43 C.R.C. 181.
Case 4461, Pacific Electric Railway Company, Los Angeles Railway Corporation, Los Angeles Motor Coach Company (dismissed by decision 36338).
Cases 3477, 3604, Southern California Telephone Company et al (1934) 39 C.R.C. 164.
Case 3153, San Diego Consolidated Gas and Electric Company (1935) 39 C.R.C. 261.
Case 3008, San Joaquin Light and Power Corp. ) (1932)
Case 3026, Midland Counties Public Service Corp.) 37 CRC 530
Case 3424, Pacific Gas and Electric Company (natural gas) (1933) 39 C.R.C. 49.

the 7-cent fare and introduced company's exhibit No. 22, estimating what income in his opinion a 5-cent fare would have produced during certain periods in the years 1937, 1938, and 1939. Mr. Kahn's testimony was in fact addressed principally to the matter of rates and to the revenues produced by various rate structures.

Mr. Appel, company's counsel, through Mr. Kahn introduced in evidence company's exhibits Nos. 24 and 25, which are this Commission's decisions Nos. 31472 and 31603, respectively, in application No. 21115. That application was made by the company in 1938 for an order of this Commission "authorizing emergency increases in certain fares" and the decisions referred to, granting experimental increases, are rate decisions. Decision No. 31472, rendered on November 23, 1938, and reported in 41 C.R.C. 531, reviewed the prior rate decisions numbers 29889 and 30849 theretofore rendered in the same proceedings and stated "In decisions numbers 29889 and 30849, the foundation was laid to again review the entire matter if the respective fare structures authorized did not prove to be satisfactory."(5)

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(5) In Decision No. 29889, 40 C.R.C. 525, the first decision in application No. 21115, the Commission said:

> "In reviewing this record, the Commission is not convinced that applicant's proposed fare structure is one which best meets the situation, in fact the President of the company has stated that no consideration has been given to any other form of fare (tr. p. 52); that the estimates were of necessity only a guess; and that experience alone could tell what results would obtain if the proposed fare structure were put into effect.
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> "The Commission has given considerable thought to the matter of selecting a fare structure which will result in the least disturbance of traffic and at the same time provide the needed revenue in the most equitable manner. In our search for such a fare structure we have given consideration to applicant's plan, and have likewise given consideration to a number of forms of fare, such as a straight 5-cent cash fare, zone fares, and the existing 5-cent fare in combination with a 2-cent charge for a transfer.

It must be remembered that the decisions referred to were made in compliance with the company's application to authorize "emergency increases in certain fares." The company, under the rules of the Commission, has regularly filed revenue and operating statistics and the Commission has continually kept abreast of the results of the fare changes. In a real sense, therefore, this has been and is now a continuing rate investigation. The Commission's order in the present case is made on that basis and provides for the regular filing with the Commission of future monthly traffic, revenue, and service statements and provides further "that this proceeding shall remain open for further investigation by the Commission." In fact, all of the proceedings involving the reasonableness of the fares of Market Street Railway Company, including the present proceeding, have been kept open and tentative rates established subject to readjustment from time to time as the results of experience may require. We shall again refer to this policy of fixing rates for public utilities. It must be obvious, however, that this policy of establishing tentative rates subject to readjustment as the results of experience may require, which policy is now generally followed by regulatory bodies, best serves the interests of the public as well as the utility, and assures the fairest results to both.

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(5) Cont'd

> "The Commission has concluded that the existing 5-cent fare, in combination with a 2-cent charge for a transfer, affords the greatest promise for the most favorable results to both the traveling public and the applicant carrier. Such a plan can be adopted upon an experimental basis and if it develops that this fare is not fulfilling the requirements, the entire matter can be reviewed and a record developed which will place the Commission in a better position to select a form of fare best suited to meet the needs of the public and provide a revenue sufficient to meet the cost of performing the service."

This record is voluminous on the subject of rates and fares. Mr. Hunter, the Commission's chief engineer, in his testimony relating to fares compared the company's fares with the average streetcar fares throughout the United States and said (tr. 220) that San Francisco's average length of haul is among the lowest in the country, producing a higher fare per mile of travel. He also testified to the relationship of fares to service. Witness Mors, the Commission's transportation research engineer, testified to the company's rate history and in Commission's exhibit No. 10 extensively reviewed the results of the company's operations from 1922 to 1942. This exhibit contains the company's rate history, an analysis of fare structures comparing the effect of the single cash fares with the so-called token fares, the effect of fare changes on operating revenue, and the revenue and passenger trends under various fare structures up to and including a portion of the year 1943. Mr. Cahill, manager of Public Utilities of San Francisco, testified (tr. 83) that the San Francisco Public Utilities Commission strongly advocates a uniform 5-cent fare and universal transfer and (tr.99) that there should be no charge for transfers and that they would not be worth as much as one cent. With respect to the effect of fare increases of 1937-1938, Witness Hunter (tr. 11, 12 and exhibit 1) testified to the fare passengers and passenger revenues of Market Street and Municipal railways for the years 1933 to 1943. Witness Mors on the same subject testified regarding the effect upon operating revenue of a 2-cent transfer charge and the sale of tokens (tr. 115). Mr. Kahn testified on the loss of his company's traffic to Municipal Railway after the company fare was increased above the 5-cent rate. The record is voluminous with respect to trends of earnings on the various fares and the effect of the fare changes on the company's net income.

This brief review of the record in so far as it deals with the company's fares and their effect on traffic, revenue, and service is by no means complete. It is a conclusive answer to the company's allegation it had no notice that the reasonableness of its rate was an issue. The petition on this point concludes with the following paragraph:

> "Even now, the company is not advised by any clear statement in the Commission's opinion on just what theory or basis the Commission premises its order reducing the company's rates. The opinion does not disclose whether the Commission has taken such action upon some theory that it might now undo a supposed mistake of the Commission itself made in 1937 and 1938 when it permitted the company to increase its rates from 5 cents to 7 cents; impose a rate reduction merely as a punishment to the company for failure to render a transportation service of some higher standard; or endeavors to fix just and reasonable rates for the future."

This observation we think is gratuitous. Decision No. 36739 is self-explanatory and states the basis on which the order reducing the rate from seven cents to six cents rests. There is no finding and no implication that we proceeded on a theory intending to "undo a supposed mistake" made in 1937 and 1938, when the rates were increased by stages from five to seven cents. Those increases, as heretofore pointed out, were specifically designated as an emergency increase and the three decisions in application No. 21115 leave no doubt that the authorized fares were experimental and subject to revision and adjustment depending upon developing conditions and circumstances. The one-cent rate reduction made in the decision here under consideration was not imposed "as a punishment to the company for failure to render a transportation service of some higher standard" but because of changed conditions and circumstances the Commission finds that a rate in excess of six cents is unreasonable and excessive. The decision is specific that the character and quality of the service rendered by the company does not justify a rate higher than six cents and that

with such rate the company will be able to earn a fair return on the rate base, provided a reasonably adequate service is furnished and the necessary amount of available equipment is placed in operation.

Reference should here be made to the company's apparent protest in its argument on the petition for rehearing against the Commission's consideration of Exhibit No. 33.(6) That exhibit is referred to in the transcript under the designation "To be furnished figures on Passengers and Car Hours" and pertains to Exhibit No. 22, introduced by company's witness Kahn, entitled "A study to determine the net income of the Company for the first six months of calendar years 1937, 1938 and 1939 if a 5¢ fare with free transfer had been in effect." In Exhibit No. 22 the number of passengers for the

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(6) Mr. Smith (tr. 354) said:

> "Now, this matter of procedural due process of law also requires that the testimony, the evidence, upon which the Commission acts be taken at the hearing so that the other party may have an opportunity to controvert it and to criticize it.
> "This record is most curious. The Commission's decision discloses, and affirmatively, that the Commission used an exhibit, Exhibit No. 33, that was never mentioned at the hearing, never made available to the other party."

And further:

> "The Commission's decision speaks of a Commission's exhibit No. 33. I am reading from the first page of the opinion: 'Our staff made its studies and investigation in part prior to the hearing of May 10, and in part during the course of the proceeding, and introduced the results in the form of 18 exhibits.' Then there is a footnote and it lists various exhibits, including No. 33. Now, either this opinion misstates that upon which it acted, or I can't read the opinion, because it seems to me very clear that the opinion says that Exhibit No. 33 was introduced by the Commission, and it was one of the results of the Commission's studies and investigation of the case. Now, I would be very glad and very much relieved if I find that the Commission's staff did not introduce an exhibit of that kind.
> "COMMISSIONER SACHSE: I think that situation with reference to Exhibit 33 is very clearly set forth on pages 341 and following, and it really starts at page 340 and then runs through to 342."

periods covered had been estimated by Mr. Kahn but the number of passengers actually carried by the company during the three periods was not shown in the exhibit. In the examination of company's witness Newton on September 15, 1943, exhibit 22 was under discussion and the question was asked of Mr. Newton whether the record contained the actual number of passengers carried and the actual number of car hours operated by the company in the three periods, as distinguished from the estimated figures in exhibit 22. The company agreed that those actual operating figures should be in the record and that they were to be given exhibit number 33.(7) We see no reason why exhibit 33 should not have the Commission's consideration in this record.

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(7) Tr. 340, et seq.:

"COMMISSIONER SACHSE: Have we now in the record the actual number of passengers that were carried on the Market Street lines in the three periods that are shown on the last page of that exhibit, namely, the first 6 months of 1937, first 6 months of 1938 and the first 6 months of 1939, and there also are in addition, the actual number of passengers that were carried, the actual number of car hours that were operated?

"MR. HUNTER: We have as to passengers and I think as to car hours.

"COMMISSIONER SACHSE: My point is in order to compare --

"MR. HUNTER: Yes.

"COMMISSIONER SACHSE: -- the actual figures with those estimates. We can have that, we should have those figures. They, of course, are available in the records by months, the first 6 months of 1937, the first 6 months of 1938 and the first 6 months of 1939, both passengers and car hours?

"MR.CASSIDY: May we be excused just a moment? We are checking.

"COMMISSIONER SACHSE: Certainly, Mr. Hunter, you do not have to look that up now, just so it may be understood, with the agreement of Mr. Appel, that that will be considered, that information will be considered part of the record.

"MR. CASSIDY: I would suggest, Mr. Commissioner, when those figures are available, that they be put in as an exhibit with a number reserved.

"COMMISSIONER SACHSE: Very well.

"MR. CASSIDY: So that might actually be in the record.

"MR. APPEL: We will have no objection to that, to furnishing you whatever information you desire on that line.

"COMMISSIONER SACHSE: That information, then, would have the exhibit No. 33."

THE COMMISSION HAS NOT ACTED ARBITRARILY OR CAPRICIOUSLY IN REDUCING THE COMPANY'S RATES FROM SEVEN CENTS TO SIX CENTS AND HAS NOT ACTED WITHOUT ANY SUBSTANTIAL EVIDENCE THAT THE 7-CENT RATE IS UNREASONABLE.

The petition for rehearing states:

> "In so far as the Commission may have premised its order reducing rates upon the theory that rates should be no higher than the value of the service rendered, the Commission has acted without substantial or any evidence before it by which the value of the transportation service being rendered by the company can be measured."

This allegation is unfounded in fact. The extent, character and quality of the company's service at the time of the investigation is referred to in decision No. 36739 and findings are made. The record is replete with testimony on past and present service conditions and with comparative service statistics. There is nothing unusual or difficult about service measurements of street railway service. In the case before us no speculative or theoretical standards need be referred to. The record contains the company's actual operating performance for past years as reported in the company's sworn annual reports to this Commission and in the monthly reports filed with us. Such performance is shown in the operating expenses under the several accounts, in the number of cars operated, in the schedules and their performance, in the load factor statistics, in the maintenance records of roadbed, track and equipment, in the depreciation and renewal practices, in the observance of the company's paving obligations under its franchise requirements, and in other actual operating and service records. Such evidence in this case permits of ready and exact comparison of service and operating conditions and standards as they existed when the fare was five cents and under the increased fares subsequent to 1937, and under the 7-cent fare at this time. We find less and greatly inferior service in all respects under the 7-cent fare as compared with the service rendered under

the 5-cent fare. We find that in comparison with the performance of the Municipal Railway the company's service is distinctly inferior. The Municipal road renders its superior service at a 5-cent fare while the charge for this company's inferior service is forty per cent higher, at seven cents.

In its petition the company refers to the satisfactory service furnished to San Francisco's war production plants and to the Navy. We gave consideration and recognition in our decision to the company's efforts in that respect.(6) Commander Jenkins, who testified on the service to Naval establishments, also stated that he was concerned primarily with "keeping the Navy establishments going and we leave the establishment of service to the general public

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(6) Decision No. 36739 reads:

"No complaint can be made in regard to the company's service to establishments directly serving the war effort, such as shipyards and other war industries, and to Army and Navy concentration points. A letter of commendation from the Office of Defense Transportation is in evidence. Lieut. Commander Jenkins, U.S.N.R., Domestic Transportation Officer, 12th Naval District, (former transportation research engineer of this Commission) testified that the company's service to Naval establishments has been satisfactory and that there has been cooperation with Navy headquarters. He stated that the Navy's transportation service requirements will greatly increase in the near future.

"We wish to put on record our conviction that all service requirements in furtherance of the war effort must have primary consideration of this company, as of all other utilities under our jurisdiction. Within the limits of our authority we are making, and shall continue to make, every effort to cooperate with the Army and Navy and with the appropriate federal agencies towards that end."

up to the other agencies that have jurisdiction over it."

The company's allegations in its petition that "by picking and choosing bits of evidence revealed in the company's records of expenses incurred for the maintenance of its equipment and tracks, the Commission purports to find proof that the company has been derelict in its service duty" and that "neither the data referred to by the Commission in its opinion nor the testimony of the witness with respect thereto justifies the Commission's conclusion" are altogether unwarranted and the record is conclusive that the company has been and now is derelict in its service duty.

The petition refers to Section 13 of the Public Utilities Act(9) and alleges that we have acted without substantial or any evidence upon facts essential to accepted standards of the rate-making process. The record in this case is conclusive, and our decision, we think, sets forth in sufficient detail that the service, the equipment and the facilities of the company are not conducive to the promotion of the safety, health, comfort and convenience of its patrons, employees and the public, and are not adequate, efficient, just and reasonable. This has been true for a number of years

(9) Section 13 of the Public Utilities Act reads:

"(a) All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

"(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

"(c) All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

past, and remains true at the present time. In this connection the petition alleges that no study was presented to indicate the probable financial results of the company's operation for the year 1943, or for any time in the future. The petition, and company counsel's argument as well, dwell at length upon the allegation that the Commission made its own assumptions of the traffic, the revenue, the expenses and net return for 1943, and for the future, on the various rates of fare; viz, five cents, six cents and seven cents. The company's position as to what the Commission may do with the record before it in the exercise of its discretion and judgment was stated by counsel in his argument (tr. 403 et seq). The Commission, according to counsel, can make arithmetical computations, but it cannot reach a deduction or conclusion that earnings or traffic or expenses for the entire year will be proportionate or disproportionate to the experience of a substantial portion of such year, or will be greater or smaller than in the preceding year, even though there be evidence of definite trends and extended actual experience. We cannot accept the company's limitations thus set upon the functions and duties of the Commission in a proceeding of this nature. In our consideration of testimony we are not confined to the operation of an adding or computing machine, nor does the law or common sense prevent our exercise of reasonable judgment on the basis of an entire and voluminous record. In rate cases, particularly when the proceeding is held open for further study and action, the Commission has on numerous occasions in the past established tentative rates subject to readjustment as the results of experience may require. This practice was followed in the 1937 and 1938 rate applications of this company, when several interim rates were ordered and put into effect, although the company had asked for different fares, and

testimony had not been introduced on the specific fares ordered by the Commission.

This point came before the United States Supreme Court in Clark's Ferry Bridge Company against Public Service Commission of Pennsylvania, decided on February 5, 1934 (291 U.S. 227). That case involved the validity of an order of the Pennsylvania Commission reducing the rates of Clark's Ferry Bridge Company. That order, in part, prescribed "(1) A rate of 8 cents cash toll for all ordinary passenger automobiles and wagons now paying 10 cents." The order also provided, "That said Company file with this Commission monthly statements of income and operating expenses, showing the number of vehicles passing over its bridge in each class of traffic as contained in its tariff." One of the bases upon which it was claimed by the bridge company that the order of the Pennsylvania Commission was unlawful was that the Commission undertook to forecast into the future what the traffic was going to be and that there were uncertainties and speculative elements in any such future estimate. Upon that matter Mr. Chief Justice Hughes said at page 241:

> "The final attack is on the form of the Commission's order. The Commission fixed the amount of the annual gross revenue and then prescribed a tentative schedule of rates. Appellant says that it is obvious that no one can tell in advance how many vehicles of different tariff classifications will pass over the bridge in a year and what annual gross revenue will be produced by a given schedule of rates. But, as the prescribed rates are expressly stated to be tentative, there is no ground for assuming that the Commission will reject an application to make such changes in the schedule as experience may show to be necessary in order to produce the stipulated revenue. There is nothing in the order which requires that the test period should be a year or any definite time. From the statements at the bar it appears that appellant has not put the tentative schedule in effect and has made no application to the Commission for a change in the schedule. If the allowance of gross revenue is adequate, as it has been found to be, there is no basis for complaint because of a

schedule of rates which on application may be appropriately modified." (Emphasis supplied).

The allegation that operating and financial results were in evidence only up to and including the month of March 1943 is incorrect. The stipulation entered into on the first day of the hearing, May 13, 1943, placed into the record the company's own monthly operating reports "from 1938 to date." (tr. 19, 20). Incorrect also and misleading is the allegation in the petition that the Commission's engineer did not testify to the financial effect of the 1936 rate increases. The record on that point in the transcript, pages 17 and 18, is as follows:

"COMMISSIONER SACHSE: Mr. Hunter, while you are back on again now I would like to ask you one or two questions. Taking sheet 1 of this exhibit and also at the same time, if you can, look at page 6. Is my conclusion correct that, after the fare increase in 1937 to the Market Street Railway the net revenue or operating income, notwithstanding the fare increase, disappears completely for the year 1936?

"A. That is correct.

"Q. In other words, before the fare increase in 1937 the operating income of the Company was $305,577; in 1938 after the fare increase, there was no operating income, but a deficit of $40,234? A. That is correct.

"Q. Then in the succeeding years, 1939, 1940, and 1941 the Company never recovered from these fare increases to even the lowest income, the lowest operating income, which was in 1937; in no year after the fare increase did the operating income reach again the operating income prior to the fare increase, with the exception of the year 1942?

"A. That is correct.

"Q. In other words, am I correct in concluding that the loss in passengers, in fare passengers, was so great up to 1942 that the fare increase was not able to overcome the loss in those passengers?

"A. That is the way the results turned out.

"Q. And, of course, in 1942, that being a war year, that situation changed?

"A. Correct."

Mr. Hunter also testified to the "high riding habit" and the "average short haul," factors which make San Francisco an outstanding streetcar riding community. These factors assure a greater volume of business and revenue if the rate is reduced.

The Commission has based its conclusions on the operating and financial results of the fare increases and not on mere theory. The record shows the company's actual experience and we can see no reason why we should substitute mere theory when we have before us

the uncontradicted facts..

DECISION NO. 36739 DOES NOT CONFISCATE THE COMPANY'S PROPERTY.

The company alleges in the petition for rehearing that the sum of $7,950,000 does not represent the fair value of the company's operative property and cannot be used for rate-making purposes. Also, that a 6-cent fare will not produce a net operating income of about $500,000, or approximately six per cent on the base figure of $7,950,000 as found by the Commission..

We desire to discuss both allegations in some detail. The methods of determining a lawful and fair rate base by a regulating commission in cases of this nature has repeatedly been defined by the United States Supreme Court, and the principles we must follow to find fair value for rate-making purposes are not obscure. The rule we have applied in the decision in this proceeding was laid down by the United States Supreme Court in Los Angeles Gas & Electric Corporation v. Railroad Commission of the State of California (289 U.S. 287). Mr. Chief Justice Hughes delivered the opinion of the court and said at Page 305:

> "As the property remains in the ownership of the complainant, the question is whether the complainant has been deprived of a fair return for the service rendered to the public in the use of the property. This Court has repeatedly held that the basis of calculation is the fair value of the property, that is, that what the complainant is entitled to demand, in order that it may have 'just compensation,' is 'a fair return upon the reasonable value of the property at the time it is being used for the public.' (Footnote citing cases) In determining that basis, the criteria at hand for ascertaining market value, or what is called exchange value, are not commonly available. The property is not ordinarily the subject of barter and sale and, when rates themselves are in dispute, earnings produced by rates do not afford a standard for decision. The value of the property, or rate base, must be determined under these inescapable limitations.. And mindful of its distinctive function in the enforcement of constitutional rights, the Court has refused to be bound by any artificial rule or formula which changed conditions might upset. We have said that the judicial ascertainment of value for the purpose of deciding whether rates are confiscatory 'is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts'." - Citing cases - (Emphasis supplied)

In the present case the property has recently twice been the subject of barter and was offered for sale, and its market value, or what is called exchange value, is available. The ascertainment of the present market or exchange value appears to have been exceptionally competent and authoritative. It was not based on opinion, testimony, or expert appraisal, but was made by the company's management and directors after extended studies and negotiations. The offer twice made, to sell all the operative property at the price of $7,950,000 was made, we must assume, in good faith since it was officially submitted to the City and County of San Francisco.(10)

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(10) The minutes of the company's directors' meeting of September 24, 1942, as shown in the transcript (p. 102) read in part as follows:

"Sale of the operative properties of Market Street Railway Company to the City and County of San Francisco. The President advised the Board that he has agreed with the Mayor and other City Officials, as well as the Board of Supervisors, to sell the operative properties of the Market Street Railway Company to the City and County of San Francisco for the sum of $7,950,000 cash, and that a charter amendment for the purpose of raising such sum by a revenue bond issue would be submitted to the qualified electors of the City and County of San Francisco at the next general election on November 3, 1942. The President stated further that the price mentioned had been agreed upon after lengthy negotiations extending over a period of about two years and is the best price obtainable from the City and County of San Francisco for the operative properties of the Company.

"Whereupon, on motion of Director Scott, duly seconded by Director Lilienthal, the following resolution was adopted:

"Resolved, that the actions of the President in negotiating the sale of and agreeing to sell the operative properties of the Market Street Railway Company to the City and County of San Francisco for the sum of $7,950,000 cash be, and the same hereby are, ratified, approved and confirmed; and it is

"FURTHER RESOLVED, that the Officers of the Market Street Railway Company be and they are hereby authorized and directed to perform all necessary and proper acts in order to carry out and complete the sale of the operative properties of the Market Street Railway Company to the City and County of San Francisco for the sum of $7,950,000 cash."

An election was held, as agreed between the City and the Company, and the proposition to purchase the property at the price named failed to receive the required vote. That outcome, however, can have no bearing on the company's own measure of the market value of its own property. The deduction might be drawn that the price was higher than the majority of the voters were willing to pay.

In his argument on the value of the company's property, Mr. Smith points to the established rule that a utility valuation in a rate case cannot be based upon the capitalization of earnings, and he implies that the $7,950,000 figure was reached by that method. There is nothing in the record to indicate or suggest such a basis of valuation. The minutes of the directors' meeting, referred to above, clearly show how the market value was reached: "The President stated further that the price mentioned had been agreed upon after lengthy negotiations extending over a period of about two years and is the best price obtainable from the City and County of San Francisco for the operative properties of the Company." The Board of Directors, as has been shown, confirmed the judgment and conclusion of the company's president.

The petition for rehearing purports to reveal the steps by which we arrived at the conclusion that six cents is a reasonable fare. The recital of these alleged steps amounts to a complete misstatement of the plain language of our decision and the computations based upon such misstatements must necessarily lead to altogether erroneous and absurd numerical results. Such false results, in dollars of revenue, expense and net operating revenue, are shown in the petition and in greater detail in a series of four tables submitted by counsel to the Commission in the course of his argument.

The Company's misleading computations are ostensibly based on the findings contained in our decision, when as a matter of fact the plain language of that decision clearly substantiates our conclusion that a 6-cent fare, with reasonably efficient operation and service, will meet all operating expenses and in addition produce a return of approximately 6 per cent on the base figure of $7,950,000.

The company first (on page 7 of the petition) refers to the operating results for 1942, apparently taken from the table on page 24 of our decision. There is no dispute as to the correctness of the figures for that year, including the net return figure of $1,069,914. These figures, it is to be remembered, are from the company's own 1942 income statement furnished the Commission in the regular sworn annual report. The petition then continues with the following allegation:

> "The Commission concedes that $250,000 more should have been charged for depreciation, reducing the actual net revenue to $819,914. From this return the Company had to meet the interest and sinking fund requirements on its bonds, as the Commission previously had authorized it to do when approving its bond covenants, and had to meet also interest and retirement obligations on its unfunded debts that had accumulated from operating losses during earlier years."

This allegation is incorrect. The depreciation practices of the company are in evidence in this record in great detail. Consecutively for eight years prior to and including 1942 the company voluntarily charged $500,000 annually to depreciation and each year's net income is stated on that basis. There is no reason why the company's depreciation accounting should be changed by us for the year 1942 any more than for any other year. The fact that the company paid its interest and sinking fund charges in part out of its depreciation reserve, instead of making necessary replacements of depreciated equipment, is not relevant at this point.

Next, the petition complains of our estimate on the results of operations for the year 1943 under the 7-cent fare, with reference to traffic, revenue, expenses, and net return. The complaint is that we considered the actual operating figures for eight months of the year and that we made assumptions for the remaining four months. On that account our conclusion that with the 7-cent fare continued in effect and with the quantities of service continuing and the number of cars operating as theretofore, the gross revenue for the full year 1943 would be $8,700,000, the expenses $7,940,000 and the net return $760,000, and the rate of return 9.6 per cent is alleged to be erroneous and contrary to due process. We have stated above the basis of our conclusions. It would be very simple to meet the test of fairness suggested by company counsel in his argument on rehearing(11) if our 1943 estimates were checked against the actual operating performance according to the company's own records and filed with this Commission under our order in this continuing rate proceeding. Counsel refused, however, to stipulate to such a check and in order to avoid a possible technical pitfall in the law on evidence we will not argue this point. We are confident the Commission kept within the limits of its discretionary judgment in concluding that the remaining months of 1943, with no change of fare and no material change in service, would follow the established trend as evidenced in the record.

The petition next purports to show the "assumptions" made by us as to the results of the operation for the year 1943, "and presumably for the future," under a 5-cent fare. The petition says "It is found that such a fare would produce a net loss of $1,153,000 per year." The petition ignores the qualified and all-important language in our decision "without any allowance whatever

(11) Mr. Smith said (tr. 346): "Now, this matter of procedural due process of law is a very simple matter. Lawyers often use, though, many complicated words to express simple things. What we mean is fair play."

for increased traffic."(12) The net loss of $1,153,000 per year, without considering the qualifying language in the decision, is obviously a mere mathematical calculation and reached by applying a 5-cent fare to the identical number of 7-cent fare passengers, i.e., a reduction of two cents for each of the 7-cent fare passengers. On this basis the petition concludes: "Hence, having found that the net profit of $760,000 expected at a seven-cent fare would be converted into a net loss of $1,153,000 if a five-cent fare were in effect, the sum of these figures, or $1,913,000, is the amount of the expected reduction in gross revenue." The Commission, it must be clear, made no such assumptions and reached no such conclusions.

The petition, continuing on its erroneous basis, then presumes to explain "The last step taken by the Commission as to the effect of the application of a six-cent fare." Decision No. 36739, page 32, reads as follows:

> "We expect the company to make every reasonable effort to improve the present unsatisfactory and inadequate service and to put all available equipment into operation. With a six-cent fare it is our expectation, based on the evidence available from the record and from the company's past and present experience, that an annual revenue of approximately $8,500,000 will be produced. Operating expenses, including

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(12) The decision, page 31, reads as follows:

> "The fixing of a five-cent fare on a twelve months' basis, without any allowance whatever for increased traffic, and including in operating expenses $500,000 for depreciation, would result in a deficit of about $1,153,000. On the basis of the record the indications are that with a five-cent fare a 25% to 30% increase in traffic would be required to produce an income, after allowing for increased operating costs, to meet all expenses, including depreciation and taxes, and leave the company with approximately 5% return on the $7,950,000 base figure. Such a result, with efficient management and the proper use of all available equipment and plant, might reasonably be brought about. An increased use by the public of all mass transportation facilities must definitely be expected in San Francisco, not only because of further reduction in the gasoline allowance and the declining number of automobiles, but also in view of the certain increase of direct and indirect war activities in this area." (Emphasis supplied).

> taxes and $750,000 for depreciation, we estimate, will amount to about $8,000,000, leaving a net operating income of about $500,000, corresponding to an approximate rate of return of 6% on the base figure of $7,950,000. Such a return would be more than adequate under existing conditions."

The company in its petition, however, comes to a different conclusion. It says "If a reduction of 2 cents in the Company's existing seven-cent fare would result in a gross revenue decrease of $1,913,000, as the Commission estimates, it is evident that a reduction of one cent would operate to reduce gross revenue by fully one half that amount, for there could not be a greater stimulation of traffic at a six-cent fare than at a five-cent fare." Above it was shown that in its allegation of what the five-cent fare would accomplish, the Commission's qualifying language as to what a reasonable increase in traffic would do had been entirely ignored by the company and no allowance whatever for increased traffic was made in the company's estimate of $1,913,000 reduction in gross revenue. In its estimate for the 6-cent fare, and coming to the conclusion that a deficit of at least $256,500 would be suffered, the petition reasons that "there could not be a greater stimulation of traffic at a 6-cent fare than at a 5-cent fare." Having made no allowance for any stimulation of traffic at a 5-cent fare, the company follows the same erroneous assumption as to the 6-cent fare.

A casual inspection of decision No. 36739 shows that the Commission concluded with the 6-cent fare under reasonably satisfactory and adequate service, and with the operation of adequate available equipment, the next 12-months' annual gross revenue would be $8,500,000 as compared with the 1943 revenue under the 7-cent fare of $8,700,000, a reduction of $200,000. For the future 12-months' period under the 6-cent fare the Commission made its

allowance of $8,000,000 of operating expenses compared with the 1943 operating expenses under the 7-cent fare of $7,940,000, an increased allowance for operating expenses of $60,000. Deducting the operating expenses from the operating revenue, under the future 6-cent fare, leaves a 12-month net operating income of $500,000, which we concluded would be the approximate amount available for return, corresponding to a rate of return of about 6 per cent on the base figure of $7,950,000. Such a rate of return, we concluded, would be more than adequate under existing conditions.

CONCLUSION

The Supreme Court of the United States has just rendered another decision which supports our views of the policy and methods we have followed throughout these proceedings. We refer to the case of Federal Power Commission v. Hope Natural Gas Company, decided by the United States Supreme Court as recently as January 3, 1944. This case involved the legality of an order of the Federal Power Commission reducing the rates charged for natural gas by Hope Natural Gas Company. It is unnecessary here to discuss that case at length. We do desire, however, to quote portions of that decision which are particularly pertinent here. In upholding the order of the Federal Power Commission Mr. Justic Douglas, in stating the opinion of the Court, says:

> "When we sustained the constitutionality of the Natural Gas Act in the Natural Gas Pipeline Co. case, we stated that the 'authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce.' 315 U.S. p. 582. Rate-making is indeed but one species of price-fixing. Munn v. Illinois, 94 U.S. 113, 134. The fixing of prices, like other applications of the police power, may reduce the

> value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. Block v. Hirsh, 256 U.S. 135, 155-157; Nebbia v. New York, 291 U.S. 502, 523-539 and cases cited. It does, however, indicate that 'fair value' is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated. (9)
> (Footnote 9 omitted)(emphasis supplied)

In the case before us the Market or exchange value of the company's operative property was not reduced by any lower rates prescribed by this Commission. On the contrary, the Commission in the 1937-1938 proceedings heretofore referred to substantially increased the company's rates. That increase, by stages from five to seven cents, finally amounted to a raise of 40 per cent. Notwithstanding the increase the company's net revenues fell below the previous net revenue from the 5-cent fare in each of the subsequent years 1938, 1939, 1940 and 1941 when the higher fare was in effect. The record is conclusive that the value of the company's property declined because of the operation of economic forces and, particularly, by reason of the effective competition of the Municipal Railway which furnished a better service at the lower rate.

The decision of the United States Supreme Court in the case referred to continues:

"We held in Federal Power Commission v. Natural Gas Pipeline Co., supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' Id., p. 586. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Id., p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. Cf. Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 304-305, 314; West Ohio Gas Co. v. Commission (No. 1) 294 U.S. 63, 70; West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 692-693 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Tel. & T. Co., 212 U.S. 414; Lindheimer v. Illinois Tel. Co., supra, pp. 164, 169; Railroad Commission v. Pacific Gas & E. Co., 302 U.S. 388, 401." (emphasis supplied)

Later in the same opinion the Court says:

"It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them. It allowed, for example, delay rentals and exploration and development costs in operating expenses. No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments." (emphasis supplied).

This latest decision of the Supreme Court of the United States, we are confident, supports our decision No. 36739 in these proceedings. We have found that a 6-cent fare for Market Street

Railway Company is just and reasonable and that any fare in excess of six cents is unjust and unreasonable. If, in the light of experience, the 6-cent fare should prove to be unreasonable under all the circumstances present in the operation of the company's street railway system, the Public Utilities Act contains the machinery for obtaining rate adjustments.

Our decision makes provision for the filing of monthly operating and service reports and we shall keep ourselves continuously informed of the traffic and revenue results from the 6-cent fare and also of all other pertinent operating and service facts. If, in the light of the actual experience, it appears that the fare should be changed we shall, on our own initiative, take appropriate action.

We conclude that the petition of Market Street Railway Company for rehearing of decision No. 36739 should be denied.

ORDER DENYING REHEARING

Market Street Railway Company having filed a petition for a rehearing of decision No. 36739 in the above proceeding, the Commission having granted and heard oral argument on said petition, and being of the opinion that rehearing should be denied, IT IS ORDERED as follows:

1. That the petition of Market Street Railway Company for a rehearing of decision No. 36739 be and it is hereby denied.

2. That the effective date of decision No. 36739 be and it is hereby extended to February 11, 1944.

Dated at San Francisco, California, January 12, 1944.

Richard Mackay
Frank R. Havenner
Frank M. Clark

COMMISSIONERS