

Testimony Opposing H.B.6821:
AN ACT CONCERNING DEPARTMENT OF TRANSPORTATION
RECOMMENDATIONS REGARDING MAXIMIZATION OF FEDERAL FUNDS,
RIGHTS-OF-WAY, ALTERNATIVE PROJECT DELIVERY, COMMUTER PARKING,
AMTRAK INDEMNIFICATION, AUTHORITY TO CONDEMN PROPERTY,
MAINTENANCE OF BRIDGES, PASSENGER SEAT BELTS, WORK ZONE SAFETY
FUNDS AND MARINE PILOT'S LICENSES.

Jeffrey J. Mirman, Esq,
Counsel to DATTCO, Inc., The New Britain Transportation Company ("NBT"),
Collins Bus Company ("Collins"), and Nason Partners, LLC d/b/a Kelley Transit
Company, LLC ("Kelley")
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**Senator Maynard, Representative Guerrero, and distinguished members of the
Transportation Committee:**

My name is Jeffrey Mirman. I practice law in Hartford with the firm Hinckley, Allen & Snyder LLP. I am here today representing four privately held and family-owned bus companies that presently provide transportation services to the citizens of the State of Connecticut – DATTCO, Inc., The New Britain Transportation Company ("NBT"), Collins Bus Company ("Collins"), and Nason Partners, LLC d/b/a Kelley Transit Company, LLC ("Kelley"). For the reasons which follow we oppose those portions of Sections 11 and 12 of Raised Bill No. 6821 which seek to amend Sections 13b-36 and 13b-80 of the General Statutes and vest the power to condemn intangible property rights with the Commissioner of Transportation. The proposed amendments are the Commissioner's latest attempt to deprive these companies of their constitutionally protected property rights in our Certificates of Public Convenience and Necessity and should not be sanctioned by this Committee.

The bus companies I represent are an integral part of the state busing system, providing safe and efficient transportation to the citizens of Connecticut. The companies' busing services presently provide public transportation options that help people commute to work, school, shopping and entertainment. These services relieve congestion on Connecticut roadways and are already a cost effective, safe, and reliable service that many Connecticut citizens rely on daily. Despite this, the Commissioner and the Department have spent the better part of the last four years attempting to interfere with this service. The proposed amendments would provide the Commissioner another method, which the Department presently lacks, to interfere with companies' service.

These proposed statutory changes arise out of the DOT's planned operation of the new Busway and the Commissioner's desire to replace the service currently being provided by private bus companies with a service completely controlled by the State.

We do not believe that the State should be taking away private sector jobs and replacing them with a service operated solely by the State.

Let us be perfectly clear. DOT has acknowledged certain routes of the new Busway operate over routes currently operated by these private companies pursuant to their Certificates of Public Convenience and Necessity, a service provided by these companies literally for generations. We have reviewed the proposed service plan for the new Busway and have informed representatives of the DOT that DATTCO, NBT, and Collins are more than willing and able to provide the necessary service over the proposed Busway routes that are at issue here, and at a substantial savings over what it will cost the State to provide the same service. A few weeks ago DOT made a proposal which would have permitted DATTCO and NBT to operate some existing routes, giving much of the routes covered by the Certificates to CT Transit, a proposal which did not comply with the requirements of the injunction which is in place against the DOT. We made a proposal to DOT which would permit the Busway to open and operate with no interruption in service. It provided for DATTCO, NBT, and Collins to operate those routes within the service plan that are covered by their Certificates, and would permit CT Transit to operate all of the other routes. For reasons which have not been made clear to the companies, the DOT has rejected that proposal and made no counter-proposal, and refuses to let the companies continue to provide the service they have exclusively and more than satisfactorily provided for many decades. The DOT has provided the companies with no alternative but to pursue vindication of their legal rights through the Court system.

The amendments to the statutes now under consideration will result in changes from a private economy that has been successful for decades based upon hard work and ingenuity to a public system devoid of incentives to provide quality service to the public.

We believe it is necessary to provide our understanding of the background history that has given rise to these proposed amendments.

Since the early 1900s, it has been the law in Connecticut that, by statute, no company is permitted to operate bus service within the State without having a Certificate of Public Convenience and Necessity. Certificates were originally issued by the Division of Public Utility Control within the Department of Regulation. Since 1979, those Certificates have been under the jurisdiction of, and regulated, by the Department of Transportation.

The Certificate establishes that there is a public need for the bus service – i.e., that public convenience and necessity require the bus service – over particular routes covered by the Certificate. Section 13b-80 provides that once a Certificate has been issued, it "shall remain valid unless suspended or revoked by the Department of Transportation."

Certificates of Public Convenience and Necessity have historically been issued to companies to provide the companies the exclusive right to operate bus services along the routes specified in the Certificate. Certificates of Public Convenience and Necessity for transportation services are utilized not only in Connecticut but also throughout the United States and the reliance on Certificates for this service has been relatively stable and undisturbed for decades. Courts have consistently found the possession of the Certificate is property right, protected by the United States Constitution and the Connecticut Constitution, and the holder of the Certificate cannot be deprived of that right without due process of law.

In August of 1980, the DOT issued a three-part report discussing the history and then-current status of the transportation system in Connecticut. The Department stated:

Motor buses regulated by the State Department of Transportation are authorized to operate over certain franchise routes (routes for which they have exclusive rights to provide service.)¹

The four private bus companies have all been providing exclusive fixed route bus service or express commuter bus service for specific routes for decades, all pursuant to Certificates of Public Convenience and Necessity.

DATTCO, headquartered in New Britain, is the owner of Certificate No. 11. Pursuant to that Certificate, Dattco provides commuter service between Hartford and New Britain, express service between Bristol and Hartford, express service between Southington – Cheshire and Hartford, local service between Hartford and New Britain via Newington, local New Britain service along East Street, service from the CCSU campus along East Street, and local New Britain Service along South Street.

NBT, headquartered in Berlin, is the owner of Certificate No. 10. Pursuant to that Certificate, NBT provides service between Hartford and Bristol via New Britain, service to Westfarms Mall via New Britain, service between Westfarms and Wethersfield via Newington Center, service between Hartford and New Britain via Newington, service between New Britain and Meriden, service between New Britain and Bristol, service between New Britain and Plainville Center, service through Burritt Street and through Arch Street, Service between New Britain and Farmington, service along Oak Street in New Britain, service along Stanley Street in New Britain, service between New Britain and Berlin, local service between Bristol and New Britain, service between Bristol City Hall and Bristol Hospital, service between Bristol City Hall and Gaylord Towers, and service along East Street to the CCSU campus.

Collins, headquartered in Vernon, provides commuter express service pursuant to Certificates No. 303 and 466. Collins operates commuter bus service between Vernon and Downtown Hartford along I-84.

Kelley, headquartered in Torrington, provides commuter express service between Torrington and Hartford. It is the owner of Certificate No. 3.

None of these four companies has ever been the subject of a hearing to revoke or suspend their Certificates, much less having their Certificates suspended or revoked.

Each of the companies has entered into contracts with the DOT. These contracts address the terms of the service and the payment for the service to be provided. However, as one Superior Court judge recently held, "the certificate guarantees exclusive rights to operate, and the contract merely sets terms of service."ⁱⁱ

In short, the system has been working perfectly for close to 100 years, and there is no reason to believe it cannot work perfectly for another 100 years.

Nevertheless, in 2010 the DOT sought to change the current system, ostensibly by putting out to bid the various routes. Our belief at the time – and this belief has been borne out by subsequent events -- was that the DOT wanted to assume total control over the bus system in Connecticut to the detriment of the private companies, all with the coming Busway in mind. The busway and its recently published service plan is dependent on access to and travel over the companies' routes. DOT has acknowledged as much in recent correspondence with the companies. DOT's publications and the *fastrak* website clearly demonstrate that DOT intends for the routes covered by the certificates to be incorporated into the Busway.

Putting the routes out to bid in 2010 would have unconstitutionally deprived the companies of their property and meant a death knell to the system of Certificates, for awarding routes to companies which did not have a Certificate covering those routes would have destroyed the exclusivity which each company possesses with respect to their routes. By awarding routes to companies without Certificates, the DOT could then have awarded all routes to the state-controlled company – CT Transit – and eliminated the right of the private companies to operate.

Because this proposal challenged their very existence, the four companies brought suit against the DOT in 2010, and the Superior Court issued a temporary restraining order against the DOT's proposal to put the companies' routes out to bid. After a series of evidentiary hearings, in 2012 the Court ultimately issued a ruling continuing the temporary restraining order as a temporary injunction, an injunction that remains in place to this day. In its written decision, the Court held that the companies possessed a constitutionally protected property in their Certificates which "cannot be depreciated by the installation of a new operator" on a route for which each company has an exclusive right to operate.ⁱⁱⁱ

Since the issuance of the injunction, each of the companies has been providing quality service along the routes over which they have the exclusive right to operate.

Nevertheless, thwarted in its effort to avoid compliance with Section 13b-80's grant of exclusivity to the bus companies, unable to revoke the certificates because the companies were meeting the needs of the public, and in an effort to assume total

control over operation of the routes owned by the private companies, in March of 2014 the Commissioner issued notices of condemnation of each of the companies' Certificates, claiming as authority Sections 13b-34, 13b-36, and 13-23 of the General Statutes. In issuing these notices of condemnation, the Commissioner assigned a value to these Certificates of one dollar – yes, one dollar.

Because the Commissioner's proposed taking of their Certificates threatened the Constitutional rights, the lifeblood, and in some cases livelihoods, of the companies, they each brought suit challenging the authority of the Commissioner to condemn their Certificates.^{iv} They claimed, and continue to claim, that the Commissioner lacks the statutory authority to condemn their Certificates. As it currently reads, Section 13b-36(a) provides:

The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, any land, building, equipment or facilities which the commissioner finds necessary for the operation or improvement of transportation services.

The Commissioner over the last four years has claimed at various times and in different forums that the Certificates expired, the Certificates were abandoned, the Certificates did not provide exclusive use of the routes, the Certificates did not grant vested property rights, and, most recently, that the Commissioner has the inherent power of eminent domain to condemn intangible property rights such as the Certificates. We do not believe that the existing statutory language permits the Commissioner to condemn intangible property such as the Certificates nor do we believe the Legislature intended to give the Commissioner the inherent power to condemn intangible property rights. Rather, the statute can only fairly be read to permit the Commissioner to condemn real, physical property, and the term "facilities" cannot be read to include intangible property. In our review of the state statutes, we determined that whenever the legislature has used the term "facilities" it has always applied the term to include only physical property.

Section 13b-80 sets forth the only statutory mechanism for interfering with a bus company's Certificate. The statute provides that the Certificate may be suspended or revoked only for cause. Interpreting the language of Section 13b-36 to permit a taking of a company's Certificate, then, is inconsistent with the language of Section 13b-80.

This past December a Superior Court judge concluded that the Commissioner does have the right to condemn the companies' Certificates pursuant to Section 13b-36(a). The Court acknowledged, "the backdrop for this controversy is the state's construction of what is commonly referred to as the 'busway,' a roadway devoted to express bus service between Hartford and New Britain." The Court stated, "the commissioner must find his authority to condemn the certificates in a statute delegating the state's power of eminent domain to him. That statutory authority to condemn is to be 'strictly construed in favor of the owner of the property taken and against the condemnor'".

The Court further recognized that the power of eminent domain "must be authorized by the 'express terms or clear implications' of a statute." Nevertheless, the Court held that the term "facilities" can and should be read to include intangible rights including the companies' Certificates. The Court determined that the statutes the Commissioner was relying on in his attempt to condemn the certificates did not explicitly provide the Commissioner with the power of condemnation. The Court determined that the Commissioner possessed the power of condemnation by "necessary implication." The Court further determined that the term "facilities" in the statute did not explicitly include intangible property rights, referring to "land, buildings, [and] equipment", but by necessity would include intangible property rights.^v The Court was required in two separate instances of statutory interpretation to find the Commissioner's power to condemn was implied and, again by implication, applied to property rights that were not set forth in the statute itself. The term "facilities" in the Connecticut Statutes appears numerous times and, after an exhaustive search, we could not find one statutory reference to "facilities" that included intangible property rights. The companies are presently appealing this ruling.^{vi}

Perhaps recognizing that the Connecticut appellate courts might see the matter differently, the Court ordered that the temporary injunction previously issued preserving the exclusivity possessed by the companies remains in place pending appeal. The Companies have taken an appeal of the ruling condemning their Certificates, which remains pending.

We must always be mindful of the potential future consequences of our actions. We speak against this proposed legislation, then, for the following reasons:

- Permitting a state agency to take by condemnation intangible property sets a very dangerous precedent, opening a virtual Pandora's Box. Where will it end? Will state agencies seek to condemn patents, copyrights, trade secrets of private companies? When will a company's intellectual property be safe from the hand of a commissioner seeking to augment state power?
- This legislation is inconsistent with what should be the State's goal of encouraging private enterprise. The State should be in the business of encouraging private enterprise, not competing with that enterprise and then taking over the business for itself.
- There is no apparent reason for this legislation. The companies are meeting the needs of the public providing a cost effective, safe, and reliable service, as they have been for decades. DOT acknowledges this when it requests the companies continue to provide certain services over the routes affected by the Busway, notwithstanding the litigation between the companies and the DOT.^{vii} There has never been a hearing to revoke or suspend the certificates at issue, a hearing that by law would be required if the companies failed to meet the needs of the public. If the companies did fail in this obligation, there is already a statutory

mechanism in place to address the failure and revoke or suspend the certificates. The private companies are willing and able to provide the service which the Commissioner believes is needed, and there has never been any suggestion that private companies cannot provide the service as well as, or better than, the State can.

- This legislation targets four family owned bus companies. There are no other bus companies that have Certificates of Public Convenience and Necessity. The State has not issued any new Certificates in more than 40 years. This legislation, then, is not designed to promote the public good, but is proposed to punish these individual companies because they have dared to pursue their desire to remain in business, providing a public service they have provided for, in some cases, close to 100 years. We question, then, whether this particular legislation if enacted could pass constitutional muster and survive an inevitable Court challenge.

On behalf of the bus companies, we urge the Committee to reject the proposed amendments to Connecticut General Statutes 34b-36 and 34b-80.

Thank you for your consideration, and I welcome your questions.

Contact:

Jeffrey J. Mirman, Esq.
David A. DeBassio, Esq.
HINCKLEY, ALLEN & SNYDER, LLP
20 Church Street
Hartford, CT 06103
Telephone: 860-725-6200
Fax: 860-278-3802
Attorneys for
DATTCO, Inc.,
The New Britain Transportation Company ("NBT"),
Collins Bus Company ("Collins"), and
Nason Partners, LLC d/b/a Kelley Transit Company, LLC ("Kelley")

ⁱ 1980 Connecticut Department of Transportation publication, "Connecticut Today Volume 111 Bus Service" (p. 22-23)

ⁱⁱ Dattco, Inc., et al v. State of Connecticut Department of Transportation, No. CV 106007261 S, 2012 Conn Super. LEXIS 1529 (Connecticut Superior Court, June 8, 2012, Levine, J.T.R.).

ⁱⁱⁱ Id.

^{iv} Dattco, Inc. V. James Redeker, Commissioner of Transportation of the State of Connecticut, Docket # HHD-CV14-6053447-S; Collins Bus Service, Inc. V. James Redeker, Commissioner of Transportation of the State of Connecticut, Docket # HHD-CV14-6052771S; The New Britain Transportation Company V. James Redeker, Commissioner of Transportation of the State of Connecticut, Docket # HHD-CV14-6053579S; Nason Partners, LLC d/b/a Kelley Transit Company, V. James Redeker, Commissioner of Transportation of the State of Connecticut, Docket # HHD-CV14-6053652S.

^v Collins Bus Serv. v. Redeker, 2014 Conn. Super. LEXIS 3048 (Conn. Super. Ct. Dec. 4, 2014, Shortall, J.T.R.)

^{vi} Dattco, Inc. et al. v. James Redeker, Commissioner of Transportation of the State of Connecticut, AC # 37556.

^{vii} February 6, 2015 letter to Dattco and NBT from DOT regarding what DOT referred to as the "Proposal for interim service plan for CTfastrak opening".