

Testimony Opposing Raised Bill No. 151 :
AN ACT CONCERNING RECOMMENDATIONS BY THE DEPARTMENT OF
TRANSPORTATION

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Senator Leone, Representative Lemar, and distinguished members of the Transportation Committee:

My name is Dominic Fulco and I practice law in Hartford with the firm Reid and Riege, P.C. I am here today representing three privately held and family-owned bus companies that presently provide transportation services to the citizens of the State of Connecticut — Dattco, Inc. (“Dattco”), The New Britain Transportation Company (“NBT”) and Collins Bus Service, Inc. (“Collins”) (collectively, the “Companies”).

For the reasons that follow, the Companies oppose those portions of Sections 2 and 3 of Raised Bill No. 151 which seek to amend Sections 13b-34 and 13b-80 (“Section 13b-80”) of the General Statutes and remove the almost 100 year statutory requirement that all operators of a motor bus have a Certificate of Public Convenience and Necessity (the “Certificate”) by providing an exception that if a person or entity is awarded a contract by the Department of Transportation (the “Department”) to provide motor bus services that person or entity does not need a Certificate.

As I will elaborate, the proposed amendments are the Department’s latest attempt to deprive the Companies of their constitutionally protected property rights in their Certificates, as those rights were found by the Connecticut Supreme Court in one of the lawsuits brought by the Companies against the Department over their Certificates. Moreover, these proposed amendments will also deprive any other holders of Certificates of Public Convenience and Necessity for motor buses of their constitutionally protected property rights. This should not be sanctioned by this Committee by moving forward with the proposed amendments.

The Companies speak against this proposed legislation, for the following reasons:

- There is no valid reason for this legislation. The requirement that a person or company must obtain a Certificate before operating a motor bus has been around for almost a century. There exists an important reason why that process has been in place for so long: public convenience and necessity must be shown by an applicant and certified by the Department. Permitting the Department to circumvent the Certificate requirement by issuing a contract would allow the Department to give away motor bus routes without the showing of a public need and for any reason whatsoever. This legislation would exclude input from the towns and boroughs where the routes are located and other holders of Certificates affected. As such, the proposed amendment removes accountability of the Department.
- Abolishing the Certificate requirement would by legislation create an “inverse” condemnation of the Companies’ Certificates since those Certificates would be rendered valueless by authorizing the Department to grant the right to operate a motor bus by merely

issuing a contract. This would strip the Companies' of their constitutionally protected rights and it would spawn more litigation where the Companies seek just compensation from the State for their Certificates. We are of the belief that the Companies would prevail in that litigation costing the state tens of millions of dollars in damages for the "taking" of constitutionally protected property rights.

- This legislation is inconsistent with what should be the State's goal of encouraging private enterprise accompanied by quality service. The State should be in the business of encouraging private enterprise, not competing with that enterprise and then taking over the business for itself.
- This proposed legislation is designed to target three family owned bus companies who have been battling with the Department both in the courts and before the Legislature for a decade to protect their rights. 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, decades. This raises another significant constitutional problem with the proposed legislation.

The Companies 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 Department, in connection with the opening and operation of CTfastrak, which is commonly referred to as the "Busway", has engaged in a mission to interfere with this service and to take away the Companies' property rights in their Certificates.

The Companies have expended tens of thousands of dollars in legal fees in rebuffing the Department's efforts and in 2016 obtained a decision by the Connecticut Supreme Court in their favor and against the Department protecting their property rights in their Certificates and defeating the Department's attempt to condemn their Certificates. *Dattco, Inc. et al v. Commissioner of Transportation*, 324 Conn. 39 (2016). In *Dattco*, the Supreme Court concluded that the Companies have constitutionally protected property rights in their Certificates. As such, the Companies cannot be deprived of rights in the Certificates without due process of law. My clients have brought five other lawsuits against the Department to protect their rights in their Certificates all of which are pending as of today.¹ The latest of those lawsuits was filed two weeks ago seeking, among other things, to declare as unconstitutional Section 13b-80 as it relates to the application for and issuance of Certificates.ⁱⁱ That case is set for an expedited trial beginning on March 9, 2020.

The amendments proposed by the Department which are before you today are a direct effort by it to circumvent a decision by the Superior Court in the Companies' lawsuits against the Department.ⁱⁱⁱ In those lawsuits, discussed again later, the Companies maintain that their Certificates provide them with the exclusive right to operate over the routes they operate pursuant to their Certificates. The Companies further maintain that the four routes that now comprise the Busway incorporate or run

parallel to the route or routes operated by the Companies pursuant to their Certificates. Of significance to the presently proposed amendments, in those lawsuits the Court ruled that a Certificate is required to operate motor buses even if the Department has contracted with an operator as it has done in the case of the Busway.^{iv} The Department contracted with First Transit, Inc. (“First Transit”) and allowed it to operate over the four routes encompassing the Busway without Certificates for those routes as required by Section 13b-80. In order to fix that violation of 13b-80 and comply with the Court’s ruling, the Department asked First Transit to file applications for Certificates over the four routes that comprise the Busway and First Transit did so in September 2019. In October 2019, after being notified of the applications, the Companies filed petitions with the Department opposing First Transit’s applications.

Besides the pending lawsuits by the Companies which include an injunction against the Department, another basis for the Companies’ opposition is that First Transit’s applications were fatally deficient in failing to set forth (on the form issued by the Department) the public convenience and necessity required for the issuance of a Certificate. Rather than reject the applications for non-compliance with the Department’s own application requirements seeking information that would show that the applicant met the public convenience and necessity requirement of Section 13b-80, the Department has allowed those deficient applications to proceed. The Department rejected the Companies’ request for a hearing, apparently desiring to make its decision in secret, and it has imposed procedures that are not authorized by statute or regulation. As a result, the Companies commenced its fifth lawsuit against the Department in the Superior Court seeking among other things to declare Section 13b-80 as unconstitutional because as it applies to them it deprives them of due process right with respect to their Certificates under both the United States Constitution and Connecticut Constitution.^v In an order issued on February 10, 2020, the Court has enjoined the Department from moving forward with those applications and issuing Certificates to First Transit until it adjudicates the Companies’ constitutional claims.

The Companies believe that a significant motivating factor behind the Department’s proposed amendments is that First Transit – as evidenced by its fatally deficient applications – cannot demonstrate the public convenience and necessity required for the issuance of a Certificate. Thus, the Department is asking the Legislature to change the law in these proposed amendments by abolishing the century old Certificate requirement.

We think it is necessary to provide our understanding of a more complete background history that has led to these proposed amendments.

Since 1921, it has been the law in Connecticut that, by statute, no person or company is permitted to operate bus service within the state without having a Certificate. The statute now in place providing for the Certificate and the process to obtain one is Section 13b-80. Prior to 1979, Certificates were 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.

Under Section 13b-80, in order to obtain a Certificate, a person or company must first make written application to the Department (as First Transit has done as discussed previously). The applicant has the burden of proving that there is “public convenience and necessity” requiring the operation of a

motor bus over the route sought by the applicant. As provided in that statute, the Department must certify the existence of such public convenience and necessity. Once the application is received, the Department provides notice to the town or borough through which the applicant's route will operate and to any other certificate holder who operates over any portion of the applicant's proposed route or parallel to such route. A public hearing was required under Section 13b-80 prior to 1997 at which time the statute was amended to provide for a hearing at the discretion of the Department. Once issued, the Certificate, which establishes that there is a public need for the bus service over particular routes covered by the Certificate "shall remain valid unless suspended or revoked by the Department of Transportation."

Certificates have historically been issued to companies to provide their holders the exclusive right to operate bus services along the routes specified in the Certificate. This type of "monopoly" was approved by the Connecticut Supreme Court back in 1922 shortly after the predecessor statute to Section 13b-80 was enacted when it rejected a claim based on those grounds.^{vi}

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.)^{vii}

Dattco, NBT and Collins have all been providing exclusive fixed route bus service or express commuter bus service for specific routes for decades, all pursuant to their Certificates.

Dattco, headquartered in Kensington, 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 New Britain, 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 South Windsor, provides commuter express service pursuant to Certificates No. 303 and 466. Collins operates commuter bus service between Vernon and Downtown Hartford along 1-84.

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.

Although the system had been working perfectly for closing in on a century, in 2010 the Department ought to change the system drastically, ostensibly by putting out to bid the various routes. The Companies' belief at the time – and this belief has been borne out by subsequent events – was that the Department 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 is dependent on access to and travel over the Companies' routes.

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 of the Companies possesses with respect to their routes. By awarding routes to companies without Certificates, the Department 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 Companies brought suit against the Department in 2010, and the Superior Court issued a temporary restraining order against the Department's proposal to put the Companies' routes out to bid. In one of the lawsuits, the Court, entered an injunction that protected the rights of the Companies that were plaintiffs, enjoining and precluding the Department from awarding to any company other than the plaintiffs service over the routes covered by their Certificates. That injunction continues to today. Subsequently, the Court determined that, under Connecticut Supreme Court authority, certificates issued for bus routes may provide for exclusivity and the Court went on to conclude that certain Certificates of the Companies provided exclusivity. In another ruling in the Companies' lawsuits, a different judge has made an interlocutory ruling that the Companies' Certificates do not give them exclusive rights in the route governed by their certificates. This has created a conflict in the findings of Companies' rights relating their Certificates that must be resolved at the appellate level. In further support of Companies' claim that their Certificates give them exclusive rights over routes covered by their Certificates, a Superior Court in another action not involving the Companies has determined that holders of a Certificate have exclusive rights to operate routes covered by the certificate at issue in that case.^{viii}

In March, 2014, 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, the Department 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 Department assigned a value to these Certificates of one dollar.

Because the Department'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 Department to condemn their Certificates. As discussed above the Companies prevailed on their claims, in *Dattco*.

The five lawsuits discussed above remain pending and there is trial scheduled in the newest, fifth lawsuit in a few weeks. The proposed legislation invites more litigation against the Department costing both the Companies and the State an expenditure of precious resources. The overall requirement of Certificates to operate motor buses has worked and should not be abolished so that the Department can circumvent existing law and Court rulings and given free rein to grant routes without the showing of public need.

This is not the first time that the Department has attempted to have the law changed relating to Certificates in the face of the Companies' court challenges. In 2015, Raised Bill 6821 was proposed to give the Commissioner of the Department the power to condemn the Certificates. The Companies appeared before this Committee speaking against that proposed legislation and it did not move forward. In 2016, Raised Bill 5411 was proposed to give the Commissioner the authority to revoke a Certificated where a route covered by a Certificate is the subject of a contract. Raised Bill 5411 sought to do essentially what the proposed legislation before you today – Raised Bill 151 – seeks to do: allow a contract to defeat the Certificate requirement. The Companies opposed that 2016 legislation before this Committee and that proposed legislation was defeated. Undeterred by its prior failures, in 2018 the Department again proposed legislation, Raised Bill 5314, to amend Section 13b-80 by specifically addition to the “sufficient cause” language allowing revocation of a Certificate a provision that sufficient cause exists where a route in a Certificate overlaps a route in a contract issued by the Department. That proposed legislation was also defeated. The Department's prior efforts to change 13b-80 were not successful and this Committee should rebuff the Department's present attempt to change the law.

On behalf of the Companies, we urge the Committee to reject the proposed amendments to Connecticut General Statutes 13b-34 and 13b-80.

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

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ⁱ *DATTCO, Inc., et al v. State of Connecticut, Department of Transportation*, HHB-CV-10-6007261-S (transferred to HHD-CV-10-6079022-S (the “First Injunction Action”); *DATTCO, Inc. v. State of Connecticut, Department of Transportation*, HHD-CV-14-6079021-S (the “Second Injunction Action”); *The New Britain Transportation Company v. State of Connecticut, Department of Transportation*, HHD-CV-15-6079020-S (the “Third Injunction Action”); *Collins Bus Service, Inc. v. State of Connecticut, Department of Transportation and James P. Redeker, Commissioner of Transportation*, HHD-CV-17-6079911-S (the “Fourth Injunction Action”) (collectively, the “Consolidated Actions”). Also, *DATTCO, Inc. et al v. State of Connecticut Department of Transportation*, HHD-CV-20-6125097.

ⁱⁱ *DATTCO, Inc. et al v. State of Connecticut Department of Transportation*, HHD CV-20-6125097.

ⁱⁱⁱ Consolidated Actions, Memorandum of Decision, February 11, 2019 (Moukawsher, J.) .

^{iv} Consolidated Actions, Memorandum of Decision, February 11, 2019 (Moukawsher, J.).

^v *DATTCO, Inc. et al v. State of Connecticut Department of Transportation*, HHD CV-20-6125097.

^{vi} *Modeste v. Public Utilities Commission*, 97 Conn. 453, 455 (1922) (rejecting a claim by a scorned applicant that the statute then in existence improperly granted what is in effect a “monopoly” to one owner of a Certificate).

^{vii} 1980 Connecticut Department of Transportation publication, "Connecticut Today Volume III Bus Service" (p. 22-23).

^{viii} *Nason Partners, LLC v. Northwestern Connecticut Transit District*, Superior Court, Judicial District of Litchfield, Docket No. LLICV-13-500743, 2013 WL 3766890, (June 18, 2013, Danaher, J.).