BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

WASHINGTON, DC

Docket No. FRA-2011-0060
RIN No. 2130–AC31

PETITION OF THE CAPITOL CORRIDOR JOINT POWERS AUTHORITY, THE INDIANA DEPARTMENT OF TRANSPORTATION, THE SAN JOAQUIN JOINT POWERS AUTHORITY AND THE NORTHERN NEW ENGLAND PASSENGER RAIL AUTHORITY FOR RECONSIDERATION OF THE SYSTEM SAFETY PROGRAM FINAL RULE AND REQUEST TO STAY THE EFFECTIVENESS OF THE RULE

Pursuant to 49 C.F.R. Part 211, the Capitol Corridor Joint Powers Authority (CCJPA), the Indiana Department of Transportation (INDOT), the San Joaquin Joint Powers Authority (SJJPA), and the Northern New England Passenger Rail Authority (NNEPRA) (collectively, Petitioners) submit the following Petition for Reconsideration of the Federal Railroad Administration's (FRA) System Safety Program (SSP) Final Rule.[1] As detailed below, the Rule imposes unprecedented and unnecessary regulatory obligations on State sponsors of intercity passenger rail (IPR)[2]

[1] 81 Fed. Reg. 53,849 (Aug. 12, 2016).

[2] Section 209 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008) (PRIIA), shifted financial responsibility for

which exceed the FRA's statutory authority, are not in the public interest, and which plainly contradict the principles espoused by the FRA in its concurrently issued *Guidance for Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations* (Guidance).[3] Petitioners request that the FRA amend the Rule to (1) define "railroad" as the IPR operator and not the State sponsor or, alternatively, provide a formal mechanism for State sponsors of IPR to delegate regulatory responsibility under the Rule; and (2) eliminate the requirement that a State sponsor directly consult with its contractors' employees. Given the substantial burden that the Rule would immediately impose on State sponsors of IPR, Petitioners also respectfully request that the Administrator enter an order staying the Rule's effective date pursuant to 49 C.F.R. § 211.29(d).

I. THE FRA SHOULD MODIFY THE RULE TO ENSURE THAT STATE SPONSORS OF IPR ARE NOT CONSIDERED RAILROADS

As promulgated, the Rule requires each railroad that "operate[s] intercity or commuter passenger train service on the general railroad system of transportation" to

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short-distance (less than 750 miles) IPR routes to the States. Approximately eighteen State sponsors of IPR, including Petitioners, provide financial support for twenty-six such routes throughout the United States. State sponsors contract for the operation of IPR – currently, all such operating agreements are with Amtrak – but do not themselves exercise operational control. Petitioner INDOT also contracts with Iowa Pacific Holdings, for example, for Maintenance of Equipment services in connection with the Hoosier State IPR service.

[3] Petitioner CCJPA received the Guidance by e-mail from the FRA on August 11, 2016. A copy of the Guidance is attached as **Exhibit A**.

develop and implement an SSP.[4] The Rule defines a "railroad" as including a "person or organization that provides railroad transportation, whether directly *or by contracting out operation of the railroad to another person*."[5] State sponsors of IPR, by providing funding pursuant to operating agreements with Amtrak or other service providers, appear to fall within this definition of "railroad" and accordingly would be responsible for developing and implementing an SSP.[6]

This definition of "railroad" imposes substantial burdens on State sponsors of IPR that were not authorized by Congress or considered in the FRA's analysis of the proposed Rule, and would not improve the safety of railroad transportation. Congress did not intend for State sponsors of IPR to assume such responsibilities, and the FRA has exceeded its statutory authority in requiring that they do so.[7] Moreover, to the

[4] 49 C.F.R. § 270.3(a).

[5] *Id.* § 270.5 (emphasis added).

[6] As discussed below, Petitioners do not believe that the Guidance is effective in relieving State sponsors of routes integrated into Amtrak's National IPR System or of certain other routes from this requirement. *See infra*, pp. 12–16.

[7] The FRA's Rules of Practice require Petitioners to explain why they did not raise facts contained in this Petition in the underlying rulemaking. 49 C.F.R. § 211.29(b). While the FRA's initial Notice of Proposed Rulemaking (NPRM) similarly defined "railroads" as including a "person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person," it also identified only "two intercity passenger railroads, Amtrak and the Alaska Railroad," that would be subject to the rule. 77 Fed. Reg. 55,371, 55,398 (Sept. 7, 2012). There is no basis in the history of the FRA's implementation of previous statutes addressing state-supported IPR routes, *see* Rail Passenger Services Act of 1970, Pub. L. No. 91-518 § 403(b) (Oct. 30, 1970), that suggests that financial support would be considered "contracting out the operation of the railroad to

extent that the FRA intends through the Guidance to relieve State sponsors of IPR from the requirement to develop and implement their own SSP, it must amend the Rule to resolve irreconcilable conflicts between the Guidance and the plain language of the Rule.

A. Application of the Rule to State Sponsors of IPR Would Impose Substantial Burdens Without Improving Passenger Rail Safety

State sponsors of IPR are established, organized, and staffed primarily to provide financial support to IPR operations and, in some cases, to also set service schedules and develop marketing programs. With very few exceptions, State sponsors do not employ qualified railroad personnel with the detailed technical knowledge to develop, implement, and oversee compliance with an SSP. If required to comply with the Rule, such States would face considerable challenges in

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another person." Accordingly, Petitioners did not anticipate, and indeed none of the comments received by the FRA appear to have anticipated, that State sponsors of IPR would be included in this definition. It was not until the FRA issued its Guidance concurrently with the Final Rule that it made clear that it intends to enforce the Rule directly against State sponsors of IPR, at least where they sponsor routes not integrated in Amtrak's National IPR System, rather than against the operators thereof. Accordingly, this Petition for Reconsideration is the first opportunity that State sponsors of IPR have had to formally raise their concerns with the FRA. Moreover, at the time the NPRM was issued, the great majority of State sponsors of IPR had not yet established their service programs, and the organizations, structure, and methodology underlying the support of short-distance IPR routes under PRIIA Section 209 were unsettled. Due to these factors, Petitioners had every reason to believe that only Amtrak, Alaska Railroad, or any future IPR *operator* – as opposed to State sponsors themselves – would be subject to the Rule, and did not raise the facts asserted in this Petition during the rulemaking process. However, Petitioners respectfully request that their views be considered now.

augmenting existing human resources before the responsibilities imposed by the Rule could be fulfilled. And, even if this hurdle were overcome, it is not clear that this would be the most efficient use of scarce resources, both human and fiscal, to promote safety. First, even though contract operators have teams of personnel dedicated to and expert in rail safety, the Rule requires States to use their scarce fiscal resources to duplicate that expertise in lieu of funding additional service for the traveling public. Second, even if the funds were available State sponsors of IPR are not organized to recruit nor hire the sufficient qualified staff to meet the obligations imposed by this Rule. Apart from the general shortage of such individuals in the marketplace, State sponsors are in most cases unable to recruit for such railroad-related positions as the related work may be outside the State sponsors' statutory duties, and budget constraints in many state and local governments limit the ability of public agencies to add new positions. Even if the public sector were able to find room in constrained budgets for such positions, it is not clear that it would be able to offer competitive salaries to railroad employees or the continuation of benefits available to them in their railroad positions. State sponsors of IPR are essentially planners, not operators, yet the Rule foists upon them responsibility for establishing critical, safety-sensitive technical processes, and demands that States reinvent their sponsoring entities and duplicate expertise available elsewhere in order to comply with the Rule.

None of these unnecessarily redundant administrative and financial burdens were considered by the FRA in promulgating the Rule. The FRA did not even mention State sponsors of IPR in its regulatory impact statement, and instead only evaluated the impact of the Rule on Amtrak and the Alaska Railroad, which FRA deemed the only two intercity passenger railroads, and twenty-eight commuter railroads. As a result, the FRA's analysis is arbitrary and grossly underestimates the Rule's costs. The FRA did not consider the additional staffing and/or contracting that as many as eighteen State sponsors could require, depending on how or whether they decide to continue the operation of State-sponsored service, in developing, implementing, and monitoring compliance with an SSP. FRA also did not consider the costs to States of addressing the increased risk of liability, including negative impacts on the overall insurance market likely to occur as a result of the Rule's mandate, and effects on States that are barred by statute from contracting for insurance coverage and must therefore self-insure. Although the liability may be capped in some cases by State statute, the creation of a duty by regulatory fiat without direct statutory authorization presents an action that is well beyond FRA's statutory authority.

On top of these expenses, Petitioners believe that implementing the Rule will likely require State sponsors to renegotiate their existing operating agreements with Amtrak and other contractors to ensure the exchanges of information imposed by the

Rule and to implement required consultation procedures. These sorts of contractual obligations must be bargained for, and will not come without cost.

These costs are significant and incapable of ready estimation. And, because they will ultimately be passed on to taxpayers, it is particularly inappropriate for the FRA to impose them without providing a transparent opportunity for the public to review and comment. Unlike the State Safety Oversight (SSO) Program recently mandated by the Federal Transit Administration (FTA)[8], the FRA and U.S. Department of Transportation have not identified any source of funding to assist the States in this endeavor. Compliance with the Rule would accordingly force the States to divert substantial resources from other programs, and might lead to hard choices as to whether the continued provision of State-sponsored IPR service remains financially viable. And, in the event that States discontinue IPR service because they determine the Rule's financial burden is too great, they may also be forced to repay millions of dollars in Federal grants and/or loans due to the early cessation of service; another cost that the FRA has failed to anticipate and address in this rulemaking.

Perhaps most alarmingly, the FRA has not explained how applying the Rule to State sponsors of IPR would enhance the safety of rail transportation and, indeed, it would not. As the FRA appears to recognize in its Guidance, in most cases it is the

[8] *See State Safety Oversight*, 91 Fed. Reg. 14,229 (Mar. 16, 2016) (codified at 49 C.F.R. Part 274).

State sponsors' service providers, and not the State sponsors themselves, that are in the best position to fulfill the FRA's regulatory requirements, including the development and implementation of an SSP. The entities with which State sponsors contract for the provision of IPR-related services are the most knowledgeable about their operations, and have already invested substantial resources in ensuring compliance with safety requirements. States' public accountability ensures that only such qualified entities are selected to provide IPR services, and the FRA's surveillance programs and attendant threat of enforcement action acts as a powerful incentive to ensure compliance among them. State sponsors typically do not perform the safety-related functions of a railroad themselves, and the Rule fails to identify any gap in the oversight of IPR safety that would justify the duplication of an experienced operator's oversight and safety planning by State employees. In fact, rather than enhance the safety of IPR services, the Rule is more likely to degrade it by placing primary responsibility for the development of an SSP with the IPR entities that are *least* qualified to develop it.

Additionally, FRA's attempt to define non-operating sponsors as "railroads" potentially opens the door to attempts to make such sponsors responsible for other statutory obligations imposed on railroads in parallel contexts, including railway labor and retirement requirements. The unquantified expansion of obligations and liability that may flow from the inclusion of States as "railroads" under the Rule would impose

further burdens on State sponsors that significantly undercut any incentives actually intended by Congress to encourage States to sponsor IPR.

The Rule thus mandates States perform a function that they have neither the staff nor resources to undertake, and has done so without input from the affected entities and virtually any consideration of the attendant costs and benefits. Compliance with the Rule will be impractical at best for most State sponsors and will run counter to the public interest by threatening the financial viability of IPR while doing nothing to enhance safety.

B. Congress Did Not Intend That State Sponsors of IPR Would Be Subject to Regulatory Obligations Such as the Rule

Requiring State sponsors of IPR to develop and implement an SSP also exceeds the FRA's authority under the Rail Safety Improvement Act (RSIA),[9] and is inconsistent with Congress' intent in enacting Section 209 of PRIIA.

The RSIA directed the FRA to require "a railroad carrier that provides intercity rail passenger or commuter rail passenger transportation" to develop and implement a "railroad risk reduction safety program."[10] The RSIA did not separately define "rail carrier" for the purpose of this mandate. Rather, it relied on the general definition of a

[9] Pub. L. No. 110-432, div. A (Oct. 16, 2008).
[10] *Id.* § 103 (codified at 49 U.S.C. § 20156).

rail carrier as a "person providing railroad transportation."[11] The term "railroad" is in turn defined as–

> (A) [A]ny form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—
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> (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
>
> (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but
>
> (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.[12]

While the FRA claims that its definition of "railroad" for the purpose of the Rule is "based upon" this statute,[13] in fact the FRA's definition goes well beyond it. The FRA has *expanded* the statutory definition of "railroad" so as to include those organizations that have contracted out an IPR operation to another person.[14]

This is not a permissible construction. A State sponsor of IPR does not become a "railroad" by providing financial support to its operator any more than a homeowner becomes a homebuilder by hiring a contractor to bump out a kitchen. There is no

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[11] *See* 49 U.S.C. § 20102(3).
[12] *Id.* § 20102(2).
[13] 81 Fed. Reg. at 53,863.
[14] 49 C.F.R. § 270.5 (Railroad).

evidence to suggest that Congress intended States to not only assume financial responsibility for short-distance IPR routes, but to directly assume responsibility for the *safety* of such routes' operations, as well. To the contrary, Congress enacted PRIIA in the very same bill as the RSIA without making any indication that States would be required to assume safety-related responsibilities if they elected to make the financial decision to ensure the continuation of IPR service. Given the substantial burden that would result were the FRA to look to State sponsors for compliance with federal railroad safety laws, it can hardly be assumed that Congress intended the railroad risk reduction safety program to apply without saying so.[15] Indeed, imposing regulatory obligations such as the Rule on State sponsors may very well jeopardize the viability of State-supported passenger rail service throughout the United States;

[15] Because the FRA failed to explain why it is necessary to define "railroad" to include State sponsors of IPR for the purpose of this Rule, Petitioners are also concerned that this definition may in the future be extended to other railroad safety laws that apply generally to "railroads." State sponsors have been repeatedly assured that the FRA would *not* look to them for the satisfaction of railroad safety obligations generally, most recently by Administrator Feinberg in a meeting on April 15, 2015, of the States for Passenger Rail Coalition. In addition to introducing uncertainty regarding the application of other safety requirements to "railroads," FRA has also created a conundrum with respect to the definitions of a "common carrier" and "railroad" under the Interstate Commerce Commission Termination Act, which limits these definitions to those that hold themselves out to provide rail service to others. *See S.D. Warren Co. d/b/a Sappi Fine Paper N. America – Acquisition and Operation Exemption – Maine Central R. Co. and the Springfield Terminal Ry. Co.*, STB Finance Docket No. 34133, slip op. at n.4 (Service Date Sept. 30, 2002). States acting solely as the financial sponsors of passenger rail service lack this characteristic.

the exact opposite of Congress' intent in establishing the State-supported scheme under PRIIA.

C. The Rule is Fundamentally Inconsistent With the Guidance and Must Be Amended In Order To Provide FRA With the Flexibility to Relieve State Sponsors of any Obligation Under the Rule

On August 11, 2016, the FRA issued the Guidance and appended the *Example of Applying Guidance to SSP Final Rule*. These documents are fundamentally at odds with the plain language of the Rule and, to the extent they represent the FRA's settled views on State sponsors' obligations under the Rule,[16] require that the Rule be amended to resolve irreconcilable conflicts between Guidance and the Rule's plain language.

According to the Guidance, State sponsors of service that is integrated in Amtrak's National IPR System must "participate as necessary" in the development of Amtrak's system-wide SSP, but State sponsors would not generally be required to develop an SSP of their own. Where a State sponsor contracts with any other entity

[16] Nothing in this Petition should be construed as an endorsement of the FRA's approach as articulated in the Guidance or as a waiver of Petitioners' right to seek timely review of the Guidance in an appropriate forum. Indeed, Petitioners have significant concern that the FRA's willingness to waive otherwise substantial regulatory requirements if Amtrak is selected as a State sponsor's IPR is not only arbitrary, but is also anti-competitive and blatantly protective of Amtrak's historical monopoly on intercity passenger rail service, discriminatory toward the substantial number of private operators and other contractors whose selection would be deterred as a result of the FRA's policy, and contrary to Congress' explicit aim of affording States greater latitude in the provision of IPR services under PRIIA.

for operations and/or maintenance of equipment, however, the Guidance states that the State sponsor will have "greater responsibility for developing and implementing its own SSP, either directly on its own, through oversight of its contract providers of safety-related services, or both."

The Guidance compels reconsideration of several aspects of the Rule. First, there exists no basis in the Rule for relieving a State sponsor from the obligation to develop and implement an SSP where it has contracted operations and maintenance of equipment services to Amtrak. As noted, the Rule imposes an obligation to develop and implement an SSP on "railroads" operating IPR, and defines "railroads" to include "[a] person or organization that provides railroad transportation, *whether directly or by contracting out operation of the railroad to another person*." There is no exception for organizations that have contracted out to Amtrak – as opposed to other persons – and the preamble to the Rule unequivocally states that "contract[ing] . . . operations to [another] railroad does not result in the delegation of the duty to comply with the SSP rule to that . . . railroad."[17] The Rule must be amended to reconcile this clear conflict.

Second, there is no flexibility in the Rule that would permit the FRA's case-by-case approach to determining State sponsors of non-integrated routes' obligations. Under the Rule, an organization is either a railroad that must develop and implement

[17] *Id.* at 53,857

an SSP, or it is not. The Rule should be amended to provide an exemption for State sponsors that do not independently fulfill safety responsibilities related to the IPR operations, or such other factors that FRA will look to in relieving or partially relieving an State sponsor from its obligations.

Third, the Guidance provides that State sponsors of integrated routes must "provide information and participate as necessary in Amtrak's development of its National SSP," but these obligations are impermissibly ambiguous in the Rule. For example, if Amtrak is the "railroad" required to develop and implement an SSP under the Rule, then the State sponsor, its employees, and its contractors are not "directly affected employees" with which Amtrak must consult, nor is the State sponsor a "railroad" that Amtrak must coordinate with. The Rule does not define State sponsors' role in such a case. Similarly, the preamble to the Rule states that an entity which does not consult with the railroad responsible for developing an SSP would merely "miss an opportunity to have their voices fully heard." But the Guidance – without pointing to anything in the Rule – suggests that a State sponsor may violate FRA regulations if it fails to consult with Amtrak. If indeed required to participate in Amtrak's development of its National SSP despite any clear directive in the Rule to do so, it is also uncertain what procedural rights a State sponsor has vis-à-vis the FRA's review and approval thereof, since in that case it is neither a "railroad" nor a "directly affected employee." The Rule does not provide for these scenarios, and the

Guidance introduces ambiguities that will complicate State sponsors' planning and processes.

One way for the FRA to reconcile the plain language of the Rule with the positions asserted in the Guidance would be to reconsider its rejection of the Rail Safety Advisory Committee's (RSAC) proposed delegation procedure. As explained by the Commuter Rail Division of the Chicago Regional Transportation Authority (Metra) in its comments on the NPRM, principal responsibility for developing and implementing an SSP ought to lie with the entity that is directly responsible for the employees, equipment, and hazards comprising the IPR operation.[18] As recommended by RSAC, a procedure allowing the FRA to review the nature of a particular sponsored IPR operation and determine the proper allocation of regulatory responsibility would enable the FRA to lawfully advance the principles espoused by the Guidance and relieve State sponsors from burdensome requirements that do not serve the public interest.

Even if the FRA elects not to amend the Rule to include such a mechanism, it must take steps to reconcile the plain conflicts between the Guidance and Rule. Petitioners are unable to rely on the FRA's assurances in non-binding "guidance" that

[18] Comments of Metra, Docket No. FRA-2011-0060 (filed Nov. 6, 2012).

are clearly incompatible with the plain language of the Rule,[19] and which may presumably be rescinded or modified without notice and comment just as they have been initially issued.

II. STATE SPONSORS OF IPR SHOULD NOT BE REQUIRED TO CONSULT WITH THE EMPLOYEES OF THEIR OPERATORS

Under the Rule, a "railroad" is required to "in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the SSP plan."[20] The Rule further provides, "[I]f a railroad contracts out significant portions of its operations, the *contractor and the contractor's employees performing the railroad's operations shall be considered directly affected employees for the purposes of this part*."[21]

As the FRA acknowledges, the extension of the consultation requirement to contractors and contractors' employees was not proposed in the NPRM or suggested by either the RSAC or any of the parties that submitted comments on the NPRM.[22] Rather, the FRA determined in the Final Rule, with little substantive discussion, that

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[19] Indeed, to "to prevent agencies from circumventing the notice-and-comment process . . . [courts generally] will reject an agency interpretation that is 'plainly . . . inconsistent with the regulation.'" *Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

[20] 49 C.F.R. § 270.107(a)(1).

[21] 49 C.F.R. § 270.107(a)(2) (emphasis added).

[22] 81 Fed. Reg. at 53,883.

such an extension was simply "necessary to address how the consultation process would be handled."[23]

The FRA's failure to provide adequate notice that it was considering requiring entities it deems a "railroad" to consult and use best efforts to reach agreement with a *contractor's* employees violates the Administrative Procedure Act. While agencies may promulgate a final rule that differs from a proposed rule, the changed aspects must be a "logical outgrowth" of what had been initially proposed.[24] Interested parties must have been able to anticipate the change, such that they might reasonably be expected to file comments.[25]

Here, there was no indication that this Rule might impose a requirement for entities to consult and use best efforts to reach agreement with its contractors' employees. The NPRM did not "expressly ask[] for comments on" or in any way "[make] clear that the agency was contemplating [this] particular change."[26] With respect to a "railroad's" obligation toward contractors, the NPRM required only that the SSP address (1) the programs established to protect the safety of the railroad's employees and contractors, (2) the process established to address safety concerns and hazards during the contract procurement process, and (3) the relationship and division

[23] *Id.*

[24] *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014).

[25] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009)

[26] *Id.* at 1081.

of responsibilities between the railroad and its contractors.[27] None of these aspects of an SSP would on their face require a railroad to consult and use best efforts to reach agreement with its contractors' employees, particularly when the term "railroad" is properly understood to be the *operator* of a particular service, and not as including a mere financial sponsor thereof.

Accordingly, neither Petitioners nor any other party had an opportunity to raise the myriad impracticalities of such a requirement.[28] For example, the obligation to consult and use best efforts to reach agreement with contractors' employees introduces substantial barriers to efficient procurement practices. Current operating agreements have been negotiated between State sponsors and the management for these operators. Requiring State sponsors to not only develop and implement their own SSP but to consult and use best efforts to reach agreement with its operators' employees on the SSP's contents may require these operating agreements to be renegotiated. And, in such a negotiation, the operators' employees – not its principals – would appear to wield enormous control, introducing a third party to the current two-party contract, which would likely cause even more protracted negotiations for these annual operating contracts. They would be entitled to a preliminary meeting to discuss the consultation process, their disagreement with any aspect of the contract as

[27] *Id.* at 55, 385–87.

[28] It is accordingly proper for Petitioners to raise facts pertinent to this requirement for the first time in this Petition. *See* 49 C.F.R. § 211.29(b).

it pertained to a State sponsor's SSP would need to be documented, and they would be entitled to file dissenting statements as to a proposed SSP with the FRA, resulting in delays in executing these operating contracts. State sponsors' procurement systems are generally unable to support such an approach to contracting for IPR services, and the burden of doing so would be significant.

Requiring State sponsors of IPR to consult and use best efforts to reach agreement with their operators' employees also substantively alters the nature of the "independent contractor" relationship. Requiring State sponsors to essentially bargain with the employees of their contractors is inconsistent with the traditional treatment of contractors' employees under railroad labor laws, and may therefore have broader consequences beyond the scope of this Rule.[29] For example, State sponsors' development of an SSP in close coordination with the employees of its operators may disturb the balance of factors that are considered in ascertaining an individual's status as employee or independent contractor. The guidelines used by the Internal Revenue Service places particular emphasis on the degree to which a business controls the behavior of individuals. Additionally, a sponsor's direct consultation with its contractor's employees may be construed to interfere with the contractor's employer-

[29] *See, e.g., Bhd. of Locomotive Eng'rs & Trainmen v. S. Cal. Reg'l Rail Auth.*, No. CV 09-8286 PA (C.D. Cal. 2010) (dismissing union members' claims against the Southern California Regional Rail Authority based on the Railway Labor Act, because the Authority contracted out the operation of the railroad and was therefore not the union members' employer).

employee relationship with those individuals, thus impacting the operator's ability to have its employees meet the current safe operating practices as required between the operator and its employees. Before disturbing this balance, and risking the unintended expansion of the coverage of railroad labor laws or interference with a contractor's employer-employee relationships, it is essential that the FRA obtain comment from State sponsors. Because it failed to do so, the FRA should withdraw this aspect of the Rule and continue to engage State sponsors to ensure there are no unintended consequences.

Finally, like the general inclusion of State sponsors in the definition of "railroad," this aspect of the Rule would not improve the safety of IPR. In summarily concluding that the expansion of the consultation requirement was warranted, FRA states, "if a railroad contracts out the actual operations of its passenger rail to another entity[,] the contracted entity that is operating the trains on behalf of the railroad would certainly need to be part of the consultation process."[30] But here again, the FRA seems to be missing the more important question: what benefit to railroad safety is there in requiring the State sponsor to not only lead this process, but to directly ensure its implementation?

Petitioners strongly believe that there is none. The Rule should be amended to require operators of IPR – not State sponsors of IPR – to develop, implement, and

[30] 81 Fed. Reg. at 53,883.

monitor compliance with an SSP that is incorporated and memorialized within the operating contract between the operator and the state sponsors of IPR. These entities are in the best position and the most technically qualified to do so, and forcing State sponsors to duplicate those efforts to ensure the safety of IPR service does not serve the public interest. The arbitrary imposition of many of the Rule's requirements on State sponsors of IPR creates a circumstance in which compliance with the rule is not possible, is not practicable, is unreasonable, and is not in the public interest.

Respectfully submitted,

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Date: October 3, 2016

Exhibit A

Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations

August 11, 2016

U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

Ms. Patricia Quinn
Chair, States for Passenger Rail
75 West Commercial Street, Suite 104
Portland, ME 04101

Dear Ms. Quinn:

As you are aware, the Federal Railroad Administration (FRA) staff provided preliminary draft policy guidance to sponsors of Intercity Passenger Rail (IPR) services in February of 2016 to clarify existing policies on IPR sponsors' roles and responsibilities for the safe operation of passenger rail service. FRA staff encouraged comments on the draft guidance; six IPR sponsors and the States for Passenger Rail Coalition (SPRC) provided comments in letters to FRA Administrator Sarah Feinberg.

In response to those comments, FRA has substantially revised the draft guidance. In its place and attached to this letter is a document titled: *Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations*. This Guidance outlines the principles for FRA's safety oversight of Intercity Passenger Rail operations. FRA staff briefed States on the broad principles in this Guidance on June 16, 2016 at a meeting of the States-Amtrak Intercity Passenger Rail Committee. At that meeting, we agreed to follow up with written Guidance.

FRA is proud of the work we do together to further the availability, safety, and reliability of the passenger rail services you support. Our focus is to promote the safe operation of intercity passenger rail service. We seek to continue to work with you in this important endeavor. We are the points of contact for this issue; please do not hesitate to contact us if you have any questions.

Sincerely,

Michael W. Lestingi
Director of Policy and Planning,
Office of Railroad Policy and Development

Patrick T. Warren
Deputy Associate Administrator,
Office of Railroad Safety

Guidance on Safety Oversight and Enforcement Principles for State-Sponsored[1] Intercity Passenger Rail Operations

I. Baseline Principles

A. FRA has jurisdiction over intercity passenger rail (IPR) operations in all areas of railroad safety.
B. In general, State-sponsored IPR operations have been conducted under the umbrella of Amtrak's National Intercity Passenger Rail System (National System) with Amtrak providing regulatory safety-related services and the State service sponsor's role primarily focused on service planning, marketing and funding of the IPR route.

II. FRA Oversight and Enforcement Principles

A. To ensure adequate safety oversight, FRA seeks to have a single entity or organization as a point of contact for IPR operations to address regulatory safety, compliance, and enforcement matters (FRA Regulatory Matters) for these operations.
B. FRA will continue to recognize IPR operations to be integrated in Amtrak's National System, and will continue to consider Amtrak to be the contact for most FRA Regulatory Matters, if:
    i. Amtrak is responsible for operating the trains; and
    ii. Amtrak is responsible for the train equipment's regular inspection and maintenance.
C. Even though FRA may recognize an IPR operation to be an integrated route in Amtrak's National System:
    i. The State service sponsor must participate as necessary in the development and implementation of regulatory programs for the operation's safety (see below for System Safety Program (SSP) example);
    ii. The State service sponsor continues to have responsibilities for complying with individual Federal rail safety requirements that may apply independently to the State service sponsor regardless of the nature of the operation (passenger or freight), such as those applicable to track owners under FRA's Track Safety Standards if the State service sponsor owns the track. See 49 CFR part 213; and
    iii. FRA may continue to deal directly with any contract provider of safety-related service for an IPR operation as necessary for FRA Regulatory Matters.
D. A State service sponsor may change the contractors that deliver IPR services. Those decisions may have safety implications requiring the IPR service sponsor to be the primary contact for FRA Regulatory Matters. See II.E. below.
E. A State service sponsor that changes its service contractors must work with FRA to establish a plan that assures regulatory safety-related requirements are being met. These IPR operations are not considered to be integrated in Amtrak's National System for purposes of FRA Regulatory Matters.

[1] *For purposes of this document, "State" means any State agency or authority, including: a State department of transportation or analogous governmental agency or authority; a regional or local governmental agency or authority whether or not directly funded or overseen by a State (including, e.g., a joint powers authority where counties or localities jointly sponsor a passenger rail service, yet the State itself is not directly involved); or a public benefit corporation chartered by a State, regional, or local government.*

i. FRA expects the sponsors of IPR routes that are not considered integrated into Amtrak's National System, and/or sponsors considering service changes that would place their routes in this category to contact FRA.
ii. FRA will work closely with the State service sponsor to identify its role.
iii. Independent IPR operations will be assigned separate and distinct reporting codes for purposes of FRA inspection and enforcement activities.

Example of Applying Guidance to SSP Final Rule

FRA expects Amtrak to develop a National System Safety Program (SSP) that will encompass its entire National System, addressing as elements of the National SSP the particular aspects of each IPR operation (including State-sponsored integrated routes) necessary for safety. FRA will consider Amtrak to be the primary point of contact on SSP issues for IPR routes integrated into its National System.

- **If the State-sponsored IPR route <u>is</u> integrated into Amtrak's National System:**
  - The State service sponsor will be responsible for ensuring that its contracts with other non-Amtrak providers of safety-related services clarify that contractors are required to provide information and participate as necessary in Amtrak's development of its National SSP.
  - The State service sponsor will be responsible for ensuring that its safety-related services contractors fulfill their responsibilities for SSP activities, including implementation of appropriate mitigations identified under the SSP.
  - If the State service sponsor is also a track owner, or has other independent responsibilities for the operation's safety, then the State service sponsor is also responsible for participating as necessary in developing and implementing Amtrak's National SSP, or developing its own SSP.
  - A State service sponsor may elect to develop its own SSP for its State-sponsored operation. In this case, FRA would consider the IPR route to be an independent operation (see discussion below).

- **If the IPR route <u>is not</u> integrated into Amtrak's National System:**
  - FRA will work closely on a case-by-case basis with State service sponsors of non-integrated routes as there may be several approaches that the State service sponsor could pursue to meet the regulatory requirements. FRA expects State service sponsors of operations that are not considered integrated IPR routes to contact FRA so appropriate options can be discussed and approved.
  - In these instances, the State service sponsor will have a greater responsibility for developing and implementing its own SSP either directly on its own, through oversight of its contract providers of safety-related services, or both.
  - If the State service sponsor is also a track owner, or has other independent responsibilities for the operation's safety, then the State service sponsor is also responsible for directly participating in, developing, and implementing, as necessary, an appropriate route-specific SSP.