BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

WASHINGTON, DC

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

SUBMISSION BY THE
MASSACHUSETTS DEPARTMENT OF TRANSPORTATION ("MASSDOT")
IN SUPPORT OF 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 SAFET PROGRAM FINAL RULE AND
REQUEST TO STAY THE EFFECTIVENESS OF THE RULE

The Massachusetts Department of Transportation ("MassDOT") hereby makes this submission in support of the above-captioned petition. For the reasons stated by the Petitioners in the above-captioned Petition (the "Petitioners"), and as further stated herein, MassDOT requests that the Federal Railroad Administration ("FRA"): stay the effective date of its Rule 49 C.F.R. §270 (the "Rule") and reconsider the Rule. In its reconsideration of the rule, MassDOT requests that the FRA (1) define "Railroad" as the Inter City Passenger Rail ("IPR") Operator and not the state sponsor of the service, and (2) eliminate the requirement that a state sponsor consult directly with the IPR Operator's employees.

I. State sponsors like MassDOT are not the appropriate parties to develop operational programs regarding Amtrak's IPR Service.

A. Only the IPR Operator should have responsibility for this important operational document

Amtrak operates IPR service in Massachusetts on routes that run from New Haven, Connecticut to certain points in Massachusetts (the "209 Shuttle and Through Trains") and from New Haven to St. Albans, Vermont (the "209 Vermonter"). MassDOT makes financial contributions to these routes, but has no operational role. The rolling stock is owned by Amtrak, the crews and maintenance personnel are Amtrak employees and the track itself is owned by multiple entities throughout the portion of the routes in Massachusetts. While MassDOT may suggest changes to the service or initiatives to improve service, these must be approved by Amtrak.

Given its lack of an operational role in the provision of these IPR Services, MassDOT has no particular expertise in developing a System Safety Program Plan ("SSP"). Moreover, it does not

have the ability to implement an SSP or enforce an SSP once developed: it does not employ the staff charged with executing the SSP, nor does it own the assets subject to the SSP. It is illogical to place an operational burden of this magnitude on non-operational entities.

Defining a Railroad to include a state sponsor of IRP routes is also not fair given the cost and burdens of the rule. As the petitioners point out, state sponsors essentially plan transportation service and finance it. They do not operate it and have little staff with the capacity to develop an SSP. MassDOT for example may well have to hire additional staff with operational expertise, a cost that it should not have to bear, given its role. Moreover, the Rule includes over 30 categories of penalties, ranging from $5,000 to $30,000 depending on whether a violation is deemed to be willful. This is also an enormous exposure that state sponsors should not have to face given their roles.

Making the state sponsor and not the operator responsible for the SSP is not just an error in logic and unfair to the state sponsor, it could also hinder efforts to improve safety. Any confusion as to regulatory responsibilities or attenuation of oversight by the FRA over the IPR Operator is counter-productive to the shared goals of improving safety on the IPR service. Making the state sponsor a regulated entity with respect to the SSP adds confusion as to responsibility, threatens clear and timely communications between the appropriate parties and misfocuses regulatory attention. This risk is amplified where, as in the case of the 209 Vermonter, three different states with no operational role or experience are considered the regulated entities. Amtrak as the IPR Operator in all three states must be considered the Railroad for purposes of the Rule.

B. State Sponsors of IRP should not be included within the definition of A Railroad that "contracts out" the provision of rail transportation.

49 C.F.R. §270.5 defines a Railroad to include, "a person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person." MassDOT requests the FRA clarify its rule so as to ensure that state sponsors of IRP are not included in this definition. Here, MassDOT is not "providing railroad transportation." It is simply reimbursing Amtrak for certain costs of IRP service. MassDOT, therefore, requests that §270.5 be amended to clarify that a state sponsor is not "providing railroad transportation" when it reimburses Amtrak pursuant to PRIIA §209.

Providing railroad transportation through a contract is significantly different from PRIAA 2009 reimbursement agreements. The Massachusetts Bay Transportation Authority ("MBTA"), for example, contracts out its commuter rail operations to a third party operator. In this case however, the MBTA owns all of the track and right of way, all of the rolling stock and all of the assets related to the provision of service. The Operator operates the system and is reimbursed pursuant to an extensive and complex Operating Agreement that was bargained between the parties. Moreover the selection of an Operator was the culmination of an extensive procurement in which the MBTA was able to vet and approve its selected contractor.

In contrast, none of the indicia of MassDOT "providing service" are present here. The agreement between Amtrak and Massachusetts was executed after the enactment of PRIIA and reflects a statutory obligation that states should provide greater funding to certain IRP routes. By

agreeing to reimburse Amtrak, MassDOT is therefore not providing service and is not doing so by contracting out service. It simply decided to pay a greater share to Amtrak for continuing to operate its 3-state service. This IRP service can in no way be understood to be MassDOT's and the rule should be amended to reflect this.

II. MassDOT should not have any obligation to consult with the Operators employees.

As more fully described by the Petitioners, the Rule's requirements that, (a) a Railroad consult with and use its best efforts to reach agreement with "directly affected employees" and (b) employees of a Railroad's contractors must be considered "directly affected employees" are entirely unworkable. All of the affected employees are Amtrak employees and MassDOT has no relationship with them. It is entirely unworkable to require MassDOT to consult and negotiate with another entity's employees, especially where that entity will be charged with executing the SSP. MassDOT has no oversight role with respect to the IPR service or its operation. It should not, therefore, have to consult with the employees of the IPR Operator.

III. The Guidance issued by the FRA is not sufficient to meet these concerns and the Rule itself must be reconsidered and amended.

While the FRA's guidance issued on August 11, 2016 (the "Guidance") appears to offer some clarity of MassDOT's obligations in connection with §270, it does not provide sufficient certainty to MassDOT or other state sponsors of IRP and the Rule itself should be revised.

First, MassDOT supports and incorporates the points made by Petitioners at pages 12-16 of the Petition. In short, the Guidance does conflict with the Rule and because of that, any clarity it offers to state sponsors may be ephemeral. It may be challenged as being inconsistent with the rule or revoked or amended at a later time. If the FRA's intent is that the Guidance should establish the relative responsibilities of state sponsors of IRP and Operators of IRP, then the Guidance should be made part of the Rule.

Moreover, the Guidance still leaves ambiguity concerning the State's role. It is not clear that making Amtrak a "primary point of contact", relieves the state sponsors from any obligation in the Rule. The Rule itself does not use the language "primary point of contact" and the term could be interpreted as being procedural in nature, rather than establishing a substantive demarcation of responsibilities.

The Guidance also provides that if a state sponsor is a track owner, then it must participate "as necessary." There is no clear definition of "as necessary" and a state sponsor would have no clear guidance with respect to its obligations under either the Rule or the Guidance. The FRA should therefore reconsider the rule so as to incorporate the Guidance in a way that specifically ensures state sponsors are not considered Railroads in the context of state sponsored IRP.