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[Comments on STURA Act's Effects on Funding for Los Angeles Metrorail System]

Number: B-226887

Date: 1987-09-17

B-226887 September 17, 1987

1. Section 338 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 directs the Secretary of Transportation to amend the grant contract with the Southern California Rapid Transit District to increase the federal share of the Los Angeles to San Fernando Valley Rapid Rail project by about $870 million. Once the contract is amended, the commitment of the United States will be fixed and the Congress will be required to appropriate the funds needed to pay the federal share of the project. 2. Subsection 338(d) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 does not expand the potential liability of the United States to the Southern California Rapid Transit District for the Los Angeles to San Fernando Valley Rapid Rail Project beyond the maximum federal share of the project set by subsection 338(c) of the Act. Although the provision authorizes the District to proceed with construction of the project prior to a mandated amendment of its contract with the Department of Transportation, and specifies a reimbursement schedule for expenses incurred by the District, the amount of reimbursement may not exceed the total federal share of the project. Further, should the District choose to proceed with construction prior to amendment of the contract, the Congress would be required to appropriate funds to reimburse the District for its expenses.

Nicholas J. Glakas, General Counsel Committee on Appropriations United States Senate

Dear Mr. Glakas:

This is in response to the concerns you expressed in your letter of April 17, 1987, about the impact of section 338 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURA Act), on your Committee's ability to control the amounts of public funds expended in future years to build a metrorail system in downtown Los Angeles. You are particularly concerned about subsection (d) of section 338 which permits the Southern California Rapid Transit District (District) to proceed, at its own expense, with the construction of Phase 1 of the Los Angeles project with a guarantee that those expenditures will be reimbursed by the government up to the limit of the authorized federal share. You ask if we agree with your interpretation of the Act, and if so, what options your Committee has to "remedy this matter."

We agree with your general assessment of the effect of the STURA Act although we differ on some specific points, as will be explained below.

As you know, the Urban Mass Transportation Administration (UMTA), Department of Transportation, already has an existing contract with the District to construct

Phase 1 of the Los Angeles Rail Transit Project, which is funded from the Mass Transit Account of the Highway Trust Fund. Although you refer to this program as a "discretionary grant program," once the Secretary of Transportation has decided to approve the grant, "it shall be deemed a contractual obligation of the United States for payment of the federal share of the cost of the project." 49 U.S.C. App. Sec. 1617(a)(2)(C). Thus, even before enactment of the STURA Act, the Congress was required to enact annual liquidating appropriations. In other words, congressional discretion was already limited by the need to honor the contractual obligation incurred by the Secretary.

Section 338 of the STURA Act is headed "Multi-year Contract for Metro Rail Project." It extended the previously existing funding relationship through fiscal year 1991 to enable the Department to amend its contract with the District to cover an expanded Phase 1 and a new Phase 2 portion of the Los Angeles metrorail project. The expanded contract, however, cannot be executed until the Secretary has prepared and published a final supplemental environmental impact statement (EIS), in accordance with the National Environmental Policy Act of 1969, pertaining to changes which might be caused by the expanded Los Angeles Metrorail project. Subsection 338(a). There are various provisions designed to assure that the Secretary would not be able to postpone the amendment of the existing metrorail project contract indefinitely by unduly delaying the completion of the EIS. The principal significance of the EIS prerequisite is that it may provide the Committee with extra time to consider amendments to the STURA Act. See discussion of your options, infra.

There are some other important changes provided in subsection 338(c). The federal share of the costs for the expanded Phase 1 (referred to in the Act as "Minimum Operable Segment-l") portion of the project was set at $605,300,000; the Phase 2 (Minimum Operable Segment-2) federal share of the costs was set at $667,000,000. The total federal share of $1,272,300,000 amounts to approximately $870,000,000 above existing contractual obligations to the project. See H. Rep. No. 27, 100th Cong., 1st Sess. 235 (1987).

Paragraph (2) of subsection 338(c) sets out a payment schedule of "not to exceed" amounts for each fiscal year, beginning with FY 1987 through FY 1991. However, if funds are not made available from the Trust Fund to pay the specified amount in any fiscal year, it is added to the amounts due in the succeeding fiscal year. By FY 1991, the entire increased federal share of $870,000,000 would be due (or so much of it as is necessary to cover the federal share of project costs incurred by the District). If the Congress refuses to appropriate sufficient funds from the Trust Fund to cover these costs, I think that the government would be liable for breach of its contractual obligation to the District. Unless the Act is amended before the Secretary has been able to enter into the expanded contracts with the District to cover these additional costs, I do not think your Committee and the Congress as a whole has a realistic option to refuse to make the necessary funds available.

Subsection 338(d) authorizes the District to construct the Phase 1 portion of the project with its own funds, without waiting for federal funding to be made available and without the need to receive advance approval from the Secretary, as would otherwise be required by subsection (3)(1) of the UMT Act.

Paragraph 338(d)(3) sets out a schedule for reimbursement of the District in the years 1992 through 1994. Note, however, that the law does not provide that the transit district "will be reimbursed for whatever costs are ultimately

incurred," as you suggest. Instead, the reimbursement provision is specifically tied to the maximum federal share for Phase 1 projects, as provided by subsection 338(c)(1), subtracting any amounts already paid to the District under its existing or amended contract.

As mentioned earlier, the STURA Act did not originate the kind of funding relationship that turns an assistance grant into a binding contractual commitment in advance of appropriations to liquidate the amounts committed. This was already provided in the previously cited UMT Act. Although STURA expanded the scope of the project and increased the federal share, it left intact the provisions in the UMT Act under which the transit projects were started. The reimbursement requirement in section 338(d) is new but it only affects the timing of the payments to the District. It does not provide an open-ended indeterminate entitlement for the District to incur expenses above the amount of the federal share authorized by section 338(c) of the STURA Act.

You asked what options your Committee might have to regain control over the funding for these grants. Once the EIS is completed and the Secretary has entered into an amended contract with the District, the obligation of the federal share becomes fixed. It is my opinion that the Committee could not realistically refuse to liquidate these obligations. Similarly, if the District has actually expended funds for the Phase 1 portion of the project under the new (d) (3) reimbursement provision, the Committee could not refuse to appropriate funds to cover these costs in the future.

However, the Secretary has not yet completed the EIS, to the best of our knowledge, and therefore has not yet used her new contract authority to incur new obligations to the District. Therefore, if Senate rules will permit, the Committee could propose amendments to the STURA Act to change the funding arrangement to make all grants subject to specific provisions of a subsequent appropriation act, or to change the amount of the federal share and impose other restrictions on the length of time the funds provided remain available. In addition, if the District has not yet incurred expenses under section 338(d), the Committee can propose legislation to eliminate this provision altogether. We would be happy to provide whatever drafting assistance you might require.

As agreed to by Ms. Kathy Cordes of the Committee staff, this opinion will be made available to the public 10 days from today unless you advise us differently.

Sincerely yours,

Harry R. Van Cleve General Counsel