IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY RESOURCES, INC. and CONSUMER CONNECTION	:	**CIVIL ACTION**
Plaintiffs,	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	
Defendant.	:	**NO. 99-4837**

Reed, S.J. **August 30, 2001**

MEMORANDUM & FINAL ADJUDICATION OF INJUNCTIVE RELIEF

Presently before this Court is the motion of plaintiffs Liberty Resources, Inc. and Consumer Connection (Document No. 19) seeking relief under this Court's decision of January 4, 2001 by which this Court declared that plaintiffs were entitled to relief as a matter of law, and the response of defendant Southeastern Pennsylvania Transportation Authority ("Septa") and the accompanying memoranda of law in support and in opposition thereto. This Court conducted a hearing on July 2, 2001, and based upon on the arguments and evidence presented and the entire record, this Court now makes the following findings of fact, conclusions of law and discussion, and enters the following order for final injunctive relief.

I. FINDINGS OF FACT

A. Background Facts

1. On January 4, 2001, this Court declared that Septa was in violation of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 104 Stat. 337, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 87 Stat. 394, 29 U.S.C. § 794, for failing to provide next-day service to all ADA-eligible patrons and constraining

paratransit service by operating in a pattern or practice that significantly limits the availability of rides to ADA-eligible patrons by issuing substantial numbers of trip denials and operating a system that fails to attempt to provide rides to all disabled riders. See Liberty Resources v. Southeastern Pennsylvania Transp. Auth., No. Civ. A. 99-4837, 2001 WL 15960 (E.D. Pa. Jan. 5, 2001).

2. This Court further ordered that specific requests for further declaratory or injunctive relief be deferred as bifurcated pursuant to Federal Rule of Civil Procedure 42 (b).

3. Parties attempted to reach a consent decree. At the request of the parties, this Court participated in telephone conferences and held conferences in Chambers in an effort to facilitate settlement. Such attempts failed. After a June 13, 2001 conference held in Chambers, this Court ordered plaintiffs to file a motion for final relief and scheduled a hearing for July 2, 2001. Plaintiffs included a proposed order with their motion and Septa included a proposed consent decree with its response.

4. In order to meet the challenge faced by this Court in granting appropriate relief, this Court permitted Septa to present testimony and evidence to show what steps Septa has already taken and what steps Septa can and will take in order to comply with this Court's January 4, 2001 ruling. The following findings are based on that presentation.

B. Compliance Facts

5. Septa hired HLB Decision Economics Inc. ("HLB") to provide a projected annual paratransit demand analysis which has been lead by Khalid Bekka ("Bekka"), the Vice

President of and Partner in HLB.[1] Bekka projected the number of rides that would be requested from both ADA riders[2] and SRP riders[3] through Fiscal Year ("FY") 2003, as well as the number of vehicles Septa would need to procure to meet the projected demand. (testimony of Khalid Bekka; Septa Ex. 2).

6. Septa relied on Bekka's demand forecast, as it existed in March, 2001, to develop Septa's paratransit budget for FY 2002, which runs from July 1, 2001 to June 30, 2002, and was approved by the Septa Board of Directors on June 26, 2001. (testimony of David T. Layton, Septa's Supervisor of Budget Analysis).

7. For FY 2002, Septa has budgeted $12,978,649 to pay carriers for ADA rides and $13,824,375 for SRP rides which totals $26,803,024 for all paratransit rides. For FY 2002, Septa has budgeted 34.2 million for the entire paratransit budget. In FY 2001, Septa budgeted 29.2 million for the entire paratransit budget. (testimony of David T. Layton, Septa Supervisor of Budget Analysis; testimony of Cheryl Spicer, Septa Chief Operating Officer; Septa Exs. 3-4).

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[1] Plaintiffs stipulated to Bekka's qualifications to testify as an expert, but objected to the general nature of Bekka's testimony. (Tr. at 15, 19). At the hearing on July 2, 2001, I heard his testimony and did not rule on the issue of admissibility. This Court questions whether Bekka's testimony would meet the standards set out in Daubert and its progeny and recognizes that plaintiffs do not have their own expert and were not privy to Bekka's findings prior to the hearing. However, this Court admits his testimony as a fact witness to the extent that it is necessary and helpful in determining what steps Septa has taken and what steps Septa plans to take in order to comply with this Court's ruling of January 4, 2001. I make no findings regarding the methodology he employed, whether his methodology is reasonable or whether it serves as a sound basis for his conclusions. I acknowledge, however, that Septa has hired Bekka as a qualified, experienced expert to forecast demand and has used his conclusions as the basis for important budget decisions. Accordingly, I conclude that his testimony is admissible in order for this Court to determine how Septa can and will comply with this Court's order of January 4, 2001.

[2] "ADA riders" refers to riders eligible for paratransit service under the ADA.

[3] "SRP riders" refers to riders who are 65 years of age or older and receive paratransit rides through Septa's Shared Ride Program.

8. Septa has budgeted to maintain an adequate number of vehicles to meet the projected demand.[4] Septa has planned to procure both replacement and non-replacement, or new, vehicles to meet the projected demand. It has further planned to extend the life of certain vehicles designated for replacement until the non-replacement vehicles are procured. (testimony of Frank Brandis, Septa Contract Compliance Manager for CCT Division[5]; testimony of Cheryl Spicer, Septa Chief Operating Officer).

9. On July 1, 2001, Septa implemented an innovative scheduling procedure designed to tweak the system whereby more rides can be provided.[6] (testimony of Frank Gillespie, Septa Special Project Coordinator; testimony of Cheryl Spicer, Septa Chief Operating Officer).

10. On July 1, 2001, Septa changed its overall reservation system. Rides can now be scheduled one to three days in advance. Prior to the change, rides could be scheduled one to seven days in advance.[7] (testimony of Cheryl Spicer, Septa Chief Operating Officer).

11. On July 1, 2001, Septa began to recertify the ADA riders. The recertification process began with sending applications in alphabetical order to each ADA rider in batches of

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[4] This number includes "float" or "spare ratio" vehicles which denotes the number of vehicles procured as a cushion against non-routine maintenance.

[5] The CCT Division refers to Septa's Customized Community Transportation Division. The paratransit system is operated out of the CCT Division.

[6] This procedure was tested on April 2, 2001 and 5 denials were issued that day and on May 16, 2001 which yielded no capacity denials.

[7] In 1996, DOT amended the regulations to remove the former 14-day advance reservation requirement because many commentators believed that the two week period caused many cancellations and no-shows by riders. Thus, it is believed that changing from a 7-day advance reservation system to a 3-day system may create even fewer cancellations and no-shows by riders.

500. Upon receiving the application, the Septa Advisory Committee, which includes members of the disability community, will determine whether a functional assessment of physical and cognitive ability is needed. (testimony of Cheryl Spicer, Septa Chief Operating Officer).

12. On July 1, 2001, Septa raised the paratransit fare from $2.50 to $3.00. On April 2, 2002, Septa will raise the paratransit fare to $3.50. (testimony of Cheryl Spicer, Septa Chief Operating Officer).

13. Septa currently provides door to door service for paratransit riders. Septa is currently evaluating whether changing to a curb to curb system would be beneficial to the system. (testimony of Cheryl Spicer, Septa Chief Operating Officer).

14. Septa seems to have concluded that it will not be contracting with a cab company to provide rides to ADA riders. (testimony of Cheryl Spicer, Septa Chief Operating Officer; testimony of Richard Krajewski, Septa Paratransit Manager of Technical Analysis).

15. Septa has not investigated the possibility of using a voucher system. (testimony of Richard Krajewski, Septa Paratransit Manager of Technical Analysis). This Court expects Septa to investigate the feasibility of using vouchers to provide back-up service to Septa to eliminate capacity denials for ADA riders, and to implement such a system rather than make ADA riders suffer capacity denials.

16. Septa alluded to the implementation of a no-show policy, but no testimony was given explaining the policy in any detail. (testimony of Khalid Bekka, HLB Vice President).

17. As discussed in greater detail in this Court's ruling of January 4, 2001, 50 % to 55 % of paratransit riders are SRP riders. Septa has not contended to this Court that it is obligated

under any law to provide rides to individuals who are 65 years of age or older. While recognizing the obvious fact that a ride reserved for an SRP rider deprives an ADA rider of that ride, Septa takes the position that it is not possible to create a system whereby ADA riders would receive priority over SRP riders in terms of reserving and receiving rides.[8] (testimony of Richard Krajewski, Septa Paratransit Manager of Technical Analysis; testimony of Frank Gillespie, Septa Special Project Coordinator). This Court finds that Septa's reasons for this conclusion are not logical and represent a very limited view of a solution allowing the use of SRP reservations for ADA riders. This Court expects Septa to develop a plan forthwith to give ADA riders priority over SRP riders so to eliminate all together capacity denials for ADA riders.

18. Septa submitted into evidence a report which details ADA paratransit statistics for the month of May, 2001. According to this Court's arithmétic calculations from that report, for the month of May, Septa issued 1,220 capacity denials which averages to 39 capacity denials each day and 23 next-day denials.[9] (Septa Ex. 5).

19. Septa has demonstrated that it is capable of providing rides to ADA-eligible riders as required under the ADA as interpreted by this Court's ruling on January 4, 2001. Both Cheryl Spicer, Septa's Chief Operating Officer, and Richard Krajewski, Septa's Paratransit Manager of Technical Analysis, testified that in four months from the hearing,

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[8] Spicer testified that if Septa is unable to extend the life of enough paratransit vehicles to meet the projected demand during the time it is waiting to procure new vehicles (Finding of Fact No. 8), as a "worse case scenario . . . we would have to result to doing substantial denials to the senior population." (Tr. at 154.)

[9] Septa has also experienced problems with one of its carriers, Atlantic, whereby scheduled rides have been cancelled. It appears that Septa is taking proper steps to correct this problem.

which would be on or about November 1, 2001, Septa expects to issue zero (0) trip denials. (Tr. at 146, 225).

II. CONCLUSIONS OF LAW & DISCUSSION

A. Equitable Powers of this Court

The Supreme Court of the United States has observed that:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould [sic] each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S. Ct. 587, 592, 88 L.Ed. 754 (1944)). See also United States v. Paradise, 480 U.S. 149, 183-84, 107 S. Ct. 1053, 1073, 94 L. Ed. 2d 203 (1987); Temple Univ. v. White, 941 F.2d 201, 215 (3d Cir. 1991); Tillery v. Owens, 907 F.2d 418, 429 (3d Cir. 1990).[10]

While this Court enjoys equitable powers that are broad in scope, a district court must grant relief which is not broader than what is necessary to correct the violation. See White, 941 F.2d at 215. It has been explained that "the dosage must not exceed that necessary to effect the

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[10] Unless Congress clearly states otherwise, courts are instructed to assume that Congress intended these equitable powers to remain in force. See Natural Resources Defense Council v. Texaco Refining and Marketing, Inc., 906 F.2d 934, 940 n. 6 (3d Cir. 1990). Section 12133 of the ADA enforces Section 12132 of the ADA under which this suit was brought. Section 12133 extends the "daisy-chain" of cross references by incorporating the "remedies, procedures and rights" of section 794a of Title 29 (referring to the Rehabilitation Act which is invoked by this lawsuit). See Jeremy H. by Hunter v. Mount Lebanon Sch. Dist., 95 F.3d 272, 282 n. 17 (3d Cir. 1996). That section refers to both Title VI and Title VII of the Civil Rights Act of 1964. See id. As this case does not involve employment discrimination, but rather a suit against an agency which receives federal funding, it appears that Title VI applies. Nothing in Title VI suggests that Congress intended this Court's equity powers to be changed.

cure." Id. at 216. The remedy must also "'take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" Tillery, 907 F.2d at 429 (quoting Miliken v. Bradley, 433 U.S. 267, 281, 97 S. Ct. 2749, 2757, 53 L. Ed. 2d 745 (1977)).

Plaintiffs move this Court to enter final injunctive relief. "[T]he term 'injunction' in [Federal] Rule [of Civil Procedure] 65(d) is not to be read narrowly but includes all equitable decrees compelling obedience under the threat of contempt." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2955, at 309 (2d ed. 1995). See also Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 84 F.3d 367, 370 (10th Cir. 1996) (quoting same passage). Rule 65(d) provides in relevant part, "Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Under the Rule, the party constrained "is entitled to 'fair and precisely drawn notice of what the injunction actually prohibits' because serious consequences may befall those who do not comply with court orders." Louis W. Epstein Family P'ship v. Kmart Corp., 13 F.3d 762, 771 (3d Cir. 1994) (quoting Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70, 415 U.S. 423, 444, 94 S. Ct. 1113, 1126, 39 L.Ed.2d 435 (1974)). "Broad, non-specific language that merely enjoins a party to obey the law . . . does not give the restrained party fair notice of what conduct will risk contempt." Id. (citing Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir.1987)).

B. The ADA

Upon consideration of the arguments presented at the hearing, the proposed order

submitted by plaintiffs, the proposed consent decree submitted by Septa, as well as in this Court's efforts to craft a final order for injunctive relief which complies with the ADA and this Court's equity powers, I find it necessary to clarify and review my ruling of January 4, 2001.[11]

In that opinion, I began by providing general background information concerning the ADA provision which requires public transportation agencies to provide paratransit services. See Liberty Resources, 2001 WL 15960, at *8. See also 42 U.S.C. § 12143.[12] I then turned to the Federal Regulations, where I determined by the plain language of the provision that the response time provision requires "by use of the term shall, that all ride requests must be granted for the next day, scheduled and provided within one hour of the desired departure time. . . .On its face, the regulations suggest an intent to accommodate *all* ADA-eligible callers with next-day service." Id. at *9. See also 49 C.F.R. § 37.131 (b) (response time provision).

Next, I interpreted the provision concerning capacity constraints which provides that an entity such as Septa may not limit paratransit service to ADA eligible riders by any operational pattern or practice that significantly limits the availability of service by issuing substantial numbers of trip denials unless such denials are attributed to causes beyond the control of Septa.[13] See Liberty Resources, 2001 WL 15960, at *9-10. See also 49 C.F.R. § 37.131 (f) (capacity constraint provision). I observed, *inter alia*, that the appendix to that provision notes that where

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[11] I discuss that ruling in brief here and assume a certain knowledge of some terms which are addressed more fully in that ruling. In addition, I refer only to those portions of the ruling which I find relevant in my duty to craft an order for final injunctive relief.

[12] The ADA specifically references Section 504. Thus, as explained in my prior ruling, a violation under Section 12143 of the ADA also triggers a violation of Section 504. See Liberty Resources, 2001 WL 15960, at *8 n. 22. For the sake of simplicity, in this adjudication, I refer only to the ADA, rather than the ADA and Section 504.

[13] I examine "causes beyond the control of Septa" in more detail below.

a pattern or practice violation is found, it is likely that the response time provision would be violated. See Liberty Resources, 2001 WL 15960, at *10. See also 49 C.F.R. pt. 37, App. D, § 37.131, p. 528 (2000). I emphasize that point here. In reconciling these two provisions, it becomes obvious that if an entity is operating a system which significantly limits the availability of service to ADA-eligible riders, the entity is surely violating a provision calling for all such riders to be provided next-day rides.

Upon reviewing these two provisions, agency statements contained in the federal register and multiple opinion letters authored by agency officials, I also concluded that the Department of Transportation ("DOT") expected entities such as Septa to *attempt* to provide service to all ADA-eligible riders, an obligation that Septa was failing to meet. See Liberty Resources, 2001 WL 15960, at *10, 12.

I found on the stipulated record before me that because Septa never attempted to provide rides 100 percent and because Septa issued nearly 30,000 capacity denials over a thirteen month period, which translated to a daily rate of 74 denials, including 30 next-day rides, Septa was in violation of both the response time provision and the capacity constraint provision. See id. at *12. In other words, in repeatedly providing next-day service less than 100 percent of the time and failing to operate a system which attempted to provide rides to 100 percent of ADA-eligible patrons, I held that Septa was in violation of the ADA. This holding does not mean, however, that Septa violates the ADA each and every time a next-day ride is denied.[14]

Because the parties cannot reach a consent decree, this Court is left with the awesome

[14] The appendix to the capacity constraint provision provides: "A missed trip, late arrival, or trip denial now and then does not trigger this provision." 49 C.F.R. pt. 37, App. D, § 37.131, p. 527 (2000).

task of determining the "magic number" which will trigger a pattern and practice violation (which in turn triggers a response time violation) under the ADA and its accompanying regulations – a task that DOT, unfortunately, did not accomplish. I tread cautiously on unchartered paths in fixing this number.

The actual language of the regulation fails to illuminate what would constitute "substantial numbers." To be precise, it reads:

> (f) *Capacity constraints*. The entity shall not limit the availability of complementary paratransit service to ADA paratransit *eligible individuals* by any of the following:
> . . .
>
> (3) Any operational pattern or practice that significantly limits the availability of service to ADA paratransit *eligible persons*.
> (i) Such pattern or practices include, but are not limited to, the following:
> . . .
>
> (B) Substantial *numbers* of trip denials or missed trips[.]

49 C.F.R. § 37.131 (f) (emphasis added). As observed in my previous ruling:

> A pattern or practice violation is defined as 'regular, or repeated actions, not isolated, accidental, or singular incidents.' "Substantial number" is defined further by illustration. For example, if reservation lines open at 5:00 a.m. and patrons are regularly denied rides after 7:00 a.m., then the entity would be in violation. Presumably, this extreme scenario would result in many more trip denials than in the present case. However, DOT noted that the list of examples was 'not exhaustive' and that 'other pattern or practices could trigger this provision.'

Liberty Resources, 2001 WL 15960, at *10 (quoting and citing 49 C.F.R. pt. 37, App. D, § 37.131, p. 527-8 (2000)).

The descriptive words are "eligible individuals," "eligible persons" and "numbers" not "percentages." See also id. at *12. The regulations also do not read, for example, "substantial

numbers of trip denials or missed trips as compared to the numbers of trip provided." Thus, it appears from the text of the regulations that the number of denials should be viewed in isolation from the number of trips provided.

The capacity constraint provision must also be read in conjunction with the response time provision which includes the seemingly clear language that: "[Septa] shall schedule and provide paratransit service to any ADA paratransit eligible 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). See also Torres v. Chater, 125 F.3d 166, 170-71(3d Cir. 1997) (a "well-settled tenet of statutory construction [is] that all provisions of the statute must be construed together") (citing Kowalski v. L & F Prods., 82 F.3d 1283, 1287-88 (3d Cir.1996))). Thus, one provision of the regulations appears to require that all ADA-eligible riders receive next-day rides, while another provision explains that a violation occurs once "substantial numbers" of rides have been denied for causes beyond the control of Septa. In order to resolve this apparent but not real disharmony, the number fixed by this Court must recognize the strong and definite mandate set out in the response time provision.

I also point out, as discussed previously by this Court, that DOT explicitly rejected a 98 percent performance standard. Liberty Resources, 2001 WL 15960, at *10 (citing 56 Fed.Reg. 45584, 45608 (Sept. 6, 1991)). I interpreted that rejection to suggest that DOT contemplated that providing rides 98 percent of the time failed to guarantee a "comparable" system. See id. Thus, while, as stated, the text of the regulations involves numbers and not percentages, it is also safe to presume that DOT intended a system that would provide rides over 98 percent of the time.

As indirectly noted in this Court's prior ruling, the regulations also forbid "[w]aiting lists

for access to service." See 49 C.F.R. § 37.131 (f) (2). See also Liberty Resources, 2001 WL 15960, at *10 (citing 56 Fed.Reg. 45584, 45608 (Sept. 6, 1991)). "Typically, a waiting list involves a determination by a provider that it can provide service only to a given number of persons. Other eligible persons are not able to receive until one of the people being served moves away or otherwise no longer uses the service. Then the persons on the waiting list can move up." 49 C.F.R. pt. 37, App. D, § 37.121, p. 527 (2000). Admittedly, the rejection of waiting lists appears to center on not allowing an entity to *permanently* deny a ride to a single ADA-eligible patron until another rider no longer wishes to use the paratransit system. At the same time, in disallowing waiting lists, the obvious presumption is that the entity is directed not to regularly turn down a single ADA-eligible rider.

A key point in this Court's prior ruling was that trip denials on the paratransit system, as compared to the fixed route system, inflict much greater harm to the rider and thus deserve heightened scrutiny. See Liberty Resources, 2001 WL 15960, at *11. In reaching this conclusion, I relied, *inter alia*, on an opinion letter authored by Patrick W. Reilly, the Federal Transit Administration's Chief Counsel, which reads: "'[T]rip denials' on the fixed route system would be comparable only if the injury (the time the passenger must wait until her demand is met) is the same. As a practical matter, however, a trip denial on the ADA complimentary Paratransit system inflicts a much more serious injury than does a trip denial on the fixed route system." Id. This Court reaffirms this reasoning and conclusion here.

In determining what constitutes a substantial number, I find this point absolutely crucial. The paratransit system is designed as a safety net for disabled individuals. The legislative history of the ADA demonstrates that providing a transportation system for the disabled was deemed a

true key to integrating the disabled into society.[15] It is a pivotal step toward knocking down the exact barriers which were targeted under the Act. I highlight the nature of the injury because what I find most challenging about creating this number is the fact that we are really talking about individuals. People, who when denied a ride, may have great difficulty getting to a doctor's appointment or to work or to see their family. People, who when denied a ride, may have great difficulty even leaving their home, an act that for the non-disabled in our society, including myself, is usually done with such relative ease that it is taken for granted each day. When we humanize this number, we see that fixing a "substantial number" in this more tangible context differs from fixing a "substantial number" in a vacuum or by relying solely on percentages.

The appendix to the regulations, as observed above, notes that: "A missed trip, late arrival, or trip denial now and then does not trigger this provision." 49 C.F.R. pt. 37, App. D, § 37.131, p. 527 (2000). Does this mean that a missed trip, late arrival, or trip denial each and every day would trigger the provision? Or that multiple missed trips, late arrivals, or trip denials each and every day would trigger the provision? This reasoning becomes circular and ultimately

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[15] As discussed in my prior ruling:

> The House Committee on Education and Labor noted that "[t]ransportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society." H.R. Rep. No. 485 (II), at 37, (1990), reprinted in 1990 U.S.C.C.A.N. 303, 319 (observing that testimony of Executive Director of President's Committee on Employment of People with Disabilities echoed the same: "inaccessible transportation has been identified the major barrier, second only to discriminatory attitudes"); accord, H.R. Rep. No. 485 (IV), at 25, (1990), reprinted in 1990 U.S.C.C.A.N. 512, 514 (Committee on Energy and Commerce noted that: "[Transportation] is a veritable lifeline to the economic and social benefits that our Nation offers its citizens ... For this reason, the National Council on Disability has declared that 'accessible transportation is a critical component of a national policy that promotes self-reliance and self-sufficiency of people with disabilities.'")

See id. at *8. See also 42 U.S.C. § 12101 (findings and purpose section to ADA).

brings this Court back to defining "substantial numbers."

The dictionary defines substantial as: "Considerable in amount." Webster's Third New International Dictionary 2280 (1986). I find little help in this definition. Am I to focus on denials spread out over a year? a month? a day? an hour? I examined the numbers in each of these contexts in my prior ruling where I was faced with a record of nearly 30,000 trip denials over a thirteen month period which averaged to 74 denials each day, including 30 next-day denials, and 3 denials each hour. See Liberty Resources, 2001 WL 15960, at *12. For the month of May, 2001, Septa issued 1,220 trip denials which averages to 39 capacity denials each day, including 23 next-day denials. (Finding of Fact No. 18.)

I applaud Septa for the steps it has taken in the months following this Court's ruling of January 4, 2001. The number of denials appears to have decreased,[16] and Septa has certainly increased its paratransit budget in an effort to create a system that is capable of meeting full demand. Septa also assured this Court that it expects to issue zero (0) trip denials by on or about November 1, 2001. (Finding of Fact No. 19.) With the actions already taken by Septa, and its expectation of zero (0) trip denials, as well as this Court's insistence that Septa develop a back-up system for providing rides which shall include, but is not limited to, implementing both a voucher system and a system to prioritize ADA-eligible riders over SRP-eligible riders, I conclude that Septa is able to comply with this requirement. This Court encourages Septa to develop and implement imaginative procedures, such as the innovative scheduling procedure (Finding of Fact No. 9), so that it can meet its own plan and the mandates of today's ruling.

For the reasons set forth above, and based upon the facts found, I now hold that more than

[16] I use this cautious language because this Court has been privy to only one month of trip data.

five (5) trip denials on any day beginning November 1, 2001, which are not caused by forces outside the control of Septa represents a substantial number and will constitute a violation under the ADA and its accompanying regulations. Allowing for more than five (5) denials on any day would diminish not only the seriousness of the injury incurred by the rider who received a capacity denial, but also diminish the convictions imposed by Congress and the regulators in enacting and implementing the ADA.[17]

My inquiry may not end here; this Court must also address the issue of what situations constitute "forces beyond the control" of Septa. Under the federal regulations, "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)(3)(ii). See also Liberty Resources, 2001 WL 15960, at *10. This term is further described as:

> For example, if the vehicle has an accident on the way to pick up a passenger, the late arrival would not count as part of a pattern or practice. If something that could not have been anticipated at the time the trip was scheduled (e.g., a snowstorm, an accident or hazardous materials incident that traps the paratransit vehicle, like all traffic on a certain highway for hours), the resulting missed trip would not count as part of a pattern or practice. On the other hand, 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.

49 C.F.R. pt. 37, App. D, § 37.131, p. 527 (2000).

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[17] While this Court is concerned about the effect of the potential number of ADA-eligible riders who could face capacity denials without Septa being held in violation of the ADA, the regulations appear to this Court to anticipate and allow for a certain number of capacity denials.

This illustration is much more detailed than the one accompanying the "substantial number" term. Certainly, weather conditions, unforeseen traffic jams and accidents are included in the definition, where as frequent mechanical breakdowns or a failure to foresee routine traffic patterns or take into account published construction delays are not included in the definition. Likewise, I conclude that the definition would not include frequent problems with employees of carriers and other contractors that cause a substantial number of trip denials or a failure to foresee routine disputes that can arise in such an arrangement and cause a substantial number of trip denials. Septa must create a back-up system that serves to provide rides when such problems arise. This Court encourages Septa to develop and implement inventive procedures to avert such problems. This Court cannot further predict each situation which would or would not fall into this category. Septa will need to use its best judgment, and this Court has created a procedure to give individualized attention to this issue on a case-by-case basis.

The foregoing adjudication shall in its entirety along with the entire memorandum opinion and Order of this Court dated January 4, 2001, Liberty Resources v. Southeastern Pennsylvania Transp. Auth., No. Civ. A. 99-4837, 2001 WL 15960 (E.D. Pa. Jan. 5, 2001), constitute the final decision of this Court.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY RESOURCES, INC. and	**:**	**CIVIL ACTION**
CONSUMER CONNECTION	**:**	
Plaintiffs,	**:**	
	:	
v.	**:**	
	:	
SOUTHEASTERN PENNSYLVANIA	**:**	
TRANSPORTATION AUTHORITY	**:**	
Defendant.	**:**	**NO. 99-4837**

ORDER FOR FINAL INJUNCTIVE RELIEF

AND NOW this 30th day of August, 2001, upon consideration of the motion of plaintiffs Liberty Resources, Inc. ("Liberty Resources") and Consumer Connection (Document No. 19) seeking relief under this Court's decision of January 4, 2001 by which this Court declared that plaintiffs were entitled to relief as a matter of law, the response of defendant Southeastern Pennsylvania Transportation Authority ("Septa") and the accompanying memoranda of law in support and in opposition thereto; having conducted a hearing on July 2, 2001, based upon on the arguments as well as evidence presented and the entire record, and for the reasons explained in the foregoing memorandum, it is hereby **ORDERED** that:

1. Septa shall abide by the requirements of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 104 Stat. 337, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 87 Stat. 394, 29 U.S.C. § 794, as interpreted by this Court's ruling on January 4, 2001 and today. In so doing, Septa shall create, manage, and operate a system capable of providing rides to all ADA-eligible riders and shall not constrain paratransit service by operating in a pattern or practice that significantly limits the availability of rides to ADA-eligible patrons by issuing substantial numbers of trip

denials and which would prevent providing next-day service to all ADA-eligible patrons.

2. Septa is on notice that commencing November 1, 2001, for each day in which Septa issues more than five (5) capacity denials, including both next-day denials and other denials, unless such trip denials were issued for a reason beyond the control of Septa, Septa is acting in violation of the ADA and Section 504 and shall pay the sums allotted in this Order and follow the procedures detailed in this Order.

3. Septa shall meet the commitments it made to this Court with respect to budgeting, procuring vehicles, and maintaining and repairing vehicles, as detailed in this Court's findings of facts. (Finding of Fact Nos. 7-8.)

4. Septa shall investigate, devise and implement a plan for using vouchers in order that ADA-eligible riders will have the financial ability to use an available commercial taxi service to provide back-up but rarely used service in order to eliminate capacity denials for ADA-eligible riders. Septa shall submit to this Court such plan by February 1, 2002.

5. Septa shall investigate, devise and implement a plan whereby ADA-eligible riders would receive priority over SRP riders in terms of reserving and receiving rides in order to eliminate capacity denials for ADA-eligible riders. Septa shall submit to this Court such plan by March 1, 2002.

6. Commencing November 1, 2001, for each day in which Septa issues more than five (5) capacity denials, including both next-day denials and other denials, Septa shall pay Liberty Resources,[1] to be received on behalf of both plaintiffs, the sum of $30.00 for each

[1] This Court chooses Liberty Resources, Inc. because it is a formal corporation with recognized leadership in office, formal records, accounts and planning mechanisms available to receive, disburse and report to the defendant and this Court. See Liberty Resources v. Southeastern Pennsylvania Transp. Auth., No. Civ. A. 99-4837,

trip that was denied on such day unless such trip denial was issued for a reason beyond the control of Septa.[2]

7. Septa shall make payment on a monthly basis on the fifteenth (15th) of each month following any month in which Septa issued more than five (5) trip denials on any day in that month.[3]

8. On the thirtieth (30th) day of each month, beginning in December, 2001, Septa shall file a monthly status report with this Court (with a copy to counsel for the plaintiffs) which shall contain for each day of the month with subsections for (i) overall, (ii) peak hour, and (iii) next-day requests and rides, the following information for the last calendar month:[4]

   a. The total number of demand and standing order requests for paratransit reservations by ADA-eligible patrons.

   b. The number of requests for paratransit demand reservations by ADA-eligible patrons.

   c. The number of standing order reservations scheduled by ADA-eligible patrons for

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2001 WL 15960, at *4 (E.D. Pa. Jan. 5, 2001).

[2] This Court chooses the sum of $30.00 because Septa's proposed consent decree chooses this sum as a per rider liquidated damages award to be paid in the event of a decision (by an arbitrator) that a substantial number of trip denials are issued that cannot be attributed to forces outside the control of Septa. (Def.'s Proposed Consent Decree ¶ 7.) Septa stated in its response to the motion of plaintiffs that: "The proposed consent decree may serve as a basis for a remedy fashioned by the court in the present case." (Def.'s Resp. at 11.) This Court expects this remedy to not only compensate the rider, but to serve as an incentive for Septa to meet its own expectations and the dictates of today's ruling.

[3] If the 15th day falls on a weekend day or a federal holiday, Septa shall make payment on the next business day immediately following the 15th day.

[4] If the 30th day falls on a weekend day or a federal holiday, Septa shall file the report on the next business day immediately following the 30th day. For the month of February, Septa shall file the report on the last day of February. If the last day of February falls on a weekend day or a federal holiday, Septa shall file the report on the next business day immediately following the last day of February.

paratransit demand ride.

d. The number of denials classified in the PASS system as capacity denials.

e. The number of demand reservations scheduled for ADA-eligible patrons.

f. The number of standing order trips provided to ADA-eligible patrons.

g. The number of demand trips provided to ADA-eligible patrons.[5]

9. The report shall also detail as to each day in which Septa issued more than five (5) trip denials whether payment was made to Liberty Resources. If no payment was made, the report shall as to each ADA-eligible rider denied, identify by rider I.D. number and tour date and number and include a written explanation of the cause for the capacity denial which was beyond the control of Septa as to each such identified denial.

10. The following procedure shall be followed for any case in which plaintiffs object to Septa's written explanation of why payment was not made:

a. Plaintiffs shall no later than thirty (30) days after receipt of the monthly report discussed in paragraph 4 of this Order, notify Septa in writing (served by first class U.S. mail) of the objection(s), including the reasons therefore.

b. Septa shall design and implement an administrative system to review the objection(s). Septa shall reevaluate its original explanation of the cause for the capacity denial which was beyond the control of Septa and shall within thirty (30) days of receipt of the objection(s), notify plaintiffs in writing (served by first class U.S. mail) of the final decision including its reasons therefore..

[5] The trip data to be collected has been agreed to by the parties as evidenced by their respective proposed order and consent decree.

c. If the parties cannot amicably resolve the objection(s) through the above procedure, plaintiffs may file a notice of intent to litigate the efficacy of Septa's capacity denial in this Court within thirty (30) days after the written re-evaluation was mailed by Septa.

d. When, as and if plaintiffs collect at least fifty (50) such capacity denials or contend in good faith that the resolution by the Court of the dispute over any one or more such denials will decide an issue which will become the law of the case for all or a substantial number of future denials, then plaintiffs may, as to those denials wherein a notice to litigate has been filed, file a motion requesting the Court to resolve the conflict over such denials.

11. Septa shall pay any monies imposed pursuant to paragraph 6 of this Order to Liberty Resources which may use the monies directly or through a subcontractor for each of the following purposes: (1) individual reimbursements to any ADA-eligible rider who was denied a paratransit ride, for documented otherwise unreimbursed expenses including but not limited to the cost of transportation caused by the trip denial; (2) the training of persons with disabilities to use Septa's mass transit system, including fixed route and paratransit service; (3) lobbying or other advocacy efforts which relate to or seek to improve the use of public transportation by persons with disabilities; and (4) other training programs which relate to or seek to improve the use of public transportation by persons with disabilities. In no event shall the monies be used to pay costs, expenses, or counsel fees related to public transportation litigation or to pay costs or expenses associated with actions which stop vehicles used by Septa to provide public

transportation. Liberty Resources shall keep records which identify to whom the monies were paid, the date on which they were paid, and a general description of how the fines were used. The previously described records and a summary thereof shall be provided by Liberty Resources to counsel for plaintiffs quarterly commencing on the first day Liberty Resources receives a payment hereunder from Septa; counsel shall provide copies to counsel for Septa promptly.

12. This order shall be in effect until Septa issues five (5) or less capacity denials each day for six consecutive months, where upon Septa may seek to have this injunction terminated.

13. This Court shall retain continuing jurisdiction to enforce compliance with the requirements of the law and this Order and if necessary, to order additional appropriate relief to achieve full compliance with the law and this Order. The parties are hereby notified that, if, for example, Septa persistently, repeatedly or on an ongoing basis issues trip denials in excess of five (5) daily, plaintiffs may seek further relief from the Court on the ground that this Order has failed in its essential purpose, even if Septa complies with its literal terms.

14. This Order shall otherwise be deemed the final order of this Court granting the motion of plaintiffs for summary judgement.

LOWELL A. REED, JR., S.J.