TELEPHONE:
(802) 828-2831

FAX:
(802) 828-2817

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
VERMONT AGENCY OF TRANSPORTATION
NATIONAL LIFE BUILDING
ONE NATIONAL LIFE DRIVE
MONTPELIER, VERMONT 05633-5001

October 3, 2016

FRA Docket Clerk
Federal Railroad Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Petition for Reconsideration
Passenger Railroad System Safety Program – Final Rule
Docket No. FRA-2011-0060, Notice No. 3
RIN 2130-AC31

Dear FRA Docket Clerk:

Enclosed for filing in the above matter is the "Petition of the State of Vermont, Agency of Transportation for Reconsideration of the System Safety Program Final Rule."

Please feel free to contact me if there are any questions.

Sincerely,

John K. Dunleavy
Senior Assistant Attorney General

Encl.
cc: Daniel P. Delabruere, VTrans Rail Program Director

**BEFORE THE**
**FEDERAL RAILROAD ADMINISTRATION**
**WASHINGTON, DC**

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

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# PETITION OF THE STATE OF VERMONT, AGENCY OF TRANSPORTATION FOR RECONSIDERATION OF THE SYSTEM SAFETY PROGRAM FINAL RULE

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Pursuant to 49 C.F.R. Part 211, the State of Vermont, through its Agency of Transportation (VTrans) submits the following Petition for Reconsideration of the Federal Railroad Administration's (FRA) System Safety Program (SSP) Final Rule.[1] As explained below, the Rule imposes unprecedented and unnecessary obligations that extend beyond railroad carriers to organizations (including state governments) that own (but do not operate) railroads or that provide financial support for operation of passenger trains by Amtrak and other railroad carriers.[2] These provisions are not authorized by statute, are not workable, and are not reasonably necessary to carry out the new Rule's purpose.

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

[2] The FRA's Rules of Practice require persons petitioning for reconsideration of a final rule to explain why they did not raise facts contained in the petition for reconsideration in the underlying rulemaking. 49 C.F.R. § 211.29(b). While the FRA's initial Notice of Proposed Rulemaking (NPRM) defined "railroads" as including a "person or organization that provides railroad transportation, whether directly or indirectly 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 intercity passenger rail 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 another person." Accordingly, VTrans did not anticipate, and indeed none of the comments received by the FRA appear to have anticipated, that states that own railroad property operated by other entities with "railroad carrier" status or that sponsor intercity passenger rail service operated by Amtrak or other "railroad carriers" would be included in this definition.

## Introduction

*The State of Vermont's Interest in the Rule*

As explained in more detail below, the State of Vermont owns several railroad lines operated by investor-owned, short-line "railroad carriers":

- Vermont Railway, Inc. (VTR): Hoosick Junction, NY to Burlington, VT;
- Green Mountain Railroad Corp. (GMRC): Bellows Falls (Rockingham) to Rutland, VT;
- Washington County Railroad Co. (WACR): Montpelier Junction (Berlin) to Websterville (Barre Town), VT; and
- Washington County Railroad Co. (WACR): White River Junction (Hartford) to Newport, VT.

In addition to its ownership of railroad properties operated by short-line railroads, VTrans provides financial support to Amtrak for two State-supported intercity passenger trains—the *Vermonter* passenger train service, which operates from Washington, D.C. and New York City, through Vermont, with its northern terminus at St. Albans, VT (a short distance south of the Canadian border) and the *Ethan Allen Express*, which operates between New York City and Rutland, VT. At present, Amtrak's *Ethan Allen Express* operates over a 1.5-mile-long segment of State-owned track (leased to and operated and dispatched by VTR) between Center Rutland and Rutland, VT. VTrans is working with Amtrak to extend this service northward over the 65.5 miles of State-owned track (also leased to and dispatched and operated by VTR) between Center Rutland and Burlington, VT.

*Requested Changes to the Rule*

First, VTrans requests that FRA amend 49 C.F.R. § 270.3 (Application) as follows (deleted material struck through; added material underlined):

**§ 270.3 Application.**

(a) Except as provided in paragraph (b) of this section, this part applies to all—

(1) Railroads that operate intercity or commuter passenger train service on the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service.

(b) This part does not apply to:

(1) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation;

(2) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation;

(3) Operation of private cars, including business/office cars and circus trains; ~~or~~

(4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 270.5);

(5) States, state agencies and instrumentalities, and political subdivisions of states that own (but do not operate) railroads;

(6) States, state agencies and instrumentalities, and political subdivisions of states that own (but do not operate) railroad equipment; or

(7) States, state agencies and instrumentalities, and political subdivisions of states that provide financial support for (but do not operate) passenger trains.

Second, VTrans requests that FRA amend 49 C.F.R. § 270.5 (Definitions) as follows (deleted material struck through; added material underlined):

**§ 270.5 Definitions.**

As used in this part—

*Railroad* means—

(1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail 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 does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation; and

(2) A person or organization that provides railroad transportation~~, whether directly or by contracting out operation of the railroad to another person~~.

## Discussion

## I. CONGRESS DID NOT INTEND FOR THE SSP RULE TO APPLY TO ENTITIES THAT ARE NOT "RAILROAD CARRIERS."

The statutory mandate for the SSP rule is contained in sections 103 and 109 of the Rail Safety Improvement Act of 2008 (RSIA), Pub.L. No. 110-432, Div. A., 122 Stat. 4848 *et seq.*, codified at 49 U.S.C. § § 20156, 20118, and 20119. In both sections 103 and 109 Congress used the venerable term "railroad carrier." Under 49 U.S.C. § 20101 (Definitions), Congress has provided the following definition of "railroad carrier":

> (3) "railroad carrier" means a person *providing railroad transportation,* except that, upon petition by a group of commonly controlled railroad carriers that the Secretary determines is operating within the United States as a single, integrated rail system, the Secretary may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of this title and implementing regulations and order, subject to any appropriate conditions that the Secretary may impose. [Emphasis added.]

The statutory definition relied upon by Congress plainly makes "providing railroad transportation" an essential element of "railroad carrier" status. Moreover, the term "railroad carrier" itself is a legal term of art, with a long pedigree in the law. A cardinal rule of statutory construction holds that:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning of its use will convey to the judicial mind unless otherwise instructed. In such case, absence

> of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

*Morissette v. United States,* 342 U.S. 246, 263 (1952), quoted in *Molzof v. United States,* 502 U.S. 301, 307 (1992).

## II. STATE OWNERSHIP OF RAILROAD PROPERTY DOES NOT RESULT IN "RAILROAD CARRIER" STATUS.

Historically, ownership of railroad property leased to a carrier was not a sufficient basis for imputing carrier status to the owner/lessor under various federal statutes such as the Interstate Commerce Act, the Federal Employers Liability Act, and the Railway Labor Act. For example, in *Meyers v. Famous Realty, Inc.,* 271 F.2d 811, 814-15 (2d Cir. 1959), *cert. denied,* 362 U.S. 910 (1960), the Second Circuit recognized a significant distinction between ownership of railroad property and actual performance of carrier services to the public. *See also Bush Terminal R.R. Co.—Entire Line Abandonment,* 342 I.C.C.2d 34, 50 (1971) (*Myers* cited with approval by former ICC).

Over the past half century, the State of Vermont, relying on this distinction, pioneered in acquiring abandoned railroad properties for lease to and continued operation by carriers. Following complete abandonment of the Rutland Railway, which left most of southern and western Vermont without any railroad service at all (*see Rutland Ry. Corp.—Abandonment of Entire Line,* 317 I.C.C. 393 (1962)), the Vermont legislature authorized the State to purchase viable portions of the Rutland Railway for lease to short-line operators who would be responsible for actual operations. 1963 Vt. Acts No. 162. The State of Vermont's purchase of the 131.6-mile-long Bennington to Burlington segment of the former Rutland Railway for lease to a new, investor-owned carrier, Vermont Railway, Inc. (VTR), became the prototype for similar arrangements in Vermont and across the nation.

The former ICC's review of the proposed purchase/lease scheme initially resulted in a determination that the State of Vermont's ownership of the tracks and other facilities to

be leased to and operated by VTR would be enough to make the State itself a carrier by railroad as defined in former section 1(3) of the Interstate Commerce Act. The former ICC opined that ownership was the key test: "The fact that the State is not empowered to undertake the actual operation of the line of railroad does not change its status under the [Interstate Commerce Act], which results from ownership of the properties." *Vermont and Vermont Ry., Inc.—Acquisition and Operation in Vermont,* 320 I.C.C. 330, 334-35 (1963) (hereafter *Vermont Railway I*).

However, in response to the State of Vermont's petition, the former ICC reconsidered its holding that the State of Vermont was a carrier by railroad. After analyzing a number of cases decided both under the common law and a variety of federal regulatory schemes, the Commission reversed itself and issued a modified opinion:

> Far from making ownership the test in fixing the status of a common carrier, it appears that these decisions emphasized that enabling legislation to transport for hire the property or persons of any member of the public is the real criterion of common carriage. Thus the cited decisions draw a distinction between the situation in which a governmental body merely owns a railroad and one in which it both owns and operates a railroad. In the latter situation, the governmental body can reasonably be held to be a common carrier, because as a railroad operator it is not exempt from the statutory scheme of regulation.

*Vermont and Vermont Ry., Inc.—Acquisition and Operation in Vermont,* 320 I.C.C. 609, 614 (1964) (hereinafter *Vermont Railway II*).

Subsequent events upheld the manner in which the State of Vermont abjured common carrier status. In the wake of the financial stress that overtook many railroad carriers in the 1970s, many branch lines throughout the country were threatened with abandonment. A number of states, following the approach taken by Vermont after the Rutland Railway's collapse in the early 1960s, responded by acquiring branch lines for lease to designated short-line operators. In *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions,* 363 I.C.C. 132 (1980, *aff'd sub nom. Simmons*

*v. ICC,* 697 F.2d 326 (D.C. Cir. 1982), the former ICC promulgated rules (originally codified at 49 C.F.R. §§ 1120A.1-.4; now codified at 49 C.F.R. §§ 1150.11-.24) intended to encourage state programs for continuation of service over marginal railroad lines. *See* 363 I.C.C. at 133. In so doing, the ICC recognized the clear intent of Congress that states seeking to salvage the operation of abandoned rail lines not be burdened with the imposition of costly labor protection rules. See *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Associates, Inc.,* 794 F.2d 9, 12 (2d Cir. 1986); *Simmons, supra,* 697 F.2d at 334-42.

Since 1991, many states, when acquiring rail lines threatened with abandonment, have avoided common carrier status by structuring the transaction so that the selling carrier retains an exclusive, permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligation. As part of the transaction, the selling carrier then transfers the freight easement directly to the state's new designated operator. See *Maine Dep't of Transportation—Acquisition and Operation Exemption—Maine Central R.R.,* 8 I.C.C.2d 835, 836-37 (1991); *Michigan Dep't of Transportation—Acquisition Exemption—Certain Assets of Norfolk Southern Ry.,* FD 35606, slip op. at 3 (STB served May 8, 2012*); Massachusetts Dep't of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc.,* FD 35312, slip op at 6 (STB served May 3, 2010), *aff'd sub nom. Brotherhood of R.R. Signalmen v. STB,* 638 F.2d 807 (D.C. Circ 2011). Indeed, VTrans has relied on this model to acquire rail lines between White River Junction and Wells River, VT, and between Wells River and Newport, VT. See *State of Vermont—Acquisition Exemption—Certain Assets of Boston and Maine Corp.*, FD 33830 (STB served Dec. 20, 1999) and *State of Vermont—Acquisition Exemption—Certain Assets of Newport & Richford R.R. Co., etc.,* FD 34294 (STB served Jan. 17, 2003.

At present, Amtrak's *Ethan Allen Express* operates over a 1.5-mile-long segment of State-owned track (leased to and operated and dispatched by VTR) between Center Rutland and Rutland, VT. As explained below, VTrans is working with Amtrak to extend this service northward over the 65.5 miles of State-owned track (also leased to and operated and dispatched by VTR) between Center Rutland and Burlington, VT.

## III. STATE FINANCIAL SUPPORT FOR AMTRAK SERVICES DOES NOT RESULT IN "RAILROAD CARRIER" STATUS.

In section 306 of the Rail Passenger Service Act of 1970, Pub.L. No. 91-518, 84 Stat. 1327, the original legislation creating Amtrak, Congress explicitly provided that Amtrak "shall be deemed a common carrier by railroad within the meaning of section 1(3) of the Interstate Commerce Act...." In section 403(b), Congress allowed states to request additional passenger rail service from Amtrak if they agreed to pay a portion of the costs. There was no suggestion in the statutory language that a state's financial support for Amtrak would trigger "railroad carrier" status for the state.

In 1995, following Amtrak's announcement that it would discontinue its overnight *Montrealer* passenger train service (which passed through the entire length of Vermont en route from Washington, D.C. and New York City to Montreal), VTrans began providing financial support to Amtrak for a new daytime service—the *Vermonter*—from Washington, D.C. and New York City, through Vermont, with its northern terminus at St. Albans, VT (a short distance south of the Canadian border). Between Washington and St. Albans, this 611-mile-long service operates over tracks owned by Amtrak, Metro-North Railroad, the Massachusetts Department of Transportation (MassDOT), and the New England Central Railroad. The *Vermonter* service continues to the present; VTrans is committed to working with Amtrak to extend service northward to Montreal.

In 1996, Vermont began providing financial support to Amtrak for a second passenger train service, the *Ethan Allen Express*, which operates between New York City and Rutland, VT. This 241-mile-long service uses tracks owned by Metro-North Railroad, CSX Transportation, the Canadian Pacific Railway, the Clarendon & Pittsford Railroad, and VTR. The *Ethan Allen Express* service continues to the present; VTrans is working with Amtrak to extend service another 65.5 miles northward from Center Rutland to Burlington, VT, over State-owned trackage that is leased to and operated and dispatched by VTR.

Over the years, Congress has looked to the states to provide additional support for Amtrak. In 2008 Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA), Pub.L. No. 110-432, Div. B, 122 Stat. 4848, 4907. PRIIA's section 209 requires states to share costs with Amtrak under a consistent formula for all routes of less than 750 miles, excluding the Northeast Corridor. The requirement for greater state subsidies took effect in October 2013. Since both Vermont's State-supported passenger trains operate beyond the Northeast Corridor, PRIIA has resulted in Vermont and its sister states providing increased support to Amtrak.

Thus, the FRA's new SSP rule goes beyond its enabling legislation by encompassing organizations that own railroads but that contract railroad operations to other entities. These provisions of the new rule are not only *ultra vires*, but also unworkable and unnecessary. The State of Vermont does not have any legal authority to repair safety concerns that arise. VTrans may not enter the railroad rights-of-way that it leases to private short-line operators without the permission of those operators. Nor does VTrans have the equipment or the personnel to make track repairs. All these responsibilities lie within the operational capacities and contractual responsibilities of the actual operators.

Even if the State could renegotiate its leases with these short-line operators, the process of reworking these contracts would entail significant expense and uncertainty, and the amended agreements would upend the owner-lessor/operator-lessee model that has served Vermont well for decades. The new rule would place significant financial burdens on VTrans and other transportation agencies across the country that currently have no responsibility for railroad operations. Complying with the new rule would not only require creating new positions, but also impact risk management in connection with the potential liability arising from new safety regulations.

## IV. THE RULE HAS SUBSTANTIAL DIRECT FEDERALISM IMPLICATIONS.

President William J. Clinton's Executive Order No. 13,132, "Federalism," 64 Fed. Reg. 43,255 (Aug. 10, 1999), requires the FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13,132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts state law, the agency seeks to consult with state and local officials in the process of developing the regulation.

The Rule, as applied to VTrans, clearly has significant federalism implications that were apparently not considered by the FRA in determining the Rule's application to

VTrans. It is particularly concerning that the Rule would have a chilling effect on states—like Vermont—that, in reliance on existing federal statutes, regulations, and case law, have carefully structured their support for short-line railroads threatened with abandonment, as well as for intercity passenger rail service, to avoid "railroad carrier" status.

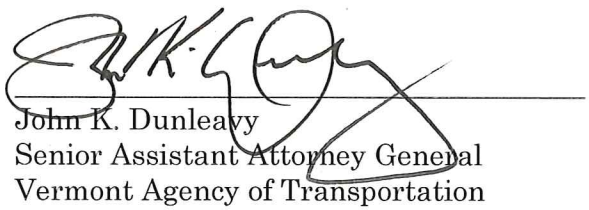
**Conclusion**

In opening the door to application of its SSP rule to non-carrier state entities that own (but do not operate) railroad property or that provide financial support to railroad carriers such as Amtrak, the FRA plainly has overreached its grant of enabling authority from Congress. Moreover, by exposing such state entities with the untoward consequences of "railroad carrier" status, the FRA will have a chilling effect on activities encouraged by Congress—*i.e.*, the states' taking a pro-active role in acquiring rail lines threatened with abandonment and in providing financial support for Amtrak passenger train services. To avoid these results, the FRA should amend its SSP rule as recommended by VTrans.

Dated at Montpelier, Vermont, this 3rd day of October, 2016.

Respectfully submitted,

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

John K. Dunleavy
Senior Assistant Attorney General
Vermont Agency of Transportation
National Life Building
One National Life Drive
Montpelier, VT 05633
john.dunleavy@vermont.gov
(802) 828-3430

*Attorneys for State of Vermont, Agency of Transportation*