

Raised Bill No. 5411

Before the Committee on Transportation
February 29, 2016
Remarks of Jeffrey J. Mirman

Mr. Chairman and Members of the Committee:

Thank you for giving me the opportunity to speak to you today. My name is Jeffrey Mirman. I am a lawyer with the Hartford law firm of Hinckley, Allen & Snyder LLP. I appear today on behalf of my clients – four privately held bus companies: DATTCO, Inc., The New Britain Transportation Company, Collins Bus Service, and Nason partners, LLP d/b/a Kelly Transit Company. I have been representing these companies in litigation with the Commissioner continuously since 2010.

You may recall that I appeared last year and spoke in opposition to Raised Bill No. 6821, and in particular in opposition to Sections 11 and 12 of the proposed legislation, which proposed amendments to Sections 13b-36 and 13b-80 of the General Statutes, and sought to give to the Commissioner of Transportation the right to condemn the private personal intangible property rights of these four companies – their Certificates of Public Convenience and Necessity which they must have in order to provide bus service in Connecticut. Their Certificates specifically authorize them to provide exclusive bus service over the routes covered by their Certificates.

Last year I pointed out that at no time had the Commissioner suggested that these bus companies are not providing a public service or not meeting the public need for the service. They are already satisfying the public need for the service which the commissioner sought the power to condemn. As the need was being satisfied, there was no justifiable reason for the Commissioner to condemn the Certificates, and no reason to condemn the Certificates other than to give the right to provide the service to another company.

The proposed legislation was bad economics, bad policy, and bad law. It was bad economics because of the value attached to the Certificates. We believed that Certificates had a value at that time in excess of \$65 million. Nothing has happened to adjust that estimate downward.

It was bad policy because the Certificates were not subject to condemnation for another use, but merely to take the right to provide the service from one entity to give it to another entity.

It was bad law because the legislation raised the specter of inconsistent application: how was the Commissioner going to eventually give my clients' routes to another

company which did not have a Certificate of Public Convenience and necessity, a requirement under Section 13b-80. The law was internally inconsistent and would be unable to withstand a judicial challenge not only on those grounds, but others as well, because it violated the equal protection clause and constituted a bill of attainder.

I appear before you today to point out the legal flaw in Section 2 of the Raised Bill, which proposes to repeal Section 13b-80 and add new language to the statute. The proposed legislation adds the following language to the existing statutory language:

Sufficient cause [to suspend or revoke a certificate of public convenience and necessity] shall include, but be not limited to, the circumstance where a route set forth in a certificate of public convenience and necessity overlaps, in whole or in part, with a route set forth in a contract issued to the holder of such certificate pursuant to Section 13b-34, as amended by this act.

You should all know that while the Certificate vests the bus companies with the exclusive right to operate over the routes covered by the Certificate, each company has a contract with the DOT pursuant to Section 13b-34. The companies can operate service over the routes Covered by their Certificates without a contract. The DOT and the companies have recognized this requirement for perhaps 100 years.

The plain language of the proposed legislation would authorize the Commissioner to revoke a Certificate where a route covered by the certificate is the subject of a contract. Well, all routes today are subject to a contract because the Commissioner has exercised his authority to set fares at artificially low levels, thus making the contracts necessary to subsidize the service. As at least one Superior Court judge has ruled on this point, "the contract between the parties governs terms of service and has no bearing on the exclusive rights that" the companies have to operate the service. *Nason Partners, LLC v. Northwestern Conn. Transit Dist.*, 2013 Conn. Super. LEXIS 1425 (Conn. Super. Ct. June 28, 2013, Danaher, J).

This legislation, then, would authorize the Commissioner to summarily revoke all of the existing certificates and terminate the right of the bus companies to provide service, because without the certificate neither they, nor anyone else, can provide the service. What sense does this legislation make? Frankly, none, because upon revocation of the certificates no service could be provided until a new entity were granted a certificate, and then a contract setting forth the terms of the service.

What this legislation proposes, then, is to permit the Commissioner to in effect take the companies' Certificates, which are vested property rights, long recognized by both the legislature and the Connecticut Supreme Court, without due process, and without any justifiable legal authority to do so, and without even the requirement of paying just compensation for the value of the certificate condemned. This legislation is, to put it bluntly, a farce, and is less able to pass legal muster in the courts than was the legislation proposed last year which was rejected.

As you know, the authority of the Commissioner to condemn the bus companies' Certificates is presently pending before the Connecticut Supreme Court. The case is still in the briefing stage, and it is possible that oral argument before the Court will take place in May at the earliest, but more likely in the Fall. If so, we can expect a decision next winter. I urge you, then, to take no action until such time as the Supreme Court rules, and it can be determined what the scope or limit are of the Commissioner's authority. Does it make sense to pass this flawed bill only to invite litigation over its consequences?

Thank you again for giving me the opportunity to speak to you today.

Jeffrey Mirman