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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

10,857

FILE: B-175155

DATE: July 25, 1979

MATTER OF: Rail Service Operating Payments Appropriation
FY 1979 - Applicable Allocation Formula *per*

DIGEST: Congress appropriated lump-sum for grants "of which \$75 million shall be available" for rail service operating payments (RSOP). Before appropriation was obligated, new formula, allocating sums to "non-rail fixed guideways" based on amount of RSOP, was enacted. *The Agency must honor \$75 million for RSOP but is not required to allocate lump-sum according to new or old formula: old formula was repealed and new formula, by its terms, applies to appropriations pursuant to authorization therein. Agency is therefore not required to fund allocation to non-rail fixed guideways.*

rail service operating payments

This decision is in response to a letter from the Chairman and five members of the House Committee on Public Works and Transportation, requesting our opinion on what the letter termed "a conflict in statutory interpretation." The conflict is over the method to distribute \$75 million, which was earmarked from within a larger appropriation for urban formula grants to the Urban Mass Transportation Administration (UMTA), Department of Transportation, for "rail service operating payments."

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The substantive legislative authority governing the distribution of these funds at the time the appropriation was enacted was repealed 10 weeks later. A new distribution formula, much broader in scope, was enacted at that time. The question is whether that new formula applies to the earlier enacted appropriation in whole, in part, or only prospectively. *see end*

A. Legislative Background

The Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. 95-335, approved August 4, 1978, 92 Stat. 444, appropriated funds for urban formula grants as follows:

"For necessary expenses for urban formula grants as authorized by the Urban Mass Transportation Act of 1964, as amended, * * * \$553,500,000, of which * * * \$75 million shall be available for rail service operating payments, to remain available until September 30, 1982."

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At the time the appropriation was enacted, the applicable authority in the Urban Mass Transportation Act of 1964, as amended, was section 18. It authorized a maximum of \$20 million to provide assistance to "States, local public bodies and agencies thereof" for support of operation of rail passenger service. The funds were to be distributed in accordance with a formula, the main ingredient of which was the number of passenger miles attributable to each eligible rail passenger service.

A few months before enactment of the appropriation act, the Senate Banking Committee reported a new authorization bill for transit legislation. (S. 2441, May 15, 1978). It proposed repeal of section 18, discussed above, and substitution of a greatly expanded program of urban formula grants not limited to commuter rail services. On May 20, 1978, the House Committee on Public Works and Transportation also completed action on a new authorization bill for the transit program (Title III of H.R. 11733), which, while it retained section 18, would have greatly expanded its scope.

Although differences between House and Senate versions of the authorizing legislation were not resolved until October 14, 1978, when the Conference Committee submitted its report on H.R. 11733 (H.R. Rep. No. 95-1797, p. 132), both House and Senate Committees on Appropriations were aware, at the time the appropriation was under consideration, that significant changes in the urban formula grant program were pending. The House Appropriations Committee, which was proposing a separate categorical appropriation of \$75 million for commuter rail operations, specifically referred in its report to "authorizing legislation proposed by the Department [which] would have included these subsidies as part of the regular formula grant program." H.R. Rep. No. 95-252, June 1, 1978, p. 46. The Senate, which did not favor a separate appropriation for rail service operating payments, justified its position by pointing out:

"Under the provisions of pending transit legislation, S. 2441, this program is absorbed into the urban formula grants appropriation." S. Rep. No. 95-938, June 19, 1978, p. 33.

The Surface Transportation Assistance Act of 1978 (STAA), Pub. L. 95-599, 92 Stat. 2689, was enacted on November 6, 1978. Section 312(c) of that act repealed section 18 of the UMTA as amended. Section 304(a) of the STAA amended section 5 of the UMTA to restructure the authorities for construction and operating systems for urban mass transit programs and the formulas under which each program's funds must be apportioned. Of particular importance is a new formula for distribution of funds

for construction and operating grants "for projects under this subsection involving commuter rail or other fixed guideway systems." Section 5(a)(3)(A) of UMTA, as amended.

"Fixed guideway," as defined by section 308(b) of the STAA, means:

"A public transportation facility using a separate right-of-way for the exclusive use of public transportation service. It includes fixed rail, automated guideway transit, and exclusive facilities for buses and other high occupancy vehicles."

Unlike the other distribution formulas for projects under section 5 of UMTA, which are based largely on relative population density, the "commuter rail or other fixed guideway systems" formula apportions two-thirds of the total amount appropriated for this purpose to urbanized areas or parts thereof on the basis of a ratio involving commuter rail train miles and commuter rail route miles. The remaining one-third would be distributed on the basis of a ratio involving fixed guideway system route miles.

The important difference between the distribution formula in existence at the time of the appropriation (former section 18) and the new formula in section 5(a)(3)(A) is that the former considered only rail service passenger miles while the latter includes an additional non-rail component, fixed guideway systems. Again, the question is which formula to use.

Discussion

UMTA's position is set forth in a notice published in the Federal Register (43 Fed. Reg. 58,935, December 18, 1978), in numerous letters to Congressmen who were involved with either the appropriation act or the authorization act--or both--and in a comprehensive letter with attachments to this Office, in which UMTA explores several alternative legal positions and explains its final choice.

As we understand UMTA's position, it believes that it is not required to apply a new section 5(a)(3)(A) formula to distribution of the \$75 million earmarked in the appropriation for rail service operating payments. It points out that the formula is expressly stated to apply to "sums appropriated pursuant to subparagraph (B) of this paragraph." Subparagraph (B) is an authorization for appropriations for fiscal years 1979 through 1982. UMTA is of the view that since the \$75 million was part of an appropriation act passed 3 months

before enactment of the STAA, it cannot possibly be considered to be "appropriated pursuant to subparagraph (B)."

On the other hand, UMTA contends that the old section 18 formula is equally inapplicable. The \$75 million was not intended to implement the existing assistance programs since both appropriations committees were well aware that significant changes in the program were pending in the authorization committees. Moreover, UMTA says, section 18 has been repealed, and to construe the \$75 million appropriation as being subject to the repealed program "would thwart the express intent of the Appropriation Committees to fund a rail program in 1979 * * *."

UMTA's solution is to regard the appropriation as "free standing"--i.e., as not being subject to either formula--for the reasons explained above. It would then use its best judgment and apply only so much of the new formula as contains the factors for rail operating assistance payments. Instead of utilizing these factors--commuter rail train miles and commuter rail route miles--for two-thirds of the \$75 million appropriation, it would distribute the entire \$75 million in this manner, making no apportionment of funds for non-rail fixed guideway systems until the Congress has enacted future appropriations for this purpose.

The members of the House Committee on Public Works and Transportation who requested this decision do not agree with this interpretation. It is their view that:

"When Congress acted on October 15 by agreeing to the Conference report on P.L. 95-599 which set out in Section 304(a) the aforementioned apportionment formula, it acted in full cognizance of the prior legislative action in the Department of Transportation appropriation, and in our view, this clearly states final Congressional thought and intent on the issue."

They thus believe that the \$75 million should be apportioned in strict accordance with the new formula, including the non-rail factors.

This same argument--that the conferees on the bill which became the STAA were well aware of the terms of the prior DOT appropriation act--was used by two other Members of the Congress to support the opposite view; that the Congress only intended to fund rail service assistance, and expected a request for a supplemental appropriation to be submitted for the fixed guideway systems program.

We believe the new formula should not be applied in its entirety to the \$75 million set-aside. The \$75 million which is set aside from the total \$553,500,000 1979 appropriation for urban formula grants is only available, by its terms, for rail service operating payments. The section 5 formula includes a factor for non-rail fixed guideway systems. Funding non-rail fixed guideway systems from the \$75 million would contravene the express terms of the appropriation.

As explained above, the new apportionment formula applies to "sums appropriated pursuant to subparagraph (B)" of paragraph 5(a)(3). The formula is therefore not necessarily controlling as to the \$75 million appropriated before the enactment of the authorization in subparagraph (B), and, hence, not pursuant thereto.

Because section 18 was repealed by the Surface Transportation Assistance Act of 1978 and because the formula in section 5 applies only to monies appropriated pursuant to the new law (i.e., subparagraph (B) of paragraph 5(a)(3)), neither of the formulas is clearly applicable to the \$75 million. As we said earlier, UMTA's solution to the problem is to allocate the \$75 million according to the portions of the new formula which distribute monies based on commuter rail factors, on the theory that the new formula should be applied to the extent it is consistent with the terms of the appropriation. Distribution of funds for non-rail fixed guideway systems would therefore not take place with respect to the \$75 million set-aside. The full \$75 million would be distributed according to the parts of the section 5 formula which deal with commuter rail operations, and non-rail fixed guideway operations would not be funded from this appropriation. UMTA believes that this solution is the only one that "responsibly resolves the ambiguity between the Appropriation Act and the Authorization Act so that the intention of Congress to fund the program can be satisfied." Under the circumstances, we cannot say that UMTA's position is unreasonable. Accordingly, since it more closely conforms to the apparent intent of the Congress in enacting the appropriation, we would not be required to object to UMTA's proposed allocation.

Of course, UMTA is not by law precluded from funding non-rail fixed guideways by allocating a total of \$112.5 million to section 5(a)(3). To do so, however, would provide less funding than the appropriations committees intended for purposes of sections 5(a)(2) or 5(a)(4), or both, and providing funding for non-rail fixed guideways apparently was not intended by those committees.

R. F. Kell
Deputy Comptroller General
of the United States