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ANALYSIS OF LITIGATION INITIATED TO PREVENT PARATRANSIT IMPLEMENTATION

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Transportation Systems Center
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16. Abstract

Implementation of subsidized paratransit services often affects business interests of existing transportation companies. At least a half dozen of these companies have responded with lawsuits seeking either to prevent implementation of this competitive service or to obtain compensation for loss of business. This study identifies and describes the legal issues raised in recent litigation initiated by taxi companies against transit districts implementing paratransit systems.

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PREFACE

This study was undertaken to identify and analyze the issues raised in recent litigation between privately-owned taxi companies and public transit districts implementing paratransit services. The work herein is the first phase of a broader examination of the legal and institutional constraints to deployment of innovative transportation systems. The study was performed at the Transportation Systems Center under the sponsorship of the Office of Technology Development and Deployment, Bus and Paratransit Technology Division, Urban Mass Transportation Administration.

METRIC CONVERSION FACTORS

Approximate Conversions to Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
in	inches	2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
		AREA		
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
		MASS (weight)		
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
		VOLUME		
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.95	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
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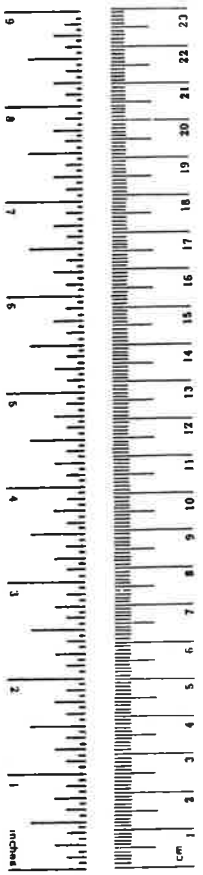

Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
		AREA		
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
		MASS (weight)		
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
		VOLUME		
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
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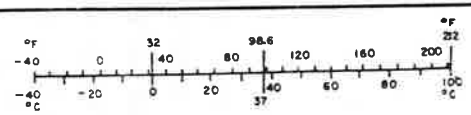

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EXECUTIVE SUMMARY

Deployment of government-assisted paratransit services often affects the business interests of existing transportation companies. Since 1971 at least a half dozen of these companies, predominantly taxi firms, have responded with law suits seeking either to prevent implementation of this competitive service or to obtain compensation for loss of business. This study identifies and analyzes the legal issues which are the basis for such litigation.

Generally, private transportation companies have been unsuccessful in their attempts to block implementation of paratransit. The affected companies have alleged:

a) Failure to comply with Urban Mass Transportation Administration (UMTA) grant prerequisites

b) Violation of license agreement granted by the municipality

c) Deprivation of their property interest in their franchise without just compensation

d) Denial of equal protection under the law

e) Violation of state transit enabling statute

f) Unfair competition by the transit district in attempting to market paratransit as a taxi service.

With the exception of a lawsuit in Santa Clara County, California, where the transit district was found to have violated the buy-out provision of the enabling statute, and the recent U.S. Court of Appeals decision that ruled that the demonstration project in Westport, Connecticut, which was authorized and funded under Section 6 of the UMT Act, must comply with the requirements of Section 3, these issues have been resolved in favor of the municipality. This does not mean that in the future a taxi company should not consider litigation as an ultimate defense against illegal actions of competing transit districts. New laws, new regulations, and changing social climates may alter legal protections available to the private taxi company. The analysis of

the applicable case law, coupled with current federal policy promoting competitive opportunities for private transportation, suggests that companies should begin thinking of participating in paratransit.

In addition, the analysis indicates that interesting changes may accompany the development and acceptance of shared-ride taxi. UMTA has recognized shared-ride taxi as a mass transit service. Therefore, companies offering this service will potentially be provided all the protections normally afforded to mass transit companies. This will mean that such taxi companies could receive additional Section 3(e) protections, as well as labor protections under Section 13(c).

It is recommended that further analysis be performed, using a case study approach, to develop understanding of a broader range of legal and institutional elements. Such information would be useful in avoiding future litigation and improving paratransit operations.

1. PURPOSE

This paper identifies and describes the legal issues raised in recent litigation initiated by taxi companies against transit districts implementing paratransit systems. An assessment of the current status of both federal and state-related issues would improve the general understanding of the institutional problems associated with implementation of a paratransit system in direct competition with existing services. This information should help local transportation planners become aware of the experiences in other jurisdictions and subsequently lessen their implementation problems. In addition, it is important to study and document the impact of government promotion and subsidy of innovative transportation services so that alternative actions or policies can be considered to alleviate inequitable situations.

2. INTRODUCTION

Paratransit services have been developed in response to congressional mandate "to assist in the development of improved mass transportation... equipment, techniques, and methods" and to "encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desireable development."[1] Beginning in the late 1960's various forms of paratransit were developed and demonstrated. From that time to the present the bulk of the literature has expounded the merits of developing paratransit to meet the travel requirements of the low density urban and metropolitan areas as well as the special needs of the transportation disadvantaged.[2] Yet, today, the value of paratransit, except in a few instances, remains generally unproven.

The lack of acceptance and experimentation in many localities appears to be, at least in part, due to apprehension of institutional problems. Institutional problems include such factors as labor/management/union relationships, work rules, regulations, and other nontechnical aspects. One important institutional issue identified by Altshuler is the interrelationship of this transportation innovation with the taxi industry. He claims, "The thorniest single issue posed by the emergence of paratransit is the role of the taxi in the field of mass transit."[3]

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[1] Urban Mass Transportation Act of 1964, 49 U.S.C. 1601.

[2] See "Paratransit, Neglected Options for Urban Mobility", R. Kirby, et al, Urban Institute, Library of Congress Cat. Card No. 74-84666; and TRB Special Reports No.'s 147, 154, and 164.

[3] "The Federal Government and Paratransit," A. Altshuler, Prepared for the Conference on Paratransit, sponsored by the Transportation Research Board and the Urban Mass Transportation Administration, Williamsburg, VA., November 9-12, 1975, P.42.

The taxicab industry has responded to this federally-promoted and subsidized development in a number of ways, including:

1) To provide the paratransit service on their own,
2) To cooperate with municipalities in providing the service, and
3) To fight paratransit deployment through litigation

The following brief comments will elaborate further on these alternatives.

One positive response by taxi companies to paratransit development has been to independently initiate paratransit operations, such as shared-ride service. An example of this is the current paratransit operation in New Haven, Connecticut, where the Public Utility Control Authority granted a waiver of the regulatory prohibition against shared-ride service for a period of one year to allow the Terminal Taxi Company to experiment with various types of paratransit services. No public funding has been used to date for this project.

Secondly, taxi companies have cooperated with municipally-managed paratransit operations in one of two ways. The taxi firm either provides the service or part of the total service under the delegated authority from the transit district or manages, operates, and provides all the services under a total system contract with the transit district. An example of the former situation is the paratransit operations in Orange County, California, where the transit district negotiated an agreement with Yellow Cab Co. of North Orange County to use taxi vehicles, painted in appropriate transit district colors, to supplement the existing minibus, Dial-A-Ride service.[4] An example of the latter situation of cooperation between a publicly-owned transit agency and a private enterprise taxi firm is the project in Westport, Connecticut. In April of 1977 Westport Transit District initiated

4. See "New Dial-A-Ride Concept in California," Taxicab Management, March 1977, p.6.

an UMTA-supported Service and Methods Demonstration Program which involves the provision of multiple transportation services under contract with a private transportation firm headed by the president of a local taxi firm.[5]

A third reaction of the taxi industry to government-promoted paratransit services is to fight implementation through litigation. Taxi firms have been unsuccessful in most of the law suits. Yet, the local planners contemplating paratransit development are apprehensive because they have heard of legal problems elsewhere. Therefore, a decision to delay or eliminate paratransit deployment can result solely because of fear and misunderstanding.

This study will review and discuss the issues raised in these law suits in order to promote better understanding of the legal problems encountered when subsidized paratransit is implemented in competition with private transportation. It is hoped that knowledge of the circumstances surrounding these taxi-transit litigations will allow other transit planners to avoid similar experiences while encouraging private transportation companies to think first of participating in paratransit before resorting to legal actions to prevent it. In addition, the study of these litigations, viewed as responses to legislative and administrative actions, would be useful information to establish policy alternatives to alleviate inequitable situations that may have been caused by the federal assistance.

The following questions, pertinent to government policy decisions and local planning, will be discussed:

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[5]The Westport project involved the provision of multiple transportation services, such as shared-ride taxi, elderly and handicpaped service, supplementary fixed route bus service and small package delivery. Eleven twelve-passenger vans were purchased under the $610,000 demonstration grant. The demonstration project is funded by UMTA as part of the Service and Methods Demonstration (SMD) Program. The SMD Program was established to develop, demonstrate, and evaluate new applications of current transit equipment and management techniques in providing improved quality and quantity of public transportation.

a) Can taxi companies prevent paratransit implementation by claiming a violation of the legislated requirements mandated in the Urban Mass Transportation Act of 1964 and subsequent amendments?

b) Is the implementation of a new paratransit service a violation of the license granted by a municipal authority?

c) Does the creation of a paratransit system infringe upon any constitutionally protected rights of the taxi companies?

d) Are there state or local statutory provisions granting additional remedies for transportation companies affected by implementation of paratransit?

e) Can taxi firms successfully argue that it is unfair competition to deploy subsidized paratransit?

3. CAN TAXIS PREVENT SUBSIDIZED DEPLOYMENT OF PARATRANSIT BY CLAIMING VIOLATION OF LEGISLATED REQUIREMENTS?

3.1 LEGISLATIVE REQUIREMENTS

One legal mechanism used by taxi firms to fight implementation of paratransit systems is to seek an injuction of the proposed project on the basis that some legal requirement mandated by federal legislation has not been met. In the case of mass transportation, specifically paratransit, the main source of these requirements at the federal level is the Urban Mass Transportation Act of 1964 and subsequent amendments.[6] The following paragraphs briefly discuss the critical requirements mandated by the Act and describe the factual circumstances giving rise to such a claim.

The Urban Mass Transportation Act was enacted to (among other purposes) provide federal assistance for the development of efficient and coordinated mass transportation systems essential to alleviating the problems of moving people and goods in the rapidly expanding urban and metropolitan areas. Pursuant to this objective, two important methods were established to obtain federal assistance. These funds directly support implementation of transportation services in competition with taxis.

a) Section 3 authorizes the Secretary of the Department of Transportation "to assist States and local public bodies and agencies thereof in financing (1) the acquisition, construction, reconstruction, and improvement of facilities and equipment for use ... in mass transportation service in urban areas ..." Section 3 assistance is generally considered, and will be referred to in this paper, as capital assistance.

b) Section 6 authorizes the Secretary "to undertake research, development and demonstration projects in all phases of urban mass transportation ..." Section 6 assistance is the source of funding for the Service and Methods Demonstration projects

[6] Urban Mass Transportation Act, 78 Stat. 302, 49 U.S.C. sec. 1601 et seq.

wherein new systems, techniques, and facilities are demonstrated and evaluated in actual operational situations.[7]

In authorizing this federal assistance, Congress included certain safeguards or conditions in each of these sections. Due to the absence of clear legislative intent, an ambiguity has surfaced in the application of these safeguards to capital and/or demonstration grants. On one hand, it is reasonable to assume that the UMT Act establishes distinct, mutually exclusive project categories, each with different administrative requirements. However, a second interpretation of this legislation indicates that the requirements for capital grants provided in Section 3(d) and 3(e) of the Act apply to any assistance under the Act, unless specifically excluded. Since these prerequisites have become important issues of contention by opponents of mass transit projects, it would be useful to delineate them here and discuss in more detail the resolution of this ambiguity by the courts.

Capital assistance under Section 3 of the Act requires that a number of specific conditions exist before the grant or loan to states or local public bodies can take place. Section 3 (d) states,

> "Any application for a grant or loan under this Act to finance the acquisition, construction, reconstruction, or improvement of facilities of equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant-
> 1) has afforded an adequate opportunity for public hearing pursuant to adequate prior notice, and has held such

[7] Full text of Section 3 of the Act can be found in 49 U.S.C. sec. 1062, Capital assistance legislation is, by necessity, referred to in this document both by the designation Section 3 and Section 1602; the former being an identifier in the legislation as written and considered in Congress; the latter being an identifier in the legislation as codified in the United States Code. Similarly, the full text of Section 6 can be found in 49 U.S.C. sec. 1605. It should also be noted that there are other important funding sources. However, these funding mechanisms have little or no impact in the initial implementation of new, competitive transportation services.

hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing:
2) has considered the economic and social effects of the project and its impact on the environment; and
3) has found that the project is consistent with official plans for the comprehensive development of the urban areas."

Section 3(e) states,

"No financial assistance shall be provided under this Act to any State or local public body or agency therefore for the purpose, directly or indirectly, of acquiring an interest in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after the date of the enactment of this Act) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of Section 13(c) of this Act.[8]

Section 14(b) of the Act adds environmental protections to be considered prior to capital assistance.

"The Secretary shall review each transcript of hearing submitted pursuant to section 3(d) to assure that an adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and that the project application includes a detailed statement on

[8]Section 13(c) of the Act (49 U.S.C. 1609(c)) provides that as "a condition of any assistance under Section 3 of this Act... fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interest of employees affected by such assistance."

(1) the environmental impact of the proposed project,
(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(3) alternatives to the proposed project, and
(4) any irreversible and irretrievable impact of the environment which may be involved in the proposed project should it be implemented."[9]

These extensive requirements are evidence of the congressional concern over the potential impact of these capital expenditures, which by their nature are permanent and long-term. Contrast the above requirements with those listed below, mandated for Section 6 research, development and demonstration grants or contracts. Section 6 assistance requires only that the Secretary use his discretion to approve projects with appropriate objectives and that labor protection provisions of Section 13(c) be complied with.

1) "The Secretary is authorized to undertake research, development, and demonstration projects ... which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation at a minimum cost."[10]
2) The Secretary of Labor must certify that such assistance complies with the requirements of Section 13(c).[11]

Although there was some opposition in Congress to allowing too much discretionary power to the Secretary of Transportation, this is not shown in Section 6.[12] The rationale for these sparse

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[9] 49 U.S.C. 1610(b) as amended by Section 6 of Public Law 91-453. Additional lengthy environmental conditions appear in Section 14(c) as well. There are miscellaneous requirements, such as the provision for adequate relocation of displaced families (Section 7 of the UMT Act of 1964).

[10] 49 U.S.C. Section 1605.

[11] See Congressional Record, October 20, 1968, p. 28344 & October 22, 1966, p. 28826 making 13(c) applicable to Section 6, research, development & demonstration grants.

[12] See Congressional Record, Vol. 109, Part 4, PP. 5318-19.

conditions appears to be the feeling that research and development projects are too remote from actual deployment to have any impact on existing operations, and that Service and Methods Demonstrations are only temporary experiments for evaluating innovations.

3.2 IMPORTANCE OF LEGISLATIVE DISTINCTIONS

Where the preceding section dealt with describing the requirements contained in the UMT Act for mass transportation capital and demonstration assistance, this section addresses the issue of whether or not those legislative conditions are mutually exclusive. Specifically, are the more stringent conditions of Section 3 applicable to Section 6 demonstration assistance. The following discussion illustrates the diversity of opinion on this question.

A relevant case addressing the issue of the distinction between the requirements of capital and demonstration assistance grants is Township of Ridley v. Blanchette.[13] In this case the Secretary of the Department of Transportation had authorized under the authority of the Urban Mass Transportation Act, as amended, the construction of a crossover on a railroad line. The Secane Crossover, as it became known, was part of a larger demonstration project, designed to improve service and increase efficiency of commuter rail facilities along the Media-Philadelphia corridor. It had clearly been authorized as a demonstration project using UMTA Section 1605 research, development and demonstration funds. The residents of the area whose houses abut the tracks brought suit agains the owners of the track, Penn Central, to prevent the construction of the crossover. One of the legal issues alleged by the residents was that Penn Central failed to notify them of the planned project and allow them an opportunity for a public hearing. The court was confronted with determining if this was in fact a requirement applicable to this

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[13] Township of Ridley, et al. v. Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of Penn Central Transportation Authority, et al., Civil No. 74-2113, 10-12-76, U.S. District Court for the Eastern District of Pennsylvania.

demonstration project. After a thorough analysis of the Urban Mass Transportation Act and subsequent amendments, the court first determined the residents had standing[14] to seek judicial review of this administrative action and then concluded that since this was a research and development project funded under Section 6 of the Act, it was not subject to the more stringent capital assistance requirements of notice and hearing. The court stated,

> " ... there is indeed significance in the statutory distinction ... between projects undertaken with federal money by state and local public agencies (that is, Section 3 capital grant assistance), and projects undertaken by the Secretary of Transportation with broader experimental-developmental-demonstrational purposes. This project ... which was without question undertaken pursuant to a contract as a demonstration project is not subject to the notice and hearing requirements of Section 1602(d) (Section 3(d))"[15] (clarification added).

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[14] A preliminary hurdle of "standing to sue" is commonly raised by defendents in cases where aggrieved parties are claiming infringement of statutory provisions. Basically, standing is the right which enables individual citizens to seek judicial review of those governmental actions which cause them some injury. Since the U.S. Supreme Court case of Association of Data Processing Service Organization v. Camp (397 U.S. 150) in 1970, the question of whether a party may have standing to sue to overturn an administrative decision has depended on two tests: a) Does the complaint by the party initiating the action allege injury in fact, economic or otherwise, and b) Is the interest sought to be protected by the complaint arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. In the Ridley case, for example, the residents did allege that they would be individually injured by the change in the use of the railroad property. Secondly, Section 1602(d)(2) of the Act, which requires an applicant for a grant or loan to certify that he has considered the economic and social effects of the project and its impact on the environment, clearly creates the "zone of interests" which the residents seek to assert. Therefore, the two tests were satisfied and the Ridley Township had standing to sue.

[15] Township of Ridley v. Blanchette, supra note 13, at p. 10. It should be noted that this decision is from a federal district court in the Third Federal Circuit. Although this decision is legally binding in Pennsylvania, it is at most persuasive authority in other states.

Therefore, the distinction between capital and demonstration grant requirements was the determining factor in the resolution of this issue.

Another recent case where an aggreived taxi firm alleged non-compliance of capital assistance requirements is Westport Taxi Service, Inc., et al. v. Brock Adams, Secretary of Transportation and the Westport Transit District.[16] In this case the Westport Taxi Company challenged the implementation by the defendant transit district of a municipal shared-ride taxi service. The shared-ride service was part of an experimental plan for a demonstration of integrated conventional transit and paratransit services, supported in part by federal assistance under the Urban Mass Transportation Act.

Westport Transit District had initiated a "competitive" service prior to the service complained about in the litigation. In 1971 the district established a "minnybus" system with routes throughout the Town of Westport and to the Westport Railroad Station. This earlier mass transportation service received federal funding as well under the Urban Mass Transportation Act. Even though Westport Taxi claimed substantial decrease in their revenues since its inception, they never attempted to have the matter litigated. However, since the Westport Transit District now proposed to establish a publicly-subsidized shared-ride taxi service in direct competition with the existing taxi service[17], the taxi company felt sufficiently threatened to fight the

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[16] Civil No. B-76-369, U.S. District Court, New Haven, Conn., 4/13/77.

[17] Westport Taxi operated both an exclusive-ride service and a service claimed by them to be shared-ride. It is alleged that the shared-ride service is authorized under Conn. Public Utility Control Authority Regulation Section 16-319-15, which provides as follows:

> "Order of Service. The operator of a taxicab shall accomodate patrons in the order of their application for service. Consent of the patron first hiring the taxicab shall be obtained if additional patrons are to be carried."

implementation. Note that it took the potential implementation of a paratransit service that was directly competitive before the taxi firm would feel seriously threatened enough to attempt to block this grant. Based on this fact, it may be possible in some localities to implement various types of mass transportation which merely supplement exclusive-ride taxi services, without extensive infringement on the existing taxi market, thereby avoiding expensive time-consuming litigation.

Westport Taxi attempted to prevent the grant of the proposed Service and Methods assistance based on a number of allegations including the claim that the provisions of UMTA were not met prior to the decision to grant federal assistance to the transit district. Specifically, the taxi company argued:[18]

> a. ..."that the application fails to certify that the required hearings were held to determine the economic, social and environmental impact of the project (see 49 U.S.C. § 1602(d);
>
> b. ....that the Secretary of Transportation did not, prior to approving the application, make a written finding that federal assistance under the Act is essential to the development of a coordinated and comprehensively planned transportation system (see 49 U.S.C. § 1602(e)(1));
>
> c. ...that the Secretary did not make a written finding that the proposed program, to the maximum extent feasible, provides for the participation of private transportation companies (see 49 U.S.C. § 1602(e)(2));
>
> d. ...that the Secretary did not make a written finding that just and adequate compensation will be paid to private transportation companies for the acquisition of their franchise interests, as required by applicable state law (see 49 U.S.C. § 1602(e)(3)); and
>
> e. ...that the Secretary also failed to comply with 49 U.S.C. § 1610, which requires specific findings as to environmental impact."

These requirements are precisely those discussed previously as conditions to Section 1602, capital assistance. However, the

[18] Westport Taxi v. Westport Transit District, supra note 16, at p. 5.

assistance in this case is for a demonstration under Section 1605 of the Act. The federal district court in its holding against the Westport Taxi Company said:

> "It is clear from the Act itself and from its legislative history that demonstration projects need not comply with the requirements of (Section) 1602(d) or (Section) 1610. Section 1610 by its very terms applies only to assistance provided pursuant to 1602 and not to a Section 1605 demonstration project. Section 1602(d) applies only where the grant or loan is to finance 'the acquistion, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service.' Although the challenged project will to some extent involve acquisition of equipment, I find that it is a demonstration project only and does not involve the more significant commitment of resources and more substantial effect on the community necessary to bring the hearing and certification requirements of Section 1602 (d) into play."[19] (parenthesis added)

The court noted in its examination that a number of circumstances in this project substantiate that this was, in fact, a demonstration project. The transit district and the Urban Mass Transportation Administration at all times treated the grant application as a Section 1605 demonstration grant. The application and approval for the grant clearly indicated the characteristics of a demonstration. The major purpose of the project was experimental. The estimated cost breakdown demonstrated that a large portion of the planned expenditures were noncapital in nature. This thorough examination of the characteristics of the project by the court clearly shows that merely claiming that a project is a Section 1605 demonstration may not be sufficient. The court may investigate beyond the grant application to determine whether the grant is for capital assistance or demonstration and evaluation, thereby setting the requirements that must be met prior to federal approval.

An additional argument raised by the taxi company that has some merit is that since one of the purposes of a demonstration project is to encourage and promote the establishment of a

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19. Id. at p. 6.

permanent system, should not the essential requirements for funding such a demonstration be similar to those needed for capital funding? The federal district court in Wesport agreed with the underlying premises but failed to reach the same conclusion. The court reasoned,

> "Every demonstration project is undertaken with the hope that its design will be replicated on a continuing basis in various locations. The fact that the locale of the demonstration may become one of the sites for a continuing project does not change the statutory requirement for demonstration grants."[20]

Whether or not the requirements for research, development and demonstration grants should be modified to line up more with the criteria for capital grants is a debatable issue. Those involved in R&D argue that their work is experimental, temporary, often unpredictable, and evolutionary, and that such innovative work should not be overburdened by additional requirements. However, an argument can be made that the legislation for UMTA demonstration grants be amended to include more stringent requirements than presently exist. There are a number of facts that support this side of the argument. First, a two year demonstration period could be judged a relatively long time, particularly when considering the total economic effect of that amount of publicly-subsidized competition, not to mention the social and environmental impacts that could accumulate over this period. Secondly, not all demonstration grants are two years or less. For example, the Service and Methods demonstration grant for Rochester, New York, was originally two and one half years with current plans to extend the demonstration grant further. Another factor supporting the argument for additional requirements prior to approval of demonstation grants is that many mass transportation companies, specifically taxi operations offering shared-ride services, operate in precarious financial circumstances. A federally subsidized demonstration project of even short duration could tap the more lucrative markets and force the private company out of business, thereby creating a void in service. However, this factor raises

[20] Id. at p.9

the question of whether or not it is the position of the government to protect marginal businesses from competition. Finally, to rephrase the argument that Westport Taxi offered to the court, the demonstration project is often the prototype of the permanent system. Locations where demonstration funds are sought today are often locations where capital and operating grants will be requested tomorrow. Therefore, the requirements associated with Section 3 (capital assistance), eventually will be necessary in many instances. Although this argument was unsuccessful in the district court, similar reasoning played an important role in the subsequent appeal by Westport Taxi Service.

The appeal to the Second Circuit Court of Appeals resulted in a partial and somewhat shallow victory for Westport Taxi.[21] On one hand, the court found that the prerequisites for capital assistance and demonstration assistance grants are not mutually exclusive and, accordingly, enjoined further funding of the project pending compliance with Section 3(d). On the other hand, although Section 3(e) similarly applies to demonstration grant applications, Westport Taxi failed to qualify as a "mass transportation company" and, therefore, was not eligible for subsection (e) protections. The first part of this decision is discussed below; the latter part is more appropriately included in the following section, Conventional Taxi Service and Mass Transportation.

The appellate court based the first part of its decision on an interpretation of the Act which was opposite that of the district court. They felt the wording of Section 3(d) was intended to include other grant assistance, such as demonstration grants, as long as certain conditions were present. Those conditions are delineated in Section 3(d) and include financial support to purchase, construct, or improve facilities which will substantially impact a community or its mass transportation service. The court stated:

> "We read the Act differently. By its own terms, §1602(d) (Section 3(d)) applies to '[a]ny application. . . under this Act' for a grant which, if implemented, meets certain

21 Westport Taxi Service, Inc. v. Brock Adams, Secretary of Transportation, Westport Transit District, Paul R. Green, John E. Meyers, and Richard Bradley, Civil Docket No. 77-6074, January 24, 1978, U.S. Court of Appeals for the Second Circuit.

> objective criteria. This language suggests that the categories overlap -- a demonstration project is exempt from sections other than §1605 (Section 6) only if its nature is such that it does not meet the criteria those sections establish. Thus, a demonstration project may or may not involve 'the acqusition . . . of facilities . . . which will substantially affect a community or its mass transportation service,' If it does not, then §1602(d) (Section 3(d)) need not be complied with; if it does, however, the requirements of that subsection cannot be avoided merely because the project is a demonstration. We are confident that Congress meant what is said when it wrote '[a]ny application . . . under this Act' and set forth objective criteria. It intended each project to be treated according to its impact, not just its type."[22] (Sections in parenthesis added for clarity).[22]

Therefore, once it had been established that the two sections of legislation, applicable to capital and demonstration assistance were not mutally exclusive, i.e., demonstration projects under Section 6 of the UMT Act are not exempt from the requirements of Section 3(d), the appellate court could proceed to determine whether or not the Westport demonstration project involved the necessary "acquistion, construction, reconstruction or improvement of facilities or equipment" and would "substantially affect a community (Westport) or its mass transportation service." In its resolution of this issue the appellate court used rationale similar to that previously discussed herein; that the project most likely will have substantial impact on the Westport community, involves the acquisition of equipment, has the potential of enduring past the projected demonstration period, which is long anyway, and will most likely have a harsh effect on the financial condition of the complainant taxi company. For these reasons the court concluded that the requirements of adequate notice and public hearing, study of economic, social and environmental effects of the project, and a finding that the project is consistent with official plans for the development of the area, must be complied with. Since these steps had already been taken, the court only required that the grant application be amended to include the requisite certification under Section 3(d) of the Act.

22 Id. at p.6.

The decision by the Second Circuit Court of Appeals to apply Section 3(d) requirements to demonstration projects authorized under Section 6 is legally binding in those states (New York, Connecticut, Vermont) within the jurisdiction of that circuit. Other states are not bound by this decision and may continue to make the distinction between capital and demonstration grant requirements as was made in the case of Township of Ridley, et al v. Blanchette (supra). However, this decision may provide persuasive authority outside the second circuit jurisdiction for anyone who might wish to challenge subsequent demonstration projects in court. For this reason UMTA has decided to follow the mandate of this decision in all demonstration grant applications made after the date of this decision.[23]

3.3 CONVENTIONAL TAXI SERVICE AND MASS TRANSPORTATION

Section 3(e) of the UMTA of 1964 is the source of legislative requirements pertinent to the situation where federal capital grants (and after the case in Westport possibly demonstration grants, as well) are used to subsidize mass transportation which may compete with taxi operations. To facilitiate subsequent discussion it will be useful to restate portions of this section.

> "No financial assistance ... for the purpose of providing by contract or otherwise for the operation of mass transportation facilities ... in competition with the ... service provided by an existing mass transportation company, unless ..."

In essence, this section of the Act is meant to provide some protection for private mass transportation companies affected by federal subsidies to publicly-owned operations who in turn establish a competitive service. There are two questions which should be asked to determine if these requirements are applicable. First, are the two systems competitive? Second, is the party challenging the grant a "mass transportation company?" To determine whether taxi services are competitive with a particular type of public transit service requires an investigation of the type of service

23 Memorandum from Margaret M. Ayres, Chief Counsel, Urban Mass Transportation Administration to Robert H. McManus, Associate Administrator for Transportation Management and Demonstrations, March 2, 1978.

provided and the type of markets served. Since this determination could vary with the particular circumstances, it is difficult to generalize. However, with regard to the second question, there appears to be strong support for the argument that conventional, exclusive-ride taxi service is not within the definition of mass transportation. To understand this conclusion and the controversy surrounding this determination, it is necessary to examine the current interpretation of "mass transportation."

The Urban Mass Transportation Act of 1964, as amended, defines "mass transportation" as follows:

> "The term mass transportation means transportation by bus, or rail or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis."[24]

Important changes were made in this definition to get it in its present form. First, the phrase "which provides to the public general or special service" was substituted for "serving the general public." This was done to allow federal assistance to aid a particular portion of the public, such as the elderly and handicapped. A second modification changed the phrase "and moving over prescribed routes" to "on a regular and continuing basis." The purpose of this change was to allow greater flexibility in developing and applying new urban mass transportation concepts and systems, such as demand responsive transportation where the service is provided throughout an area rather than along fixed routes.[25]

It is unclear from this statutory definition whether exclusive-ride taxi service comes within this definition. In addition, it is unclear how a company offering a combination of services should be treated. Unfortunately, there is no definitive information in the

24 Section 12(c)(5) of UMTA of 1964, as amended by Section 702 of Housing and Urban Development Act of 1968, Public Law 90-448; 82 stat. 476.

25 H.R. Rep. No. 1585, 90th Cong., 2nd Sess. 65-66, reprinted [1968] U.S. Code Congressional and Administrative News, p. 2940-1.

legislative history or Congressional Record to help resolve these problems.

Until very recently judicial determinations on whether or not exclusive-ride taxi service qualifies as "mass transportation" have been limited to state court interpretations of local statutes or ordinances which to some degree, at least, appear to have been modelled after the federal legislation. However, this issue was addressed at the federal level in the recent litigation in Westport, Connecticut. In that case the court was asked to determine if Westport Taxi, which provided conventional, exclusive-ride service, met the definition of a "private mass transportation company", as specified in the UMT Act. The federal district court partially addressed this question when it considered whether or not Westport Taxi had standing to sue. As explained previously (see footnote #14), one factor in the detemination of standing is whether the interest sought to be protected is "arguably within the zone of interests protected by the statue." In this situation the specific legislation (Section 3(e)) is aimed at protecting private mass transportation companies from competition authorized and supported under the UMT Act, therefore the taxi company met this criteria. Although the court's ruling is directed at establishing standing to sue rather than qualifying Westport Taxi for the protective provisions of Section 3(e), the analysis does provide additional insights into federal judicial interpretations on this important issue. The court stated,

> "While it may be true that Congress did not intend to subsidize exclusive-ride services, it is also true that this particular variety of transportation service is not the only service Westport Taxi provides. Rather a substantial portion of Westport Taxi's business comes from its shared-ride service, under which passengers traveling in the same direction use the same cab if the initial passenger agrees to the sharing. As a private provider of one type of shared-ride service, albeit with the consent of the first rider, Westport

> Taxi is at least 'arguably' within the zone of interests Congress sought to protect by paying special attention to private mass transportation companies."[26]

The district court addressed the issue a second time but only to state that further resolution was not necessary since Section 6, demonstration assistance and Section 3, capital assistance were mutually exclusive and, consequently, the protections of Section 3(e) are inapplicable to this demonstration project.

The decision of the Second Circuit Court of Appeals ruled contrary to the district court and held that Section 3(e) must be complied with prior to the grant of any assistance under the UMT Act. However, the court added that before Section 3(e) protections can be applied to demonstration grants (or any other grant assistance under the Act according to the rational of the court), a determination must be made that the firm seeking such projections is a mass transportation company. The court concluded,

> "The analysis applicable to §1602(d) is also applicable to §1602(e). Like subsection (d), subsection (e) applies to all 'financial assistance ... provided under this Act.' However, only a 'mass transportation company' may claim the protection of subsection (e). We have already held that, for standing purposes, Westport Taxi is 'arguably within the zone of interests' protected by this subsection because it arguably fits the definition of a 'mass transportation company.' We must now decide, on the merits, whether it is in fact a mass transportation company.'[27]

In deciding that the conventional taxi service provided by Westport Taxi was not "mass transportation" within the meaning of the UMT Act, the appellate court relied on legislative history and administrative guidance. The legislative history provided an

26 Westport Taxi v. Westport Transit District, supra note 16, at p. 5.

27 Westport Taxi Service, Inc. v. Brock Adams, supra note 21 at p. 8.

explanation for the modification and apparent expansion of the definition of mass transportation (see footnote #25). Without such explanation, the new definition could include conventional taxi service. The Congressional statements appear to preclude the position that the change was intended to include exclusive-ride taxi service. Rather, the change was to permit greater flexibility in adapting new concepts and systems in urban mass transportation.

To a greater degree it appears the appellate court relied on UMTA's administrative interpretation, custom and guidance. UMTA has consistently considered only group or collective services, which are regularly available to the public and not capable of being reserved for exclusive or private use, as being mass transportation. An affidavit provided to the court by the Acting Administrator of the Urban Mass Transportation Administration echoed the relevant points contained in the UMTA proposed policy statement for paratransit[28] issued previously. The affidavit identified services, such as exclusive-ride, charter, sightseeing, car rentals and private ambulance services as being the types of transportation deemed not "mass transportation" within the scope of the UMT Act. The court clearly gave considerable weight to the experience and informed judgment of UMTA as it concluded,

> "In view of this administrative interpretation and practice, and in view of the legislative history of the 1968 amendment, we hold that a company such as Westport Taxi, operating five taxicabs under a regulation which provides that the consent of the first rider to hire a taxi must be obtained before other may be carried, is not a 'mass transportation company' entitled to the protections afforded by §1602(e)[Section 3(e)].29 (bracket added for clarity).

The ruling of the appellate court is an important judicial interpretation of the meaning and scope of "mass transportation" as used in the UMT Act. However, the ruling appears to be narrow and

28 Paratransit Service: Proposed Policy, 41 Fed. Reg. 46412 (October 20, 1976).

29 Westport Taxi Service, Inc. v. Brock Adams, supra note 21 at p. 10.

may have limited value as precedent. The decision specifically cites local regulation, thereby inferring the main issue is the wording of the regulation rather than the type of service provided. In addition, trends in paratransit service indicate some form of evolution form exclusive-ride service to shared-ride service. This decision does not address at what point a company providing a combination of such services becomes a mass transportation company. Clearly, further guidance on these issues are needed for UMTA.

There have been other state judicial determinations on related issues dealing with: (1) whether certain paratransit services are so similar to taxi services that they should fall under the same license requirements; and (2) do taxis qualify as an existing transit system under state compensation statutes? While these cases may not directly address whether or not taxis are mass transportation, they do shed light on how future litigations may decide this question.

In Kon, et al. v. City of Ann Arbor[30] the affected taxi companies attempted to persuade the court that dial-a-ride and conventional taxi service were really the same. If the court agreed, then exclusive-ride taxi service would come under mass transit as dial-a-ride does. The trial court, in its decision against the taxi companies, delineated the important differences between the two services. The primary distinctions were that the dial-a-ride passengers cannot limit the number of additional passengers nor direct that a particular route be taken as they could in a taxicab.

In Yellow Cab v. Orange County Transit District[31] the taxi companies argued that they came within the scope of the definition of an exisiting transit system. In the final decision against the

30 Kon et al. vs. City of Ann Arbor, Civil No. 5967, Washtenaw County Circuit Court, 9/7/71.

31 Yellow Cab of Northern Orange County, a Corporation et al. vs. Orange County Transit District et al., Court of Appeals Fourth District, State of California, 4 Civil 15949, 12/27/76.

taxi companies the appellate court determined that the taxi service failed to meet the requirements of a transit service as set forth in the transit-enabling legislation, since, 1) taxis carried parcels and telegrams, and 2) they charge a flat fare rather than an individual fare required for transit systems.

These cases demonstrate some of the distinguishing features used by the courts to exclude taxis from consideration as mass transit. This judicial reasoning, such as the two-part test developed by the court in Ann Arbor may be useful as a basis for future legislation to clarify the definition of mass transportation. While there appears to be little or no problem at the state level differentiating conventional, exclusive-ride taxi service from mass transportation, there is difficulty in distinguishing shared-ride taxi service from many of the paratransit systems currently being promoted by Urban Mass Transportation Administration. UMTA is aware of these difficulties and has recently attempted to clarify its position with regard to taxis and federally subsidized paratransit.

In 1976 UMTA issued a statement of proposed policy on paratransit services[32] discussing, among other things, the "protection of existing operators" and "eligibility (of private operators) for federal financial assistance." Whether or not this proposal will become codified in its present form remains to be seen. For the purpose of this discussion, though, this policy statement provides the Administration's current viewpoint on how taxis, exclusive and shared-ride, fit into the scheme of mass transportation.

UMTA realizes that precluding private operators from participating in paratransit would not be in the public interest. Paratransit operations can often be performed most efficiently and effectively by existing private transportation companies. The statement of proposed policy reflects these concerns.

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32 Paratransit Service: Proposed Policy, supra note 28.

> "Pursuant to this policy and to Sections 3(e) and 4(a) of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies...."[33]

The policy statement also elaborates on the phrase, "provide, to the maximum extent feasible, for the participation of private mass transportation companies." This phrase originally appeared in Section 3(e)(2) of the Act approximately twelve years earlier.[34] Currently, the criterion can be satisfied if local taxi operators and other private transportation providers are given ample opportunity to compete for the contract to provide the new paratransit services. Additional details on the procedure to implement this criterion should be contained in the final version of UMTA's Paratransit Policy Statement.

In addition to the protections established for taxi companies and similarly situated transportation operations, the statement addresses who is eligible to receive federal assistance in the form of capital and operating grants or loans. First, private transportation companies can only receive federal funds through a contractual agreement with the public agency or by a contract with a non-profit agency.[35] Second, and more important in defining the scope of mass transportation, the policy statement directly and specifically excludes conventional, exclusive-ride taxi service from subsidy.

> "Paratransit services which may qualify for Federal financial assistance include dial-a-ride, jitney, community minibus, subscription bus service, certain forms of vanpooling and other types of collective

33 Id. at p. 46413

34 Urban Mass Transportation Act of 1964, 78 stat. 302, 49 U.S.C. 1602(e)(2) states, "The Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies."

35 Funding non-profit agencies is possible under Section 16(b) of UMTA of 1964, 49 U.S.C. 1612(b)(2).

(shared-ride) transportation services which are regularly available to the public, i.e., which cannot be reserved for the private and exclusive use of individual passengers.

Services which are not eligible for Federal financial assistance include exclusive-ride taxi services, car rental services, for-hire limousines and private ambulance service, and other similar forms of private transportation."[36]

It is interesting to note that the UMTA requirement that the service not be available for private and exclusive use of individual passengers coincides closely with the criteria used in the 1971 case of Kon v. City of Ann Arbor, where exclusive-ride taxi operations were distinguished from dial-a-ride services.

The proposed policy statement further qualifies what transportation entities are considered mass transportation and are thereby eligible for federal assistance. The question raised earlier, whether a taxi company offering both exclusive and shared-ride service can be considered a mass transportation company, is partially answered by the statement.

"Where an organization is providing paratransit service as an incidental adjunct to its main business, UMTA will not consider such organization to be a mass transportation company within the meaning of Section 3(e) of the Act, or a mass transportation company or system with employees entitled to protection under Section 13(c). For example, ... a private taxi operator providing shared-ride paratransit services or contract services to a public authority, e.g., to provide special transportation services for elderly and handicapped persons, could be held to be providing such services on an incidental basis to its main business."[37]

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[36] Paratransit Service: Proposed Policy, supra note 28 at p. 46413.

[37] Ibid.

Unfortunately, what looks like a definitive answer to a question often raises additional questions. The question created in this instance is what does "incidental adjunct to its main business" mean? This could mean that if less than fifty percent of total service revenues comes from the shared-ride service, it will be classified as incidental. What if the shared-ride service revenues varies with the time of year-for example, higher during the school year? Should twenty-five percent be the revenue requirement? Furthermore, it is entirely feasible in the example given in the policy statement (above) that the taxi company could begin to emphasize the contracted special service more heavily and that that portion eventually will become the majority of the company's service.

3.4 SUMMARY

This section discussed the legislative requirements for federal capital and demonstration grants. It was shown that the requirements for capital grants are relatively extensive while those for demonstration money are few. Attempts have been made by those injured as a result of demonstration assistance to have the court apply the more stringent requirements normally used for capital assistance approval. To date, the decisions have been decided both ways. In at least one jurisdiction a federal court has held that demonstration and capital assistance are mutally exclusive and no additional protections apply to Section 6 grants. Yet a U.S. Court of Appeals, representing binding authority in another jurisdiction, has ruled to the contrary and held that demonstration grant applications must comply with Sections 3(d) and 3(e) of the UMT Act. In this latter appellate case the court distinguished exclusive-ride service furnished by the taxi company and "mass transportation" within the meaning of the Act. Therefore, the taxi company was found to be ineligible for protection under Section 3(e). It is clear from the discussion of the relevant judicial determinations and administrative actions, that exclusive-ride service is excluded from the scope of mass transportation. It is just as clear that companies operating totally paratransit

service, such as shared-ride taxi operations, are considered mass transportation. However, it is difficult to make any conclusions regarding the status of a taxi firm offering both services since the only basis for such a decision hinges on interpretation of such phrases as, "incidental adjunct" or, alternatively, depends on whether strong enough arguments can be made to bring the service within the scope of mass transportation.

4. IS THE IMPLEMENTATION OF A NEW PARATRANSIT SERVICE A VIOLATION OF THE LICENSE GRANTED BY A MUNICIPAL AUTHORITY?

Generally, the operation of a taxicab service requires permission of the appropriate administrative agency. This agency can be the state public utility commission, the city or town police department, or the designated town licensing office. The permission can take the form of a license, franchise, or a certificate of public convenience and necessity.

An examination of the meaning of license, franchise, and certificate of public convenience and necessity reveals that for the purpose of this analysis they are the same.[38] Any distinctions in the rights and duties arise from the wording of the ordinance itself. Therefore, whether a municipality grants a license, franchise, certificate of public convenience and necessity or other category of permission, what it is called is unimportant; what is explicitly stated in the ordinance is all-important. The remaining discussion will examine the degree to which the municipality may compete with a licensed taxi operation.

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[38] In "Franchises", 36 AmJur 2d 722, 726, it is stated that a franchise is a privilege given by the government to do something that citizens commonly are not allowed to do. Similarly, a license is described in 51 AmJur 2d 7 as having "the nature of a special privilege entitling the holder of the license to do something that he would not be intitled to do without a license." Finally, a certificate of public convenience and necessity granted by a state is described in 36 AmJur 2d, 724 as either a franchise or a license depending on provisions of the certificate. In the abstract they are hard to distinguish. What is distinguishable relates to such factors as transferability and these are irrelevant in the analysis of whether deployment of para transit violates the authority granted to the taxi companies.

There are not many cases discussing whether a license constitutes a guarantee by the public agency not to compete with the taxi service. What cases there are, however, are decided on sound precedent and therefore should form a valid basis upon which to make planning decisions.

Kon v. Ann Arbor provides the most insight into this issue. In this case a taxicab company attempted to block the establishment of a dial-a-ride service by claiming that the granting of licenses to existing taxicabs by the city constituted an implied agreement by the city that it would not engage in a competing business. In its analysis the court applied the general rule that a statutory grant in which the public has some interest is to be interpreted strictly in favor of the government and no duty or right shall pass by implication.

Therefore, in the case of taxi licenses, franchises or certificates of public convenience and necessity it appears the court must find explicit language to show that the authority was for exclusive operation. In the Ann Arbor case the court examined the language used in the taxicab licensing ordinance and concluded there was no deliberate or explicit purpose to surrender the city's rights nor was there a grant of exclusive service rights to the taxi company. The court also distinguished between an agreement by the city not to grant other licenses and an agreement restricting the city itself from operating a competitive service. It is clear from the previous discussion that the city can establish competitive services unless clearly and explicitly prevented by the licensing ordinance. On the other hand, it is unclear at least from the Ann Arbor case whether the city could have contracted out such a competitive service. The court implies this interpretation when it said,

> "... (the attorney for the taxi company) has well made his point here that the city originally put this contract or system out for bids and might very well have contracted with a private agency for this purpose, but that is not the question before us here, and we will not address ourselves to that. What we have here is

a case where a municipal authority itself will be operating the transportation system."[39]

In the planning of paratransit deployment where the final operator may be either the municipality or a private company contracted to operate the service, it is important to investigate whether or not the franchise is exclusive and, if it is, to what extent the franchise is exclusive.

The appellate court, reviewing the Ann Arbor trial court decision, also decided against the taxi company using the basic rule that the city has broad powers to do generally what it wants to do while exercising its authority of reasonable control of the streets.

"Defendant city has reasonable control of its streets. Plaintiffs have no right to use the streets without the consent of the city. The licenses plaintiffs rely on are nothing more than a privilege to do what is prohibited without such licenses."[40]

The Westport case[41] also addresses the issue whether freedom from competition by the municipality is guaranteed in the certificate of public convenience and necessity. Westport Taxi held a certificate from the Connecticut Public Utilities Control Authority. The transit district's plans included setting up a municipal shared-ride taxi service. The taxi company argued that the intent of the authority granted by the certificate is to prohibit competition unless there is a finding of necessity or, alternatively, to award adequate compensation. In this case the federal court found (as the state court did in Ann Arbor) no basis in the taxi company's claim that they possessed certain rights to be immune from competition from the transit district. Therefore, applying the general rule that a franchise granted in the public interest is

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39 Kon v. Ann Arbor, (trial court decision), supra note 30, at p.162.

40 Kon v. City of Ann Arbor, Ford Motor Co. and Ann Arbor Transportation Authority, Michigan Court of Appeals, File No. 12748, 6/2/72.

41 Westport Taxi v. Westpost Transit District, supra note 16.

to be strictly construed in favor of the public and nothing passes by implication, the court held that the transit district could enter into competition with the taxi company regardless of any economic injury to the latter. The taxi company's "freedom to exercise their own franchise has been in no way impaired even though the profitability of their operation may decline."[42]

It is interesting to note that no distinction was made in the Westport case between the municipality operating a competitive service and contracting out for the service. As was mentioned earlier, the court in the Ann Arbor case recognized the difference but sidestepped making any decision whether or not it was a distinction without a difference. It may be possible that the issue was never raised in Westport, or possibly the federal court reasoned that the relationship of the district and the service contractor is essentially an agency relationship. Viewed as such, the contractor would be acting under the control and supervision of the district, thereby making this question irrelevant.

The district court in the Westport case also addressed whether there was any federal statutory right to protection from government competition. The situation in Westport involved federal assistance authorized under the Urban Mass Transportation Act. Therefore, any federal protections would be found in that legislation. The court determined that any federally established protection must be derived "from the Congressional intent expressed in 49 U.S.C., Sections 1602(e) and 1603 to provide for and encourage 'to the maximum extent feasible' the participation of private enterprise and to compensate mass transportation companies for acquisition of their franchises or property to the extent required by applicable State or local law."[43] The first of these requirements was discussed in Section 3; the second will be addressed in Section 6. In Westport, the transit district attempted to provide for participation of private enterprise by holding hearings on the project, inviting and encouraging the taxi companies to bid, and

42 Id. at p. 11

43 Id. at p. 12

negotiating with them at length on how they can participate. The Westport Taxi Company declined to bid.[44] The court felt that as a result of the efforts of the transit district, the statutory requirements were met. The district court concluded,

> "All the statute requires is encouragement of private participation 'to the maximum extent feasible'. It does not allow private transit operators to write their own ticket."[45]

In summary, the analysis of the applicable taxi litigation indicates that the municipality may implement paratransit in competition with taxi service unless there is clear, explicit wording in the taxi ordinance creating an exclusive operating grant. However, some attention should be given to who actually is the operating entity - the government or a contractor. A situation could occur where the municipality may be allowed to implement competitive paratransit where another entity, such as a government contractor, may be prevented from doing so.

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[44] The hearings and negotiations were conducted with two taxi firms, the plaintiff Westport Taxi and Teddy's Taxi of Westport. The latter apparently viewed the project differently and bid to provide the paratransit services. A contract was eventually negotiated with a private transportation firm headed by the president of Teddy's Taxi to provide the shared-ride taxi, service for the elderly and handicapped, supplementary fixed route bus service and small packaged goods delivery service.

[45] Westport Taxi v. Westport Transit District, supra note 16, at p. 12.

5. DOES THE CREATION OF A PARATRANSIT SYSTEM INFRINGE UPON ANY OF THE TAXI COMPANY'S CONSTITUTIONALLY PROTECTED RIGHTS?

There are two constitutional issues raised when a transit district initiates service in direct competition with existing private transportation companies:

1) Deprivation or property without just compensation, and
2) Failure to provide equal protection under the law.

5.1 DERPIVATION OF PROPERTY

Deprivation of property without just compensation, often called inverse or reverse condemnation, involves the situation in which private property is taken by the government pursuant to a legislated purpose without just payment. Private transportation companies have argued that their license or certificate granting them the authority to provide a given service should be viewed as a property interest; that deployment of competitive paratransit services by a government agency is in effect the same as taking or destroying their property interests. Therefore, without equitable compensation the action of the state government (or agency delegated the power-usually the transit district) should be considered unconstitutional.

Although it may appear that taxi companies have a strong constitutional argument, the cases to date adjudicating this issue demonstrate that they have been unsuccessful in obtaining recoveries or preventing the implementation. This argument has been successfully disputed by establishing that government competition in the from of paratransit deployment is not "taking" in the constitutional sense. A government may compete with a private utility unless that utility has a legally-protected interest in operating its franchise free from competition.

In the Westport case the taxi company held a certificate of public convenience and necessity issued by the Connecticut Public Utility Control Authority. The taxi company claimed that the establishment of a municipal taxi service by the transit district

has the effect of destroying or taking its franchise. Since no compensation had been paid, it was alleged that there was an unconstitutional deprivation of their property. The court held that competition by itself did not constitute a taking of property. As long as the competition is lawful, i.e., is not a violation of express conditions of a contract or franchise, any resulting economic injury to the taxi company is merely damage without any wrongdoing. Without some malfeasance by the transit district the taxi company cannot maintain the law suit.[46] The court stated,

> "They have no constitutional right to compensation unless they have a legally protected, compensable interest in operating their franchise free of new competition." [47]

Another case ruling on the issue of deprivation of property without compensating the owner is Hladek v. The City of Merced.[48] The City of Merced implemented a dial-a-ride service in 1974 in direct competition with an existing dial-a-ride service operated by a taxi company. The taxi company alleged that the city operated their service at a loss, thereby forcing the taxi-managed system out of business. In effect the taxi company complained that their property (business) was damaged or "taken" as a direct result of the city's competition. The court disagreed and found no cause of action for inverse condemnation had been proven. The court stated,

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[46] A malfeasance sufficient to establish a cause of action against the transit district might be the case where the transit district, under the delegated authority of the Connecticut PUCA revokes or modifies the certificate held by the complainant taxi company. This situation was actually alleged by the taxi firm and denied by the defendant Westport Transit District. Such an unwarranted revocation would appear to be a valid basis of complaint that the state government deprived the taxi firm of their property without adequate compensation.

[47] Westport Taxi v. Westport Transit District, supra note 16, at p. 11. Affirmed, supra note 21, at p. 11, footnote #3.

[48] Edward J. Hladek, et al., v. The City of Merced, Fifth Appellate District, California Court of Appeals, 5Civ. 2882, May 9, 1977.

> "It is well settled, however, that when a municipality or public agency engages in competition with a private business and the latter suffers economic harm, the infliction of that harm is not a "taking" of property that requires compensation in the constitutional sense (United Railroads v. City and County of San Francisco).[49]

Therefore, barring some wrongdoing such as violating an agreement not to compete, the City of Merced was within its rights to improve transportation services for the public good.

The Ann Arbor case also discussed the constitutional issue and similarly found that competition alone is not enough to establish the "taking" of personal property. In that case the city attempted to implement a dial-a-ride service which the local taxi operators felt was in direct competition with their service. They claimed that the action of the municipality constituted a deprivation of their business property without payment for the losses. Again the court looked for both the malfeasance and the ensuing economic damage. The taxi companies could quantify their economic injury but failed to show any more than mere competition by the City of Ann Arbor. Competition is not, in and of itself, sufficient to establish a taking.[50]

The cases discussed above appear to indicate that without clear, explicit language granting taxi or other private transportation companies exclusive operating rights, there can be no complaint

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49 Ibid. at P.2. The cited case of United Railroads v. San Franciso is a 1919 U.S. Supreme Court case that is still good law and directly applicable to this situation. In that case the city of San Fransico planned to construct a municipal street railway paralleling and competing with United's service. The Court concluded that as long as the franchise did not specifically preclude the city from such acts, the construction of a competitive service did not constitute an eminent domain action by the city.

50 Another Michigan case, J.R. Mammia v. Twin City Area Transportation Authority, File No. 75-2337 CZ, decided April 22, 1976, similarly concluded that the establishment of a dial-a-ride service serving the Townships of St. Joseph, Benton Harbor, and Lincoln in competition with an existing bus company was not a public taking which is compensable by law. The existing bus company did not have exclusive contract or franchise rights to provide transportation in the area nor was there any revocation of the bus company's license to continue the bus service.

that competition by the municipality is depriving private enterprise of any property.

5.2 FAILURE TO PROVIDE EQUAL PROTECTION UNDER THE LAW

An equal protection complaint arises when one party feels that the federal, state, or local laws are being applied inequitably. Generally, the party who has been deprived of a right or benefit will attempt to claim that no rational reason can be offered by the government to justify such an exclusion. On the other hand, an equal protection argument can be made by a party who, to his disadvantage, comes under a law or regulation while similarly situated parties are regulated otherwise. This latter situation is basically the constitutional argument that can be raised by a taxi company when paratransit is deployed without having to comply with local ordinances.

The taxi company in the Ann Arbor case claimed that the dial-a-ride system being implemented by the city was really similar to taxicab service and, therefore, should be governed by the taxi licensing ordinances. The trial court found that since the dial-a-ride system did not provide exclusive-ride service and the vehicle route could not be controlled by the passengers, the two services were dissimilar enough to exclude the dial-a-ride from any licensing requirements. Apparently, if the taxi company could force the dial-a-ride service under the jurisdiction of the taxi-cab ordinance then the city would have to apply for a certificate of public convenience and necessity. If necessity could not be shown, then the implementation could be blocked. However, this logic leads to absurd results. What would occur is a situation where the city would be approving its own license.

Another legal argument disputing the taxi company's claim of denial of equal protection is the general rule that the government may, in the interest of the public welfare, operate competitive utilities without regulations or alternatively be governed by disparate regulations. The theory here is that the government

operation is for public purposes while a privately run utility has profit as its only motive. Therefore, different controls must apply.[51] For these reasons the argument that the taxi company was denied equal protection of the laws was quickly rejected by both the trial and appellate courts.

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[51] See Springfield Gas and Electric Co. v. City of Springfield, 257 U.S. 66 (1921), where the court rejected the claim that it constituted a denial of equal protection of the laws for a state to require private utilities to be regulated by a utilities commission while allowing a municipality to set the rates for a utility owned by it.

6. ARE THERE STATE LEGISLATIVE PROVISIONS GRANTING ADDITIONAL REMEDIES?

While Section 1 provided a discussion of the federally-legislated protections available to transportation companies affected by federal grants, this section will focus on state or local legislation as a source of remedy. As was the case in other sections, the analysis will be confined to those states where litigation on this issue has taken place. However, it is anticipated that the conclusions and recommendations arrived at should be equally useful in other states as well.

The major legislative protection offered private transportation companies is found in the enabling statutes that create transit districts. Generally, the enabling statute contains a buy-out or compensation clause which requires that no system be established unless the district has purchased (or has initiated the purchase of) the existing transit system. Hence, for a taxicab company to be eligible for this buy-out provision it must qualify as an existing transit system.

California is one state that offers a diversity of legislation which, depending on the county involved, can protect or ignore economic injury to taxicab companies resulting from municipally-sponsored paratransit. This inconsistency is pointed out in a report by Hollinden and Fielding which deals with the enabling statutes in effect in California.[52] It is noted in that report that numerous California transit districts, such as Alameda, San

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[52] "Operating Differences and Restraints Imposed by the Enabling Ordinances of the Fifteen California Transit Districts," Hollinden and G.J. Fielding, University of California, Irvine, Calif., November, 1976.

Francisco, Fresno, Stockton, Santa Clara, Golden Empire, Sacramento, and San Mateo have enabling statutes broadly defining "transit" as follows:

> "Transit means transportation of passengers and their incidental baggage."[53]

It appears that a definition such as this would include taxicab service. This could mean that taxi firms presently operating in the area would have to be purchased prior to paratransit implementation.

Contrast the above liberal definition with that used in such counties as Marin, West Bay, San Diego, Santa Barbara, Santa Cruz and Orange County:

> "Transit means the transportation of passengers only and their incidental baggage by means other than a chartered bus, sightseeing bus, or any other motor vehicle not on an individual passenger fare-paying basis".[54]

This definition of transit requires that taxi companies meet some fairly strict requirements before the buy-out provision can apply to them.[55]

There are two recent California cases that graphically demonstrate the effects of these diverse definitions of "existing transit." The first case occurred in Santa Clara County where the taxi companies were instrumental in preventing the implementation of a dial-a-ride service and received approximately three hundred thousand dollars in damages. The second case was in Orange County where the taxi company failed to qualify as existing transit, thereby losing its bid to prevent the paratransit deployment.

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[53] Id. at p. 14

[54] Ibid.

[55] San Mateo goes one step further by expressly excluding taxicabs as being part of "existing transit system."

In the Santa Clara County case the aggrieved taxi companies claimed that they met the definition of transit contained in the enabling legislation[56] and were therefore entitled to the benefit of the buy-out provision. On January 9, 1975,the Superior Court in an interlocutory (pending final determination) judgment stated,

> (It is) "adjudged and decreed that Defendants (transit district) have failed to comply with the provisions of the Public Utilities Code of the State of California... in that Defendents failed to give Plaintiffs (taxi company) written notice as provided...and that Defendant's further failed to purchase Plaintiff's existing systems as required...prior to Defendant's establishing their dial-a-ride service. It is further adjudged ... that each of the plaintiffs herein is an existing system within the meaning of Section 100021 of the Public Utilities Code of the state of California."[57]

In addition the court ordered the transit district to permanently stop operations of dial-a-ride by January 24, 1975, or alternatively to begin good faith efforts to purchase each of the taxi companies. The transit district notified the taxi companies on January 21, 1975,that they had decided to enter into negotiations for the purchase of their businesses. However, on May 9, 1975,the dial-a-ride service was terminated before negotiations were completed. Subsequently, the district filed a motion in the trial court for an order stating that the district was no longer required to purchase the taxicab companies. The court's ruling was subsequently modified and the proper remedy for the violation of the buy-out provision was changed to damages incurred from the

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[56] Section 100021 of Public Utilities Code reads . . . "Existing system means any transit service or system operating entirely within Santa Clara or at least 40 percent of whose revenue vehicle miles for the preceding calendar year were operated within the district . . ."
In addition Section 100021 defines transit as "the transportation of passengers and their incidental baggage by any means."

[57] Interlocutory Judgment, No. 319918, Jan. 9, 1975, Marshall S. Hall, Judge, Superior Court of Cal., Santa Clara County.

inception of the paratransit service, Nov. 24, 1974 to its termination on May 9, 1975.[58]

The Santa Clara case represents the only clear victory for private transportation companies in their attempts to prevent implementation of paratransit. It is imperative that the issue leading to this recovery be understood. The taxicab companies qualified as an "existing (transit) system" under the buy-out clause of the enabling statute. The statute, whether intentionally or not, was broadly written. Juridictions with similarly liberal ordinances will potentially have the same result if a private transportation firm opposes paratransit deployment. Therefore, it is important to examine the enabling legislation creating the transit district where the innovative transportation system is planned.

The litigation in Orange County, on the other hand, is a situation where, in order to be considered an existing system eligible for buy-out protections, it is necessary to meet specific criteria. The Orange County Transit District is controlled by buy-out

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58 The taxicab companies appealed this modification claiming among other things: 1) the initial interlocutory judgment should be final and not subject to modification since the time for an appeal had passed, and 2) the buy-out remedy was mandatory by the ordinance, 3) the election was made by the transit district to buy out the taxis and they should be precluded from changing their mind. The First Appellate Court of California decided (Case No. 1 Civil 38211, Dec. 21, 1976) the modification changing the remedy to damages was correct. The interlocutory decree was actually injunctive in nature and therefore the court can modify it to adapt to changing conditions. Also, the statute is silent on the form of remedy applicable to this specific situation and damages appear appropriate. Finally, the buy-out remedy and damages are not inconsistent and the district ultimately chose one of the alternatives directed by the court.

provisions similar to those of Santa Clara County.[59] The provisions include: 1) notice to existing transit services of the intent to establish a competitive service, and 2) purchase of existing system before deployment of a new service. What distinguishes Orange County, however, is the definition of "transit service." Public Utilities Code Section 40221 provides in part:

> (b) " 'Existing system' means any transit service or system of a publicly or privately owned public utility situated entirely within Orange County, or at least 75 percent of whose revenue vehicle miles for the preceding calendar year were operated within Orange County."

The only obvious difference between this ordinance and that of Santa Clara is the level of percent of revenue. However, Orange County went one step further and defined "transit service or system" in Section 40005 of the Public Utilities Code as "the transportation of passengers only and their incidental baggage by means other than chartered bus, sightseeing bus, or any other vehicle not on an individual passenger fare-paying basis ..." This last definition was pivotal in the exclusion of the taxi company from the buy-out provisions.

At the trial court level, [60] the court determined that the complaining taxi companies were privately-owned public utilities and were existing systems within the PUC Section 40221 (above).

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[59] Applicable Public Utilities Code Sections for Orange County include: Section 40222. ".... before the district may establish any transit service or system which may at any time divert, lessen, or compete for the patronage or revenues of any existing system, the district shall give a written notice to the public utility which is operating the existing system. The written notice shall describe the transit service or system which the district proposes to establish and shall state the time within which the district proposes to establish such service or system." Section 40222.5. "The district shall not establish the proposed service or system, or maintain and operate the service or system until it has completed the purchase of the existing system..."

[60] Yellow Cab v. Orange County Transit District, Superior Court of Orange County, No. 229461.

Therefore, the notice requirement and buy-out provision applied. Since neither protection was met, the trial court ordered that within 120 days the Orange County Transit District should either stop operation of the dial-a-ride service or begin good faith negotiations for the purchase of the two taxi companies with which the dial-a-ride would compete. The defendant transit district did not raise the question in the trial court whether or not the taxi companies were also within the definition of "transit service". However, the transit district appealed the decision[61] and subsequently argued that the plantiff taxi companies could not meet the requirements in the definition. The criteria are: 1) the service must transport passengers and their incidental baggage only, and 2) not ... any other motor vehicle not on an individual passenger fare-paying basis. The appellate court determined that the taxi companies failed to meet these requirements since about one percent of their business consists of delivering telegrams and packages and they charge a flat fare instead of an individual fare.[62] Since the taxi companies do not come within the definition of transit service, they are not "existing systems" that can benefit from the buy-out provisions of the statute. It should be noted that in a footnote at the end of the decision, the state appellate court calls on the legislature to solve the "social question of whether private taxicab businesses must face the risk of publicly-subsidized competition."[63] Furthermore, the court could see no basis for the legislative distinctions between counties. What the appellate court appears to be suggesting is that the legislation in California become more uniform and, furthermore, that it conform more to the language of Santa Clara, i.e., let the social burden of the impacts of innovation fall on the municpality.

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[61] Yellow Cab v. Orange County Transit District, supra note 31.

[62] Individual fare paying basis means that each passenger must pay the scheduled fare while flat fare means the vehicle is hired and the fare is constant regardless of how many passengers are carried.

[63] Yellow Cab v. Orange Transit District, supra note 31, at p. 16.

Across the country, in Connecticut, the Westport taxi company argued their cause on similar grounds; that state legislation[64] granted the Public Utility Control Authority (who in turn delegated it to the transit district) certain powers of eminent domain. The taxi company argued that as a result of the district's competition in the form of a municipally-operated, shared-ride taxi service, the state has impaired the taxi firms business. Hence, the state legislation should apply and just compensation be paid. The federal court considered this an issue for state court determination and decided not to rule on this question. The court commented, however, that it doubted that competition alone would be enough to invoke compensation by the state, since there really was no direct taking of the franchise, only dimunition of value due to competition by the state. In any event the federal court left this for the taxi company to argue before a state court which to this point has not occurred.

In summary, therefore, it is important to investigate state remedies which could either prevent the deployment of paratransit or allow for recovery of economic damages. Generally, these remedies may be found in the transit enabling statutes or eminent domain statutes. To date the only recovery by a taxi company has been because of a broadly worded state transit enabling statute which was interpreted by the court to include private taxi operators within the scope of protection.

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64 Connecticut General Statue 7-273-e.

7. IS IT UNFAIR COMPETITION TO DEPLOY SUBSIDIZED PARATRANSIT?

Unfair competition is the situation in which one party provides goods or services that resemble the goods or services of another to such a degree that the public is confused or deceived. Applying this definition to the paratransit implementation situation, it can be argued that by establishing paratransit services that operate in a similar manner to exclusive or shared-ride taxis, the transit district is guilty of unfair competition. To date, however, the conduct of the transit district has not been determined as that which would tend to pass off the paratransit service as that taxi service. Therefore, no taxi companies have successfully litigated this issue.

A state court decision discussing this issue is Kon v. The City of Ann Arbor. In this case the taxi company claimed unfair competition on the basis that the new service resembled the existing taxi service and the public would be confused and purchase the paratransit service instead of theirs. In response to this the court stated,

> (to constitute unfair competition) "there must be, traditionally, a passing off, or pawning off of the goods or services of one person as those of another. It is not every competition, no matter how hard it may be on the person who is not used to that competition, which falls within the legal definition of unfair. There is no allegation here of any passing off, or pawning off of the services provided by the proposed transportation authority as being those of any of the plaintiffs ..." [65]

For most paratransit implementations the decision in Ann Arbor appears reasonable. Generally, there are no express or implied representations on the part of the municipality to imitate an existing taxi service. For that matter the transit district would probably attempt to distinguish its service through lower fares, different vehicles, and diversified services.

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[65] Kon v. City of Ann Arbor, supra note 30, at p. 160.

Unfair competition has been further defined in some states by statute. California, for example, as part of the Unfair Trade Practices Act, has made it unlawful for any person, municipal corporation or other public entity engaged in business in California to sell any "article or product at less than the cost thereof to such vendor ... for the purpose of injuring competitors or destroying competition."[66] Hladek v. The City of Merced addressed whether this statute was violated by the city's deployment of dial-a-ride and subsequent operation of such a system at a deficit. The court unfortunately never reached a decision on the merits of the case since the initial complaint by the taxi companies lacked sufficient information to establish a legal cause of action. The taxi companies failed to allege two critical elements in their initial complaint: 1) that the municipally-operated service came under the control of this legislation, that is, no exclusions applied to the dial-a-ride service, and 2) that the city had formulated the intent to economically injure or destroy them. Therefore, that cause of action was dismissed with leave granted to the taxi companies to amend their complaint.

In summary, the common law claim of unfair competition does not appear formidable unless the competitive new service so clearly resembles existing services as to cause confusion with the public and mislead them into thinking they are actually using a private taxi service. The statutory unfair competition claim must be examined on a state-by-state basis to determine exclusions and requirements. It is impossible to generalize, but if the California statute is typical, most legislation would exempt publicly-owned operations and probably require some evidence of specific intent to injure the existing businesses.

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[66] California Business and Professions Code, Section 17043

8. CONCLUSIONS AND RECOMMENDATIONS

8.1 GENERAL

It appears that private transportation companies have been seriously impacted by the implementation of government-assisted paratransit services. Accordingly, the deployment of these competitive systems has resulted in litigation in at least a half dozen localities since 1971. The analysis of this litigation has resulted in the following findings, conclusions and recommendations.

8.2 FINDINGS

1) The deployment of paratransit services supported by UMTA capital or demonstration grant assistance oftentimes creates competition that may adversely affect existing private transportation companies. Until recently, the conditions associated with the grant of Section 3 and Section 6 money have been considered discrete and mutually exclusive. However, recent litigation has resulted in a ruling that demonstration projects are not exempt from compliance with capital assistance conditions. Therefore, the more stringent procedural requirements found in Section 3(d) of the Act must be adherred to when the demonstration project involves "the acquisition of facilities or equipment which will substantially affect a community or its mass transportation service." Similarly, the procedural requirements of Section 3(e) are required when the result of the demonstration assistance could potentially be competition with a "mass transportation company," To date, conventional, exclusive-ride taxi services have not qualified as "mass transportation" and, therefore, have been denied these added safeguards. It should be noted that this recent case is legally binding only in a few states and, although it is clearly persuasive authority, other jurisdictions are free to distinguish the application of capital grant and demonstration grant requirements.

The more difficult question which may have to be addressed in the near future is how to handle an exisitng transportation company offering both shared-ride and exclusive-ride service. Since shared-ride services are recognized as mass transportation, the issue then becomes what protections would such a company qualify for under this new status. Presently, UMTA's proposed policy requires a finding that the shared ride portion be more than an "incidental adjunct to its main business" before such provisions apply. How the courts will interpret this administrative direction remains an open question.

2) Implementation of paratransit services by the municipality has not, at present, been considered a violation of the license granted by the government unless there is an express agreement not to compete contained in the licensing ordinance. Public utility licenses granted by state law have been interpreted strictly and without an express agreement not to compete; the government is free to provide similar services. However, where the municipality itself may be able to compete, a transportation company under contract to the municipality might very well be prohibited.

3) Private transportation companies have been unsuccessful in claiming constitutional violations resulting from paratransit implementation. To substantiate the constitutional claim of deprivation of property (business franchise) without just compensation it is necessary to show that there was a taking of private property by the government. The cases have held that there is no taking unless the existing company had a legally-protected right (such as an express agreement by the government not to compete) to be free from competition. Another constitutional claim which has been unsuccessful is denial of equal protection of the laws. The one case which analyzed this claim held that the para-

transit service was not similar to exclusive ride taxi service and, therefore, the taxi licensing laws did not pertain.

4) To date the only successful law suit brought by a private transportation company against the municipal transit district implementing paratransit was a result of a state transit enabling statute. Generally, statutes creating transit districts require that the government purchase existing transit services as a prerequisite to implementing competitive services. The key to qualifying for the buy-out provision is that the transportation service must come within the definition of "existing transit service." It is important that the full definition be analyzed to determine whether existing transit service is liberally defined as it was in Santa Clara or rigidly defined as in Orange County.

5) Paratransit implementation by a government entity has not been considered unfair competition in the common law sense. The transit district is not imitating taxi service. On the contrary, the agency generally exerts efforts to clearly distinguish the two services by using different vehicles, fares and service options. Therefore, without a passing off or pawning off of the paratransit service as that of a taxi service, there is no valid claim of unfair competition. In addition, states may have applicable unfair competition statues which should be analyzed prior to deployment of government-subsidized paratransit.

8.3 CONCLUSIONS

To date the majority of legal actions initiated by private transportation companies and stemming from government-subsidized competition have resulted in delays, expensive legal fees, and apprehensions on the part of transit administrators. However, with the exception of Santa Clara, none of the law suits resulted in a decision for the existing transportation company. This does not mean that in the future a taxi company should not consider litigation as an ultimate weapon against illegal actions of com-

peting transit districts. Admittedly, new laws, new regulations, and changing social climate[67] may alter the legal protections available to private taxi companies. In addition, it should be recognized that the litigation discussed here may only be persuasive authority and would not be binding in other jurisdictions. However, the analysis of the relevant case law, coupled with current federal policy promoting competitive opportunities for private transportation, suggests that, at present, it would be best for taxi companies to first think of how they can join in paratransit deployment rather than how to fight it.

8.4 RECOMMENDATIONS

The study of the legal issues resulting from deployment of subsidized paratransit further emphasizes the larger problems of what can be done, on one hand, to avoid inhibitions and problems before they lead to litigation and, on the other hand, to promote

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67 Even though the courts have objectively interpreted the rights and duties of the private companies according to the applicable laws, they have in at least three instances recognized the possible social injustice that this situation creates:

A) In the Ann Arbor case the court called the conflict an "unfortunate situation." The public agency, on the one hand, was attempting to initiate new, improved, less expensive transportation while, on the other, it was threatening the livelihood of those already providing competitive services. The court summarized its feeling by saying," the situation is somewhat reminiscent of the dislocation that we know accompanied the advent of the industrial revolution many years ago..."

B) Similarly, the court in the Orange County case recognized the social issue of "whether private taxicab businesses must face the risk of publicly-subsidized competition."

C) In the Merced case the court went to great lengths to outline what was needed in the taxi company's amended complaint in order to allow the court to determine whether or not the transit district violated the California Unfair Trade Practices Act. This unusual assistance was apparently an attempt by the court to find a solution which would allow for recovery by the taxi firm for the damage caused by subsidized competition.

and establish a successful paratransit operation. Clearly, these are not easy problems to solve. However, it is fair to say that any resolution will have to include some combination of: project involvement coordinated among the potential providers, users, and managers; cooperation between system managers (transit districts) and system operators (private transportation companies); good faith negotiations; equitable contractual agreements in compliance with UMTA policy; understanding of labor considerations, such as union/nonunion wage and work rule discrepancies, application of Section 13(c) of the Urban Mass Transportation Act of 1964 and other institutional considerations. At this time, most of these factors are merely undefined phrases that appear often in the context of innovative transportation systems, but generally without any depth of understanding. One approach to develop a better understanding of these institutional elements is the case study method.

There are localities that have, to varying degrees of success, been able to find the proper combination of these factors. Orange County is one such location where the transit district and a private taxi company were able to develop the proper mix of co-operation, involvement, fairness and understanding to form a successful paratransit operation. The documentation of such a case study would be a useful step toward understanding the institutional issues that must be resolved.

New paratransit demonstrations are planned and initiated each year. An analysis of the institutional constraints for a specific location prior to the commencement of a demonstration project could be beneficial to both the experimental paratransit demonstration and future deployments, as well.

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