UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY RESOURCES, INC. and CONSUMER CONNECTION Plaintiff, vs. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	Civil Action Number 99-4837

Brief of United States of America as *Amicus Curiae*

The United States of America as *amicus curiae* hereby submits this brief to this Honorable Court. Based upon its review and analysis of the undisputed material facts in this action, and the application of those facts to the law, the United States urges this Court to find that the Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") has discriminated against individuals with disabilities in the provision of complementary paratransit services in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132 and 12143, and the Department of Transportation's regulations implementing those statutes, 49 C.F.R. Part 37, Subpart F.

I. INTEREST OF THE UNITED STATES

This case involves the interpretation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"),[1] which covers

[1] The Plaintiffs' allegations in this action arise from both Title II of the ADA and Section 504 of the Rehabilitation Act. When Congress passed the ADA in 1990, it instructed that these two statutes were to be construed consistently. Because Title II of the ADA amended Section 504 with respect to the transportation provisions, in the remainder of this brief when referring to the applicable statute, for the sake of economy, the United States will refer only to the ADA.

state and local government entities. Part A of Title II, 42 U.S.C. §§ 12131-12134, generally prohibits disability-based discrimination by state and local government entities, see 42 U.S.C. § 12132; while Part B of Title II, 42 U.S.C. §§ 12141-12165, sets forth specific requirements governing public transportation services provided to individuals with disabilities. The United States Department of Justice (the "Department")is the federal agency with primary responsibility for enforcement of Title II of the ADA, including responsibility for coordinating the work of other federal agencies, such as the Department of Transportation ("DOT"), that have responsibility for certain limited aspects of ADA implementation. See 42 U.S.C. § 12133; 28 C.F.R. § 35.190(a). Moreover, the Department is the only federal agency authorized to file suit in federal court against a state or local government entity to enforce any provision of Title II of the ADA, including the provisions applicable to paratransit transportation systems, 42 U.S.C. §§ 12131 - 12150. See 42 U.S.C. § 12133; 28 C.F.R. § 35.174; 49 C.F.R. Part 37.11(b).

The Department of Transportation also has significant administrative and enforcement responsibilities regarding the Title II transportation provisions at issue in this action. Pursuant to statutory directive, Congress directed DOT to promulgate regulations implementing the transportation provisions of the ADA and Rehabilitation Act. See 49 U.S.C. §§ 12143(b), 12149. DOT also has significant administrative enforcement responsibilities to ensure compliance by state and local transit authorities with the implementing transportation regulations, including receiving, adjudicating and resolving complaints involving state or local transportation authorities. See 49 C.F.R. § 37.11(a); 49 C.F.R. Part 27, subpt. F.

Because of its responsibility for enforcing, and coordinating implementation of, Title II of the ADA, the federal government has an interest in ensuring that this statute and the regulations promulgated to implement it

are properly and consistently applied and construed. This Court's ruling on the correct interpretation of the relevant DOT regulations will have widespread impact for public transit entities nationwide seeking to comply with federal paratransit standards. Given the Department's expertise with regard to the legal issues before this Court, the government believes its views regarding the enforcement provisions of Title II will be of assistance.

II. STATEMENT OF THE ISSUE

In this brief, the United States will address the following issue: Whether SEPTA is in violation of Title II of the ADA and the Department of Transportation's implementing paratransit regulations by failing to comply with the "next-day response time" mandate, and by imposing "capacity constraints" on its provision of complementary paratransit services.[2]

III. STANDARD FOR SUMMARY JUDGMENT

As recognized in Pittston Co. Ultramar America v. Allianz Ins., 124 F.3d 508, 515 (3rd Cir. 1997), a motion for summary judgment must be granted if there exist no genuine issues of material fact. The United States submits that, as set forth below, there is no dispute between the parties concerning any facts material to the claims and defenses in this action, thus rendering it appropriate for this Court to enter summary judgment.

IV. APPLICABLE STATUTORY AND REGULATORY SCHEME

1. Federal Statutes

Title II of the ADA, 42 U.S.C. § 12143, expressly provides that public entities that operate fixed route systems must provide complementary paratransit service comparable to their fixed route service. Specifically, Title II establishes that it is "considered discrimination" for an entity such

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[2] Although the parties dispute whether the Plaintiffs have standing to pursue their claims against SEPTA in this action, the United States takes no position with respect to this issue.

as SEPTA:

> to fail to operate with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without using such system.

42 U.S.C. § 12143(a). See also Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

In order to ensure the implementation of specific requirements defining comparability between fixed route and paratransit service, Congress mandated that the Secretary of the Department of Transportation issue final regulations establishing paratransit requirements, including standards that "shall establish minimum service criteria for determining the level of services to be required under this section." 42 U.S.C. § 12143(b)(3). To carry out the requirement that paratransit systems be comparable to fixed route systems – and, with respect to response time, that paratransit be comparable "to the extent practicable" with fixed route service – Congress delegated to DOT the authority to establish standards for public entities to provide the required level of paratransit comparability.

2. Federal Paratransit Regulations

DOT promulgated regulations defining both the level of comparable paratransit service, as well as the minimum service criteria required to ensure comparability. See 49 C.F.R. Pt. 37, Subpt. F. The language of the ADA provides that, at a minimum, comparability in the level of service between paratransit and fixed route systems with respect to response time be achieved "to the extent practicable." 42 U.S.C. 12143(a). In furtherance of this mandate, the regulations specifically prohibit capacity constraints as an

unlawful impediment to achieving such comparability. Id.; see also 56 Fed. Reg. at 45, 608 (stating that capacity constraint mechanisms are incompatible with a comparable paratransit system and thus the rule is to prohibit them).

a. Next-Day Response Time Mandate

Response time refers to the time within which transit providers must respond to a request for service made the previous day. The criteria setting forth the general standard regarding next-day scheduling provides that:

> Response time. The entity shall schedule and provide paratransit service to any ADA paratransit eligible person at any requested time on a particular day in response to a request for service made the previous day. Reservations may be taken by reservation agents or by mechanical means.

49 C.F.R. § 37.131(b). Insofar as the regulations require the provision of paratransit service "at any requested time on a particular day in response to a request for service made the previous day," 49 C.F.R. § 37.131(b), next-day service is mandatory when requested. See 49 C.F.R. Pt. 37, App. D. In enacting this requirement, DOT determined that next-day scheduling achieved "a good balance of minimizing inconvenience to users and allowing providers sufficient time to schedule trips to maximize efficiency." See 56 Fed. Reg. at 45,606. The flexibility necessary to assist the provider was provided by the so-called "two-hour window" requirement which allows providers to negotiate pick up and drop off times with riders within reasonable time limits. See 49 C.F.R. § 37.131(b)(2); see also 56 Fed. Reg. at 45,606-607. Accordingly, the response time mandate reflects DOT's determination that next-day scheduling was necessary to ensure that paratransit service be comparable "to the extent practicable" with response time for fixed route service.

b. Unlawful Capacity Constraints

In conjunction with the next-day service mandate, the regulations also prohibit a transit entity from imposing, or allowing to exist, a "capacity constraint" on the level of paratransit service required by the response time

standard. According to the regulations:

> Capacity Constraints. The entity shall not limit the availability of complementary paratransit service to ADA paratransit eligible individuals by any of the following:...
>
> (i) Any operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons.
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> (ii) Such patterns or practices include, but are not limited to, the following: ... Substantial number of trip denials or missed trips.
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> (iii) Operational problems attributable to causes beyond the control of the entity (including, but not limited to, weather or traffic conditions affecting all vehicular traffic that were not anticipated at the time a trip was scheduled) shall not be a basis for determining that such a pattern or practice exists.

49 C.F.R. § 37.131(f). Like the response time mandate, the prohibition on capacity constraints reflects DOT's determination of the criteria necessary to ensure comparability between paratransit and fixed route service. In promulgating this rule, the Department made clear that an avoidable constraint on capacity which results in substantial numbers of trip denials unlawfully impedes complementary paratransit service comparable to that of a fixed route system.

Any type of capacity constraint that can be avoided by the provider, including a quota, waiting list, or lack of appropriate numbers of vehicles, vehicle space or drivers, is incompatible with providing a comparable system. See 49 C.F.R. Pt. 37, App. D. As DOT observed, "patterns or practices of this kind have the effect of limiting the availability of paratransit service to eligible persons in a way not contemplated by the ADA." 56 Fed. Reg. at 45,608. With respect to trip denials, "a 'pattern or practice' involves regular, or repeated actions, not isolated, accidental, or singular incidents. A missed trip, late arrival or trip denial now and then does not trigger this provision." 49 C.F.R., App. D., 37.131. Conversely,

> Operational problems outside the control of the entity do not count as part of a pattern or practice under this provision. ...[However] if the entity regularly does not maintain its vehicles well, such that frequent

> mechanical breakdowns result in missed trips or late arrivals, a pattern or practice may exist. This is also true in a situation in which scheduling practices fail to take into account regularly occurring traffic conditions (*e.g.,* rush hour traffic jams) resulting in frequent late arrivals. Id.

The plain language of the regulations, read consistently with DOT's comments, thus prohibit public entities from failing to provide complementary paratransit service to ADA-eligible riders by engaging in any operational pattern or practice resulting in substantial capacity trip denials.

3. Department of Transportation Letters of Interpretation

The Department of Transportation's Federal Transit Administration ("FTA") has issued four letters of interpretation which are highly instructive on the meaning and interpretation of its complementary paratransit regulations. Each of these letters identifies specific circumstances in which transit providers are determined to have violated the ADA due to capacity trip denials.

a. FTA Letter Dated March 23, 1999

In a letter to counsel for the Plaintiffs in the instant action dated March 23, 1999, FTA made clear that comparability between paratransit and fixed route systems contemplates that providers maintain sufficient capacity to meet 100% of paratransit demand irrespective of swings in demand. See Ex. A attached hereto. FTA also concluded that transit agencies must deal with fluctuations in paratransit demand, just as they would for their fixed route service. Id. at 1.

b. FTA Letter Dated December 28, 1999

The FTA reinforced this interpretation in a letter to SEPTA's Chief Operating Officer, dated December 28, 1999, in which it acknowledged the minimal service criteria reflected in the regulations as necessary to ensure paratransit service comparable to the fixed route system. See Ex. B attached hereto. According to FTA, the term "substantial number" as used in section

37.131 cannot be construed as permitting transit entities to make operational decisions that serve less than all ADA-eligible riders. FTA recognized that the paratransit regulations assume that forces outside an entity's control will result in an insubstantial number of trip denials; thus, denials resulting from forces outside the agency's control do not violate the ADA, whereas avoidable denials, *i.e.*, those resulting from operational decision making, violate the ADA. Id. at 3. FTA concluded that paratransit operators must monitor ADA paratransit usage, acquire additional resources based on projected demand, and maintain the ability to respond to surges in demand. Id.

c. FTA Letter Dated August 15, 2000

In a letter dated August 15, 2000, to the Chief Counsel and Vice President of Government Affairs of the American Public Transportation Association, FTA stated that a transit provider may escape liability for paratransit capacity constraints if they can demonstrate with empirical evidence that an equally high level of denials exists on both its fixed route system and paratransit. See Ex. C attached hereto. FTA concluded, however, that trip denials on a fixed route system would be comparable only if the injury sustained – the time passengers must wait until their demand is met – is the same as that experienced by paratransit users when denied service. Id. at 2.

d. FTA Letter Dated April 15, 1996

Finally, in a letter from FTA to a transit provider in Chicago, Illinois, dated April 15, 1996, FTA made clear that, notwithstanding a transit provider's ability to meet a high percentage of total demand for paratransit service, a discriminatory pattern or practice may still exist if ADA-eligible patrons consistently experience trip denials. See Ex. D attached hereto. FTA concluded that in considering the relationship between service capacity and

trip denials, the proper focus is on the number and nature of trip denials rather than the percentage of demand met. Id. at 1.

V. SUMMARY OF ARGUMENT

SEPTA has engaged in prohibited operational patterns and practices that significantly limit the availability of paratransit services to ADA-eligible persons in southeastern Pennsylvania. The stipulated facts alone demonstrate an operational pattern of substantial numbers of overall trip denials, next-day trip denials, peak hour trip denials and weekend trip denials.[3] During a thirteen-month period, SEPTA's daily capacity trip denials constituted 13.4% of next-day trip requests, with the monthly denial percentage ranging from 8.9% to as high as 23.7%. Stip. No. 23. SEPTA also denied 9.1% of weekend trip requests, averaging 75 denials every weekend day of that period. Stip. No. 24. SEPTA's overall trip denials constituted 5% of paratransit demand[4] service requests, averaging 74 trip denials every single day of the thirteen-month period. Stip. Nos. 22 & 26. Moreover, SEPTA's operational practices not only perpetuate the capacity constraints responsible for such trip denials, but ignore mechanisms designed to eliminate those constraints. Finally, SEPTA's persistent noncompliance with the next-day response time mandate ensures that ADA-eligible riders are consistently denied paratransit

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[3] Cites to Stipulations and Exhibits throughout this brief, when making reference to undisputed materials facts in this action, are the same as those referred to in the summary judgment briefs previously submitted to this Court by Plaintiffs and Defendant.

[4] An important distinction regarding SEPTA's paratransit system is that users must schedule either "standing order" trips or "demand service" trips. A standing request is an advance service request for trips scheduled to occur at fixed times several times per week on an ongoing basis, whereas a demand request is a request for service or a particular trip made the previous day as the requested trip. See Stip. No. 21. The most striking data regarding SEPTA's paratransit violations reflects the routine denial by SEPTA of demand trip requests which, unlike pre-arranged standing trips, require an immediate response.

service in violation of the ADA and implementing regulations.

SEPTA's substantial capacity denials, resulting from forces within SEPTA's control, seriously thwart the Congressional objective that paratransit systems be comparable to fixed route systems. Congress' purpose in enacting the ADA's transportation provisions was its recognition of reliable transportation as paramount to the full integration and mainstreaming of persons with disabilities into society. See H. Rep. No. 101-485, pt. 2, at 37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 319. Accord S. Rep. No. 101-116, at 13 (1989). Such integration is impossible if substantial numbers of ADA-eligible riders are routinely deprived of opportunities to hold jobs, keep medical appointments or attend social functions due to artificial capacity constraints. SEPTA's routine, repeated capacity denials effectively ensure that critical paratransit service is available to eligible riders only when enough users do not desire it. The United States thus respectfully submits that SEPTA's operational patterns and practices of substantial trip denials significantly limit the availability of paratransit services to ADA-eligible riders in southeastern Pennsylvania in violation of the ADA and federal paratransit regulations.

VI. ARGUMENT

SEPTA's Artificial Capacity Constraints and Noncompliance with the Next-Day Response Time Mandate Violate the ADA and Federal Paratransit Regulations.

The ADA and DOT implementing regulations prohibit "capacity constraints" by paratransit providers, including the existence of "[a]ny operational pattern or practice that significantly limits the availability of service" which includes, but is not limited to, "[s]ubstantial numbers of trip denials". 49 C.F.R. § 37.131(f)(3)(i)(B). A pattern or practice "involves regular, or repeated actions, not isolated, accidental, or singular incidents. A...trip denial now and then does not trigger this provision." 49 C.F.R. Pt.

37, App. D.

To further clarify what constitutes a prohibited pattern or practice, the paratransit regulations specifically exempt "[o]perational problems attributable to causes beyond the control of the entity," such as unforeseeable weather or traffic conditions affecting all vehicular traffic, from forming the basis of an unlawful pattern or practice. 49 C.F.R. § 37.131 (f)(3)(ii). However, factors resulting in substantial trip denials that the entity can avoid or control but fails to constitute prohibited capacity constraints. Thus, for example, if an entity regularly fails to maintain its vehicles so that frequent mechanical breakdowns occur resulting in missed trips, an unlawful pattern or practice may exist. 49 C.F.R. Pt. 37, App. D. Similarly, frequent late arrivals resulting from scheduling practices which fail to take into account regularly occurring traffic conditions (*i.e.*, rush hour) may also so qualify. Id.

A. SEPTA's Operational Patterns and Practices of Substantial Trip Denials Constitute Unlawful Capacity Constraints.

The United States respectfully submits that the undisputed record evidence of SEPTA's next-day, weekend and peak hour trip denials clearly qualifies as "substantial" in the manner contemplated by the regulations. Between May 1999, and May 2000, inclusive, SEPTA's capacity trip denials constituted 13.4% of next-day trip requests during this period. Stip. No.23. SEPTA denied next-day trip requests every single day during this thirteen-month period, averaging 30 denials per day. Id. On a monthly basis, SEPTA's next-day trip denials ranged from 8.9% to as high as 23.7%. Id.

During this same period, SEPTA's capacity trip denials constituted 9.1% of weekend demand (non-standing) service requests. Stip. No. 24. Even though SEPTA receives more than 50% fewer trip requests on weekends than weekdays, SEPTA denied trip requests every single weekend day during this thirteen-month

period at an average of 75 denials per weekend day. Id. On a monthly basis, the percentage of weekend trip denials ranged from 2.6% to 19.8%. Id. Evidence of peak-hour trip denials during May 1999 and May 2000, inclusive, reveals that SEPTA's capacity denials constituted 6.4% of the total peak hour trip requests during the period. Stip. No. 25. SEPTA denied peak hour trip requests on all but one weekday during this thirteen-month period, averaging 66 denials per day. Id. On a monthly basis, SEPTA denied 4.7% to 11.4% of peak hour trip requests. Id.

Even when viewed in the aggregate, SEPTA's overall trip denials significantly limit paratransit availability to eligible patrons who experience trip denials every single day. Between May 1999 and May 2000, inclusive, SEPTA denied 5% of the paratransit demand (non-standing) service requests, averaging 74 denials per day every day of this thirteen-month period. Stip. No. 22. On a monthly basis, the percentage of trip denials (compared only to demand service trips) ranged from 3.2% to 10.6%. Id. In addition to routine daily denials, on certain days SEPTA's denial rates are considerably higher. For instance, on Christmas Day 1999, 225 eligible riders – over 19% of the requests that day – were deprived of spending the holiday with friends or family because of existing capacity constraints. See Attachment 1 to Stips.

As discussed fully *infra*, the frequency and consistency of these capacity denials are not due to forces outside of SEPTA's control. The regulations make clear that the type of operational problems that excuse trip denials are limited to unforeseeable events at the time a trip is scheduled such as a snowstorm, accident or hazardous materials incident that prevent all vehicular traffic. See 49 C.F.R. § 37.131(f)(3)(ii); see also 49 C.F.R. Pt. 37, App. D. As Plaintiffs correctly assert in their brief, although such unanticipated events may affect the number of missed trips or late arrivals,

they should not impact SEPTA's scheduling of paratransit trips. See Pl. Brief at 35. Paratransit scheduling, like all transit scheduling, requires an accurate assessment of the service demand, available inventory of vehicles and staff, and the effective deployment of those resources. As discussed below, SEPTA's substantial trip denials reflect a deliberate choice not to allocate sufficient resources to meet paratransit demand and are thus inexcusable under the ADA and implementing regulations.

Whether viewed categorically or in the aggregate, the stipulated data regarding SEPTA's paratransit trip denials unequivocally demonstrates an operational pattern in which eligible users are denied demand trip requests consistently every single day. That such denials constitute "regular or repeated actions" as opposed to "isolated, accidental or singular incidents" is clear. See 49 C.F.R. Pt. 37, App. D. In an attempt to avoid this conclusion, SEPTA argues, "[i]t is only when there is a pattern or practice of trip denials that a transportation authority would be in violation of this regulation. A transportation authority would not be in violation of the regulation each time that it is unable to provide a ride." Def. Brief at 23. See also id. at 25 ("[P]laintiffs take the position that even one denial is substantial.").

SEPTA's argument disingenuously advocates viewing each and every one of its denials separately as isolated occurrences. However, percentages of next-day trip denials ranging as high as 23.7%, and weekend trip denials ranging as high as 19.8%, hardly qualify as the type of "trip denial [occurring] now and then" that the regulations exempt in calculating whether substantial trip denials exist. No doubt SEPTA would prefer that each of the 74 daily trip denials, 30 daily next-day denials, 75 daily weekend denials and 66 daily peak hour denials be viewed as distinct, unrelated offenses. To do so, however, would overlook the very type of operational pattern that the regulations were

designed to prevent. Given the frequency and consistency with which thousands of SEPTA's paratransit patrons have been consistently denied trips on a daily basis, SEPTA's attempt to disguise this discriminatory pattern as insubstantial is wholly unsupportable. When substantial numbers of ADA-eligible riders are daily prevented from holding jobs, voting or keeping medical appointments due to avoidable capacity denials, the existence of an unlawful operational pattern cannot seriously be disputed.

Moreover, the ability of a paratransit entity to meet a high percentage of demand in no way disproves the existence of substantial capacity denials. Although SEPTA acknowledges that it fails to meet total paratransit demand, it nevertheless contends that "such a failure to provide a ride to each eligible person who requests a ride is not a violation of the ADA or the regulations because there are not a substantial number of denials." Def. Brief at 24-25. SEPTA argues that because it is required to provide only a substantial number of paratransit reservation to ADA-eligible patrons, it meets its paratransit obligations. Id. at 1; see also id. at 23 ("Section 37.131 does not require a transportation authority to provide a paratransit ride to every patron who requests a ride. Rather, it requires SEPTA to offer and provide an unspecified number of rides.").

SEPTA's argument that meeting nearly all, rather than all, paratransit demand is sufficient to satisfy its paratransit obligations not only misstates the law, but fundamentally misconstrues the statutory intent behind the enactment of the ADA and implementing DOT regulations. The plain language of Section 37.131 does not require that paratransit entities provide *a substantial number of reservations*, but rather prohibits an entity from engaging in any operational pattern resulting in *a substantial number of trip denials.* As the former FTA Administrator, Gordon Linton, explained in a Department of Transportation letter dated April 15, 1996 interpreting Section

37.131,[5] "[i]n considering the relationship between service capacity and trip denials, it is probably more useful to focus on the number and nature of trip denials rather than the percentage of demand met." See Ex. D at 1. Indeed, focusing on the percentage of demand met rather than the number of denials obscures an accurate assessment of whether an entity's paratransit service is functioning at a level comparable to its fixed route service as contemplated by the ADA. As Mr. Linton explained, "[a]n operator may be capable of meeting a very high percentage of total demand for its paratransit service and still have an ADA-eligible rider who experiences substantial trip denials." Id. Indeed, SEPTA's denial rates of 13.4% of next-day requests, 9.1% of weekend requests, 6.4% of peak hour requests and 5% of overall requests, demonstrate the precise situation described by Mr. Linton in which substantial numbers of eligible riders are denied service notwithstanding SEPTA's ability to meet a high percentage of demand. As Mr. Linton correctly concluded, such an operational pattern constitutes discrimination in violation of ADA or, at the

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[5] The United States respectfully submits that DOT's interpretive letters wholly support Plaintiffs' position in this case. In its brief, SEPTA challenges the persuasive authority of these letters, arguing that while the interpretations are "interesting and informative, they are entitled to no more weight than the views set forth in the memoranda of law of the parties in this action." Def. Brief at 24. SEPTA's contention seriously understates the persuasive authority of an agency's interpretations of its own regulations. As this Court aptly observed, "[w]hen an agency's interpretation of its own regulation is at issue, the deference owed to that agency is [] vast." Advanced Career Training v. Riley, 1997 WL 476275 at * 7 (E.D.Pa.); see also Director of Workers' Compensation Programs v. Eastern Assoc. Coal Corp., 54 F.3d 141, 147 (3d Cir. 1995); and Connecticut General Life Ins. Co. v. Commissioner of Internal Revenue, 177 F.3d 136 (3d Cir. 1999)("[A]n agency's consistent interpretation of its own regulation will be accorded substantial deference...and [courts] must defer to the [agency's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'")(internal citation omitted). Under the Supreme Court's recent decision in Christensen v. Harris County, 120 S.Ct. 1655, 1663 (May 1,2000), DOT's letters are also "entitled to respect" to the extent the interpretations have the "power to persuade."

very least, evidences an unlawful capacity constraint. See id.

SEPTA's assumption that a certain percentage of regularly occurring trip denials does not violate the law also overlooks the regulatory requirement that trip denials must result from forces outside the provider's control in order to be excused. SEPTA relies heavily on language from Mr. Linton's April 15, 1996 letter stating that "[t]he Department's ADA regulation does not require that all trip requests (from eligible riders) must be served in order for an operator to be in full compliance, neither does it provide a number or percentage of trip denials that is considered to be acceptable." Def. Brief at 23 (quoting Ex. D at 1). SEPTA's reliance on this isolated statement fundamentally misapprehends the way in which the "substantial denials" requirement is qualified by the exemption for operational problems outside the provider's control. As the FTA's Chief Counsel, Patrick Reilly, explained in a subsequent DOT interpretive letter, dated December 28, 1999,

> **the term 'substantial number' as used in Section 37.131 cannot be read to allow a transit agency to make operational decisions to serve less than all eligible riders**. The assumption of section 37.131 is that operational decisions designed to serve all eligible riders will lead to an insubstantial number of denials because of elements beyond the transit agency's control.

Ex. B at 2(emphasis added). Indeed, denials resulting from forces outside the entity's control will likely be insubstantial precisely because of the infrequency of such forces. That entities are not held to an unconditional rule of compliance does not, as SEPTA contends, reflect lack of concern for providing paratransit service to 100% of eligible riders, but rather DOT's common sense recognition that forces outside the provider's control will sometimes prevent it from doing so. SEPTA's repeated substantial trip denials, due to forces within its control, are thus inexcusable under the established regulatory scheme.

B. The Factors Responsible for SEPTA's Operational Patterns and Practices of Substantial Trip Denials Are Within Its

Control.

The undisputed facts in this action reveal that there are no forces outside SEPTA's control responsible for its routine capacity trip denials, and nothing in the record demonstrates that SEPTA is unable to remedy this operational pattern. See, e.g., Deposition of Cheryl Spicer, at 144-145; 161-162. On the contrary, SEPTA's substantial trip denials reflect deliberate choices not to allocate sufficient resources to meet paratransit demand and, as such, constitute unlawful operational practices which substantially limit the availability of paratransit service to ADA-eligible riders throughout southeastern Pennsylvania.

According to the stipulations, SEPTA owns 321 paratransit vehicles which it leases to three carriers. Stip. No. 14. It is SEPTA's prerogative to choose the number of vehicles dispatched on any given day. Deposition of Warren Montague at 27; Spicer Dep. at 188, 125. Notwithstanding the considerable weekday paratransit demand, on an average weekday SEPTA uses only 278 of its 371 paratransit vehicles, with 6 to 30 of the remaining vehicles routinely out of service due to mechanical problems or preventative maintenance. Stip. No. 16. Rather than use the remaining vehicles to decrease trip denials, they are set aside as part of a "spare ratio." Montague Dep. at 26-27. Prior to January 2000, SEPTA only used approximately 250 vehicles on average for daily paratransit trips, Stip. No. 17, but subsequently increased its trips from 250 to 270. Id. at 26. SEPTA could still increase the number of vehicles used on a daily basis to 290 within its current contract. Id.

SEPTA has never endeavored to dispatch additional available vehicles within its spare ratio in order to decrease capacity trip denials. Stip. Nos. 18 and 19. Nor has SEPTA calculated how many vehicles within its spare ratio are actually used on a daily basis to replace in-service vehicles that break

down. See Spicer Dep. at 147. With respect to weekend trip denials, SEPTA uses only 85 of its vehicles on Saturdays and 67 on Sundays (approximately 25% of its total 253 vehicles), even though doing so consistently results in an average of 75 denials each weekend day. Stip. No. 20.

Despite SEPTA's awareness that it daily deprives ADA-eligible riders of transportation, it has not expanded its capacity. Moreover, it has not even attempted to determine the feasibility of alternate transit mechanisms that might allow it to meet full paratransit demand. As plaintiffs correctly argue in their brief:

> SEPTA has undertaken no studies to determine how many additional tours, vehicles or staff are necessary to meet full paratransit demand and eliminate capacity denials. Spicer Dep. at 28, 29, 103-104; Pl. Brief at 16;
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> SEPTA has undertaken no studies to determine the feasibility of providing alternative transportation such as taxicabs as a back-up system to meet excess paratransit demand and eliminate capacity denials. Spicer Dep. at 25; Pl. Brief at 17;
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> SEPTA has undertaken no studies to determine whether reducing the time for advance reservations, thereby potentially reducing cancellations and no-shows, would enhance its ability to meet full paratransit demand and eliminate capacity denials. Stip. No. 32; Pl. Brief at 17;
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> SEPTA has not evaluated the budgetary cost increase of eliminating capacity trip denials and meeting full paratransit demand. Stip. No. 33; Pl. Brief at 17;
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> SEPTA's budgets are designed to meet its current, inadequate level of paratransit service rather than the entire projected increase in paratransit demand. Spicer Dep. at 82; Pl. Brief at 17.

Of considerable importance, in March 2000, the FTA reviewed and reported on SEPTA's paratransit budget and operations. Stip. No. 34. Prior to the FTA report's release, SEPTA based its paratransit budgetary requests solely on the number of paratransit trips actually provided, excluding capacity trip denials. Id. FTA concluded that this budgetary approach was flawed, and recommended that SEPTA henceforth include its capacity denials in its budget calculations in order to more accurately estimate paratransit volume. Id.

Despite this recommendation, SEPTA's paratransit budgetary requests for the upcoming year continue to assume a 2-3% trip denial rate. Stip. No. 35. Furthermore, when asked during a deposition whether providing service in those instances when SEPTA issued capacity denials would result in an increase of SEPTA's budget request, SEPTA's President and CEO responded, "I don't know. That's something we have to work out. I don't know those numbers." Spicer Dep. at 32.

SEPTA's failure to maximize use of existing capacity in order to ameliorate its daily, consistent capacity denials clearly contravenes its regulatory paratransit obligations.[6] As a Title II public paratransit provider, it is SEPTA's legal responsibility to gauge the number of vehicles, drivers and routes necessary to meet full demand, as well as to maintain the necessary flexibility to accommodate changing demand. Such flexibility may require that, for a substantial period of a given year, a significant number of vehicles or drivers are unused in order to ensure the capability to deal with contingencies that might otherwise prevent meeting full demand. SEPTA, in clear disregard of its legal obligations, argues that "[s]uggesting that SEPTA use more of its vehicles is misguided. SEPTA follows a prudent policy of keeping a reasonable number of vehicles out of service on the streets each day." Def. Brief at 26.

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[6] The parties have stipulated that approximately 50-55% of all paratransit rides scheduled serve elderly patrons who participate in a program called the "shared ride program." Stip. No. 9. Despite the specific requirements related to complementary paratransit, SEPTA does not give priority to ADA-eligible riders over those participating in the shared ride program, since service is provided on a first-come, first-served basis. Deposition of June Smith at 16; Spicer Dep. at 96; Stip. No. 10. Although it certainly is commendable that SEPTA has endeavored to provide assistance to the elderly community, it does not excuse non-compliance with the specific requirements of complementary paratransit for ADA-eligible patrons. If SEPTA desires, in its discretion, to continue its shared ride program for elderly patrons, it cannot do so at the expense of those patrons legally entitled to paratransit service.

Implicit in SEPTA's argument is the assumption that it would make bad business sense to encroach into its spare ratio in order to reduce or eliminate capacity denials. Not surprisingly, this argument mirrors those proffered by transit authorities in opposing the regulations during the commentary period prior to DOT's final enactment of the regulations. Providers similarly complained that stringent paratransit requirements would force them to purchase or maintain excess capacity, thereby increasing costs. See 56 Fed. Reg. at 45,608. In rejecting this argument, DOT made clear that in order to ensure comparability between fixed route and paratransit systems, providers must maintain adequate capacity to avoid the type of systemic denials of service that constitute capacity constraints. See id.; see also 61 Fed. Reg. 25, 409, 25, 412-13. Indeed, the undisputed data demonstrates that SEPTA could eliminate its weekend capacity denials simply by maximizing use of its existing fleet to accommodate weekend demand. See Stip. No. 20. The United States respectfully submits that SEPTA cannot continue to employ a deficient paratransit system that underutilizes existing resources to achieve minimal compliance with the law, while simultaneously relying upon those inadequacies to excuse such noncompliance.

Insofar as SEPTA's existing resources are insufficient to meet full paratransit demand, its failure to expand current capacity likewise violates the ADA. As FTA's Chief Counsel has explained, "those matters which the transit agency controls, such as decisions on resources for paratransit services, must be designed to meet the demand by all eligible riders, rather than some subset of total demand." Ex. B at 2. Accordingly, as the FTA made clear, capacity denials due to lack of vehicles violate the ADA. Id. at 3. As Mr. Reilly concluded, "Operators must monitor current ADA complementary paratransit usage, acquire additional service based on projected demand, and maintain the ability to respond to surges in demand." Id.

SEPTA's argument that uncontrollable fluctuations in paratransit demand prevent it from fully complying with its legal obligations is equally unsupportable. See Def. Brief at 7, ftnt. 9 ("[T]he greatest force outside of SEPTA's control that is responsible for SEPTA not being able to provide a reservation to every ADA-eligible person is the ever-changing demand for paratransit services."). Inability to predict fluctuating demand and inadequate resources cannot excuse an operational pattern or practice of substantial capacity denials. Were it otherwise, paratransit providers could easily eschew their legal obligations by choosing to meet a minimal level of paratransit demand, and justifying their refusal to increase capacity to meet full demand as an unavoidable consequence of unpredictable demand fluctuation. As FTA's Chief Counsel has explained, however, a transit entity's failure to maintain adequate capacity to respond to 100% of paratransit demand at all times denies ADA complementary paratransit service in violation of ADA:

> **A transit agency must be able to deal with the swings in demand when administering its ADA complementary paratransit service, just as it would on its fixed routes.** How a transit agency deals with these swings in demand is its prerogative. For instance, it can have an extra contractor available for times when demand exceeds the transit agency's own fleet, or it may simply increase the size of its fleet, or any other method it chooses that works to accommodate any peaks in demand. However, if a transit agency has not adequately dealt with this issue, and the transit agency denies ADA complementary paratransit service to a qualified individual with a disability because it does not have the capacity to respond to demand, the denial of ADA complementary paratransit service is discrimination within section 202 of the ADA.

Ex. A at 1.

This position is entirely consistent with the Department of Transportation's previous interpretation reflected by its amendments to the paratransit regulations. In 1996, DOT rescinded the 14-day advance reservation requirement which mandated that paratransit entities permit patrons to schedule reservations up to two weeks in advance of a requested ride. 61 Fed. Reg. 25,409; 25,412-13 (1996). DOT repealed this requirement,

explaining:

> It should be emphasized that, in order to meet Part 37 requirements, all paratransit systems must provide at least one-day advance reservations at all times. One of the apparent reasons that users take advantage of existing advance reservation systems in large numbers is their apprehension that, if they wait until the day before travel, the capacity of the system to serve them will have been exhausted. This can lead, in turn, to the scheduling, no-show, and cancellation problems cited in many comments. **To make a short-term reservation or real time scheduling system work properly, transit providers need to make sure that adequate vehicle capacity is available, such that systematic denials of service do not exist to an extent that would constitute a capacity constraint.**

Id. at 25,413 (citation omitted; emphasis added). As Plaintiffs correctly point out, DOT recognized that while transit entities required greater flexibility in scheduling in order to meet paratransit demand, it was their responsibility to maintain sufficient capacity to respond to next-day service requests. There can thus be no question that repeated trip denials due to lack of adequate vehicles was considered both preventable and unlawful under the revised regulatory scheme.

Furthermore, not all trip denials resulting from fluctuating demand violate the regulations. Occurrences which cause an unanticipated increase in demand, such as unique sporting or entertainment events, may result in intermittent trip denials for which transit providers are not held accountable. See 49 C.F.R. Pt. 37, App. D. SEPTA, however, appears not to be claiming incapacity or inadequate resources to meet demand, but rather the inconvenience of accommodating vagaries in demand. Nothing cited by SEPTA nor stipulated to in the record indicates that any such swings are so drastic as to genuinely deprive SEPTA of its ability to provide full service in such situations. Moreover, SEPTA not only maintains inadequate capacity to serve full paratransit demand, but refuses to assess the additional resources necessary to do so. As Plaintiffs point out, SEPTA has not considered the feasibility of back-up transportation methods to assist in meeting excess

demand, see Spicer Dep. at 25, nor has it evaluated the volume of additional vehicles or drivers required to meet demand. Id. at 28, 29, 103-104. Despite FTA's clear recommendation, SEPTA has not revised its budgetary requests to account for the increased paratransit demand of which it is clearly aware, see Stip. No. 33; to the contrary, SEPTA's budget continues to assume a 2-3% denial rate of paratransit service requests. See Spicer Dep. at 82. Nowhere in its brief does SEPTA explain or otherwise account for these failures.

Finally, SEPTA's refusal to even consider the steps necessary to ameliorate its existing capacity constraints indicates blatant disregard for compliance with regulations with which it disagrees. The federal paratransit regulations clearly forbid transit providers from providing anything less than full service and meeting full demand except under circumstances outside the provider's control. Although it consistently deprives its patrons of paratransit service every single day, "SEPTA believes that it is in compliance with the law and, therefore, does not need to try to determine what steps need to be taken to meet 100 percent of demand." Def. Brief at 26. SEPTA's apparent indifference to the masses of disabled individuals unable to hold jobs, keep medical appointments or otherwise participate in society due to its own systemic inadequacies is particularly troublesome in light of the feasibility of eliminating many, if not all, of its capacity constraints. More importantly, SEPTA's refusal to do so is legally indefensible under the ADA and federal paratransit regulations.

C. SEPTA's Chronic Failure to Provide Next-Day Service Violates the Next-Day Response Time Mandate of the Federal Paratransit Regulations.

The response time mandate of the ADA and federal paratransit regulations requires public transit entities "to schedule and provide paratransit service to any ADA paratransit eligible person at any requested time on a particular day in response to a request for service made the previous date." 49 C.F.R.

§ 37.131(b). Also referred to as "next-day scheduling," this mandate compels entities to provide next-day service without scheduling a trip more than one hour earlier or later than the time requested. See 49 C.F.R. Pt. 37, App. D. Thus, just as riders cannot demand immediate service upon request, providers cannot deny a requested trip made the previous day. Id.; see also Pl. Brief at 34.

SEPTA's routine, substantial trip denials not only violate the regulatory prohibition against capacity constraints, see § 37.131(f)(3)(i)(B), but violate the next-day response time requirement contained in Section 37.131(b) and, as such, constitute a separate actionable offense. As discussed *supra*, the undisputed data reveals that SEPTA denied next-day trip requests every single day for a thirteen-month period, constituting 13.4% of all next-day trip requests. See Stip. No. 23. SEPTA's President and CEO conceded in deposition that these denials do not result from forces outside of its control. See Spicer Dep. At 144-45. Furthermore, SEPTA's next-day service performance deteriorated even further from March 2000 through May 2000, such that 13.7% of all next-day trip requests were denied during that period averaging 37 denials per day. See Stip. No. 23 and Attachment 3 to Pl. Brief.

The United States respectfully submits that SEPTA's interpretation of its legal obligations under the next-day scheduling requirement fundamentally misconstrues the regulation's plain language and legislative intent. In its brief, SEPTA argues that next-day scheduling does not unconditionally require next-day service for each ride requested, but only that transit entities make reservation services available during the hours its administrative offices are open. Def. Brief at 20-21 (citing 49 C.F.R. Pt. 37, App. D). By its very language, however, the regulation unambiguously mandates that entities "schedule and provide paratransit service" to any ADA-eligible rider for a

trip requested the previous day. 49 C.F.R. § 37.131(b). SEPTA's interpretation thus erroneously conflates this requirement regarding the mandatory *provision of requested rides,* see § 37.131(b), with the separate requirement regarding *availability of reservation services* to schedule such rides, see § 37.131(b)(1). Moreover, SEPTA's interpretation would render meaningless the prohibition against substantial trip denials if entities were required only to ensure the availability of reservations without the concomitant obligation to actually provide the requested rides.

SEPTA continuously deprives ADA-eligible users from the type of reliable transportation necessary to hold jobs, keep medical appointments and attend social functions. As Plaintiffs aptly observe in their brief, paratransit users are already disadvantaged by their inability to obtain immediate transportation if needed, see Pl. Brief at 37; this disadvantage is compounded when they are unable even to secure rides in advance due to avoidable capacity constraints. SEPTA's routine, repeated capacity denials thus effectively ensure that critical paratransit service is available to eligible riders only when enough patrons do not desire it. This point is underscored by SEPTA's own argument that some ADA-eligible patrons who experienced capacity denials may have ultimately secured a requested ride if they made multiple requests to secure the ride or if cancellations occurred. Def. Brief at 4; see also Richman Dep. at 89-90 (stating that paratransit riders avoided scheduling next-day trips at peak hours because of the probability of being denied service). Such a result not only directly contravenes the comparability requirement between paratransit and fixed route service, but effectively eliminates Congress' stated objective of ensuring that persons with disabilities be integrated and mainstreamed into American society.

D. Potential Deficiencies in its Fixed Route System Do Not Excuse SEPTA's Noncompliance with its Paratransit Obligations.

Finally, the United States submits that inadequacies in SEPTA's fixed route system does not relieve it of its legal paratransit obligations. In its brief, SEPTA argues that Plaintiffs have the burden of demonstrating that SEPTA's fixed route system meets 100% of demand. Def. Brief at 26. This assertion is incorrect. As FTA Chief Counsel made clear in a letter dated August 15, 2000, a transit entity may avoid liability under the ADA if "the transit entity can demonstrate with empirical evidence that it has equally high level[s] of denials on both its fixed route system and its ADA Complementary Paratransit System." Ex. C at 1 (emphasis in original). However, the entity cannot merely rely on the fact that both systems are equally inadequate in meeting demand, but would also have to demonstrate that it does not plan to increase the capacity of its fixed route system, *i.e.*, by acquiring additional or larger vehicles, more efficient scheduling, or contracting for additional service, without employing the same measures to increase its paratransit capacity. Id. at 2. Since Plaintiffs have provided evidence of SEPTA's operational patterns and practices of substantial trip denials, SEPTA has the burden of proving that its fixed route system generates an equal (or greater) number of denials. Even if SEPTA met this burden, it would also have to prove that it does not intend to employ steps to expand its fixed route capacity without using the same steps to increase capacity on its paratransit system. SEPTA has made no such showings.

Even assuming that SEPTA could demonstrate comparable deficiencies between its fixed route and paratransit systems, the injury sustained by its users is still not commensurate with that experienced by its paratransit users. As the Department of Transportation observed, fixed route users forced to forego a ride due to overcrowding need only catch a subsequent bus, whereas paratransit users faced with the same situation may be altogether prevented

from obtaining transit service. According to DOT,

> Certainly no system administrator tells a [nondisabled] passenger that he can forget about traveling that day because he has already ridden the bus 20 times that month or that he needs to work his way to the top of a waiting list before he can elbow his way onto a train. If the administrator of a paratransit system tells a similar story to a passenger, it is not a story about a comparable system.

56 Fed. Reg. at 45,608. Similarly, as FTA's Chief Counsel explained:

> [T]he effect of denials on the fixed route system would have to be the same as the effect of the denials on the paratransit system. For instance, an able-bodied passenger who is passed by a bus need only wait for the next bus, which usually entails a wait of some minutes. A passenger with a disability who is dependent on ADA Complementary Paratransit system and who is denied a ride, however, typically has to wait one or more **days** to have their needs met. Therefore, **'trip denials' on the fixed route system would be comparable only if the injury (the time a passenger must wait until her demand is met) is the same. As a practical matter, however, a trip denial on the ADA Complementary system inflicts a much more serious injury than does a trip denial on the fixed route system.**

Ex. C at 2 (first emphasis in original; second emphasis added). Accordingly, SEPTA cannot escape liability for its paratransit service violations on this ground.

VII. CONCLUSION

Based on the above, it is clear that SEPTA is in violation of Title II the ADA and implementing Department of Transportation implementing paratransit regulations as alleged by the Plaintiffs. The United States respectfully requests that this Honorable Court grant summary judgment in favor of Plaintiffs, and deny Defendant's motion for summary judgment.

Respectfully Submitted,

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