BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA-2011-0060
RIN 2130-AC31
SYSTEM SAFETY PROGRAM

PETITION FOR RECONSIDERATION SUBMITTED BY NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Pursuant to 49 C.F.R. Part 211, the North Carolina Department of Transportation ("NCDOT") submits the following petition for reconsideration of FRA's final rule in Docket No. FRA-2011-0060: System Safety Program. NCDOT seeks amendment of the rule and a specific acknowledgement in the rule that the requirements of the System Safety Program ("SSP") rule (the "Rule") does not apply to States, state agencies, instrumentalities, and political subdivisions of states that own (but do not operate) railroads, railroad equipment or that provide financial support for intercity passenger rail service on the grounds that FRA's attempt to mandate such entities' compliance with the Rule is not practicable, is unreasonable, and is not in the public interest per 49 C.F.R. § 211.29. NCDOT also requests that the effective date of the Rule be stayed while FRA considers this and any other petitions for reconsideration.

FRA Should Amend the Rule and Specifically Acknowledge that the Rule Does Not Apply to NCDOT, and other State or Public Entities Who Merely Own Railroads, Equipment or Act as Financial Sponsors of Intercity Passenger Service.

NCDOT requests the following amendments to the Rule:

(1) NCDOT 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) intercity passenger rail service.

(2) NCDOT also 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~~.

As set forth in more detail below, it is clear that FRA should amend the Rule and specifically acknowledge that NCDOT and/or other State or public entities that own railroads, equipment or that financially sponsor intercity passenger rail service ("Sponsors"), are not subject to the Rule since compliance with the Rule is not practicable, is unreasonable in its imposition of costs and administrative burdens, and is not in the public interest. In attempting to apply the Rule to such Sponsors, FRA exceeded its statutory authority by, in the Rule, redefining such Sponsors as "railroads" pursuant to the Rail Safety Improvement Act of 2008 ("RSIA').when such sponsors are not defined as "railroads" in the RSIA. RSIA, secs. 103 and 109, Public Law 110–432, Division A, 122 Stat. 4848 *et seq.*,codified at 49 U.S.C. 20156, 20118, and 20119 Additionally, with respect to NCDOT, an agency of the State of North Carolina, attempting to mandate that NCDOT comply with the Rule has substantial direct federalism implications. Finally, the Rule imposes substantial financial and other burdens on NCDOT and other similarly situated Sponsors without improving rail safety.

1. NCDOT Requests that FRA Consider the Facts Raised in This Petition.

The FRA's Rules of Practice require a petitioner to explain why it 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 a "universe" of 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 that suggests that financial support would be considered "contracting out the operation of the railroad

to another person." See, Rail Passenger Services Act of 1970, Pub. L. No. 91-518 § 403(b) (Oct. 30, 1970). Therefore, NCDOT did not anticipate, and indeed none of the comments received by the FRA appear to have anticipated, that Sponsors would be included in this definition. It was not until the FRA issued its "Guidance for Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" ("Guidance") concurrently with the Final Rule that FRA made clear that its intention to enforce the Rule directly against Sponsors, at least where they sponsor routes not integrated in Amtrak's National System, rather than against the operators thereof. Accordingly, this Petition for Reconsideration is the first opportunity that NCDOT has had to formally raise its concerns with the FRA. Moreover, at the time the NPRM was issued, the great majority of Sponsors had not yet established their service programs, and the organizations, structure, and methodology underlying the support of short-distance intercity passenger rail routes under PRIIA Section 209 were unsettled. For these reasons, NCDOT had every reason to believe that only Amtrak, Alaska Railroad, or any future operator – as opposed to Sponsors themselves – would be subject to the Rule, and did not raise the facts asserted in this Petition during the rulemaking process, since the Rule did not. However, NCDOT respectfully requests that its views be considered now in light of the inadequate notice of the Rule's application to NCDOT.

2. ***In the Rule, FRA Has Departed from the RSIA's Definition of "Railroad" and Has Therefore Acted in Excess of the Authority Granted by that Statute.***

FRA contends that the Rule is promulgated to satisfy the statutory mandate in the RSIA. However, in neither the RSIA nor in the Passenger Rail Investment and Improvement Act (PRIIA) of 2008 does Congress specify an intent that a State financial sponsor of intercity passenger rail services has any responsibility to comply with the RSIA's mandate. The RSIA at

section 2, "Definitions" provides that the term ''railroad'' has the meaning given that term by section 20102 of Title 49, United States Code.

49 U.S.C. § 20102(2) states:

> "railroad"
>
> (A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including
> (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.

The Rule, at 49 C.F.R. § 270.101, mandates that: "Each railroad subject to this part shall establish and fully implement a system safety program that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities." The Rule, at 49 C.F.R. § 270.5 states:

> 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.**

(emphasis added)

FRA contends that "The definition of ''railroad'' is based upon 49 U.S.C. 20102(1) and (2)...." 81 FR. 53850, 53863 (August 12, 2016). That misstates the case. In fact, the Rule expands the universe of regulated entities through the inclusion of the highlighted language of § 270.5(2). This language, which is found nowhere in the RSIA-adopted definition of "railroad" now purports to subject to the SSP requirements "...any person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person...." This new definitional section constitutes a significant departure from the language of the authorizing statute and in fact exceeds the scope of the statute. The Guidance purports to apply the Rule to programs such as NCDOT's by assuming NCDOT would be responsible for development of an SSP instead of placing this requirement on operators of railroads. NCDOT's program is split into two components. North Carolina sponsors the *Carolinian* service, for which Amtrak acts as both operator and maintainer of the equipment, which is owned by Amtrak. For the *Piedmont* service, Amtrak provides train operations, ticketing, and all of the critical functions of a customer service operation, and an NCDOT-selected provider maintains state-owned passenger equipment in conformity with FRA regulations. There is no evidence that Congress intended Sponsors such as NCDOT to comply with the RSIA SSP mandate.

Additionally, it should be noted that the statutory mandate for the SSP rule is contained in sections 103 and 109 of the RSIA. In both sections 103 and 109 Congress used the 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.

The statutory definition relied upon by Congress plainly makes "providing railroad transportation" an essential element of "railroad carrier" status. Moreover, the term "railroad carrier" is itself a legal term of art. A cardinal rule of statutory construction is 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).

In fact, the specific definitions of "railroad" and "railroad carrier" contained in 49 U.S.C. § 20102 make no mention of the category of entity described in 49 C.F.R. § 270.5(2), *ie* "A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person." Since the FRA's definition of "railroad" subjects NCDOT to the Rule's requirements in the absence of Congressional authority, it is clear that the Rule should be amended to remove 49 C.F.R § 270.5(2), and to acknowledge in 49 C.F.R. § 270.3 that States and other public entities that own railroads or equipment, or that financially sponsor intercity programs through contracts with others, are not subject to the Rule. *See*, 5 U.S.C. § 706 (2) (c) (on judicial review of agency action, reviewing court shall set aside agency action in excess of statutory authority).

3. The Rule Has Substantial Direct Federalism Implications.

Executive Order 13132, ''Federalism'' 64 FR 43255 (Aug. 10, 1999), requires 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 13132, 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.

A. The Rule Conflicts with North Carolina Law and Imposes Obligations in Excess of NCDOT's Authority.

NCDOT, as an agency of the State of North Carolina, possesses only those powers expressly granted to it by its legislature or those which exist by necessary implication in a statutory grant of authority. *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 359 (2011). NCDOT's statutory authority to act as a financial sponsor of the *Piedmont* intercity rail program is found in Article 2D of Chapter 136 of the North Carolina General Statutes, N.C. Gen. Stat. § 136-44.35 *et seq.* N.C. Gen. Stat. 136-44.36 provides that Article 2D shall not be construed to grant to NCDOT the power or authority to operate directly any rail line or rail facilities. The North Carolina General Assembly's specific denial of authority for NCDOT to act and operate as a railroad cannot be reconciled with FRA's treatment (and in fact its very definition) of NCDOT as a "railroad." In fact, FRA was or should have been aware of this state law conflict, having previously been

engaged with NCDOT on the issue of whether NCDOT was a "railroad carrier" per 49 U.S.C. § 20102(3).[1]

In order to implement the SSP, NCDOT would need to seek specific legislative authority from the General Assembly, as it was required to do in order to provide System Safety Oversight ("SSO") of third-party transit providers subject to Federal Transit Administration ("FTA") oversight. Such a grant of legislative authority would likely not be forthcoming, since it would be contrary to the General Assembly's denial of such authority as discussed above.

It should also be noted that 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. NCDOT is not authorized by the General Assembly to undertake these or other similar obligations.

The Rule therefore requires NCDOT to carry out a function it is not authorized by law to perform, making compliance impracticable and unreasonable.

B. The Rule Threatens to Impair NCDOT's Existing Contracts with Other Entities, Including FRA.

(i) The Rule Threatens to Impair NCDOT's Contracts with Its Third-Party Service Contractors.

Application of the Rule to NCDOT would impair implementation of NCDOT's contracts for passenger rail service, and potentially implicate the Contracts Clause of the United States Constitution.

NCDOT currently contracts with Amtrak for operation of its *Piedmont* intercity passenger rail service. NCDOT also contracts with RailPlan International for mechanical service and

[1] See, NCDOT v FRA, 08-1308m (D.C. Circuit 2008).

maintenance on its *Piedmont* service. The Rule imposes on NCDOT the obligations to inquire and manage the operations of these entities, tasks for which NCDOT lacks the means, manpower, funding .and requisite statutory authority. If required to comply with the Rule, NCDOT would not only face considerable challenges in augmenting existing human resources, but would need to pursue legislative changes before the responsibilities imposed by the Rule could be fulfilled. Also, implementing the Rule will likely require NCDOT to renegotiate its existing operating agreements with Amtrak, RailPlan and other future contractors to ensure compliance with and implementation of the requirements imposed by the Rule. Further, NCDOT would have to secure additional funding from the General Assembly in order to implement an SSP. Achieving these prerequisites is at best uncertain, making application of the Rule impracticable and not in the public interest, especially since the railroad operators and mechanical contractors currently have direct responsibility for safe operation of passenger service.

(ii) ***The Rule Also Threatens To Impair NCDOT's Contracts Involving FRA.***

NCDOT also has entered into a Grant Cooperative Agreement with FRA ("GCA") in August 2010 and a Definitive Service Outcomes Agreement ("DSOA") with Amtrak, Norfolk Southern and North Carolina Railroad Company in March 2011. The GCA provides full funding for extensive improvements along the *Piedmont* line, provided NCDOT achieves the service outcomes set forth in the DSOA. NCDOT entered into those agreements prior to the September 7, 2012 notice of proposed rulemaking ("NPRM"), when system safety oversight, and the attendant expense it would entail, were not contemplated by NCDOT, and which NCDOT believes were not contemplated by FRA at that time (indicated by FRA's lack of consultation with NCDOT and others similarly situated during the NPRM phase). The GCA provides that

failure to provide the service outcomes set forth in the DSOA can result in FRA recoupment of funds advanced under the GCA. Imposition of the financial burden of mandating NCDOT implementation of the SSP reduces State funding available for the *Piedmont* and Carolinian services, thus threatening the ability of NCDOT to deliver the service outcomes. Also, the imposition of these costs that were not required by law nor contemplated by the GCA without making federal funds available for such costs has substantial, direct and significant federalism implications.

C. The Rule Defines Employees of NCDOT's Independent Contractors as NCDOT Employees, Thus Significantly Impacting State Law.

The Rule, at § 270.107(a)(1) purports to require NCDOT to "...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...." The Rule, at § 270.107(a)(2) specifically states that "...If 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...." The State of North Carolina does not seek to expand its pool of employees to include employees of the State's contractors. The unintended consequences of any such implementation are potentially far-reaching, implicating, among other things, tax policy, health benefits and retirement benefits.

NCDOT, as an agency of the State of North Carolina, is immune from suit except to the extent it waives its sovereign immunity by contract, or to the extent its General Assembly has waived the State's sovereign immunity in the Tort Claims Act, N.C. Gen. Stat § 143-291 *et seq.* The Tort Claims Act waives the State's sovereign immunity only with respect to claims of negligence by the State or its employees and agents.

As noted above, Amtrak operates the *Piedmont* and *Carolinian* services, and RailPlan services and maintains the *Piedmont* equipment. NCDOT has no authority to direct the actions of employees of these contractors, whose terms of employment are governed by contracts with their employers and by any applicable collective bargaining agreements. The Rule's mandate at § 270.107 may affect the distinction between the State's employees and its independent contractors. Specifically mandating that a State agency develop an SSP in close coordination with the employees of its contractors may disturb the balance of factors that are considered in ascertaining an individual's status as employee or independent contractor, potentially subjecting the State to tort liability for the acts of an untold number of individuals (third-party independent contractor employees) whom it has no role or input in hiring. The guidelines used by the Internal Revenue Service, for example, place particular emphasis on the degree to which a business controls the behavior of individuals. Through this section of the Rule, FRA purports to mandate that NCDOT direct the behavior and conduct of third-party employees. This is a potentially significant and extremely troubling impact on North Carolina State law and the State's liability and management of employees and their benefits.

The Rule also potentially impacts other areas of North Carolina state law. Requiring NCDOT to essentially bargain with the employees of its contractors is inconsistent with the traditional treatment of contractors' employees under railroad labor laws, and may therefore have broader consequences. Additionally, NCDOT's consultation with its contractor's employees may be construed to interfere with the contractor's employer-employee relationship with those individuals, thus impacting the contractor's ability to manage its own.

D. The Rule Fundamentally Alters the Responsibilities and Roles of Safety Oversight Bodies Such As NCDOT

Sponsors such as NCDOT are established, organized, and staffed primarily to provide financial support to intercity operations and, in NCDOT's case, to provide safety oversight (as opposed to safety plan implementation). Historically, the rail carriers and operators have been tasked with implementation of safety measures. For example, pursuant to 49 C.F.R. § 213.5, the owner of track is responsible for track safety unless it is assigned; any assignment requires, among other things, a statement as to the competence and ability of the assignee to carry out the duties of the track owner. The rationale for this is clear—the owner is in the best position to implement the safety requirements. A plan author who is not an owner or designee has no authority or means to implement responsibilities with respect to track safety standards.

By contrasting example, as set forth in *Shanklin v. Norfolk Southern Railway Co.,* 529 U.S. 344 (2000), in certain circumstances and subject to USDOT Federal Highway Administration approval, state Departments of Transportation, public utilities commissions and other authorities determine what constitutes adequate highway/rail grade crossing protection, directs the design and construction of safety improvements by the owning/operating railroad through federal safety programs and the owning/operating railroad establishes a plan for maintenance of the safety devices. Requiring Sponsors such as NCDOT to participate in an SSP for maintenance and eventual improvement of crossings places NCDOT in the dual position of planning improvements at crossings it had previously determined to be adequately protected. This is but one example of the type of conflict of interest that could arise from the Rule's compelling NCDOT to undertake the roles of both safety system planner and safety system overseer.

E. The Rule Was Promulgated Without Meaningful Consultation Between FRA and NCDOT.

As set forth above, application of the Rule to NCDOT and other Sponsors creates a host of federalism concerns and has substantial and direct effects on North Carolina state law and on the relationship between states and the federal government. It was promulgated without meaningful consultation between FRA and NCDOT, nor, to NCDOT's knowledge, between FRA and the major state participatory bodies such as the American Association of State Highway and Transportation Officials' (AASHTO's) Standing Committee on Rail Transportation ("SCORT"), AASHTO's Executive Committee which seats the Secretary for each member Department, the States for Passenger Rail Coalition ("SPRC") or the National Governor's Association ("NGA"). Given the real and significant federalism effects the Rule has, and given the lack of engagement with affected public sponsors of intercity passenger rail service, application of the rule to those sponsors in these circumstances is not practicable, is unreasonable, and is not in the public interest, and the Rule should be amended as set forth above.

4. *The Rule Imposes Substantial Financial and Other Burdens on NCDOT and Others Similarly Situated Without Improving Rail Safety.*

The Rule mandates that NCDOT conduct an SSP, a function for which it does not have the staff, resources, nor as set forth above, the statutory authority to perform, and has done so without input from NCDOT and other affected entities. And, even if the many obstacles to SSP implementation were overcome, it is not clear that SSP implementation as currently contemplated by FRA would be the most efficient use of resources to promote safety.

Even though contractors employ personnel dedicated to and expert in rail safety, the Rule requires Sponsors to use their scarce fiscal resources to duplicate that expertise for existing service in lieu of funding additional service. Also, even if the funds were available, Sponsors are

not organized to recruit nor hire sufficient qualified staff to meet the obligations imposed by this Rule. Apart from the general shortage of such individuals in the marketplace due to the duplicative employee functions and duties stipulated in this Rule, Sponsors are in most cases unable to recruit and retain such railroad-related positions due to budgetary considerations as these functions are outside the sponsors' duties and would likely impact the ability of such state sponsors to maintain their passenger programs due to the financial imposition of railroad-related labor employment and retirement requirements thrust upon them, as well.

None of these administrative and financial burdens were considered by the FRA in promulgating the Rule. The FRA did not even mention Sponsors 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. FRA concluded in its costs and benefits analysis that most of the passenger railroads affected by the Rule already participated in the American Public Transportation Association (APTA) system safety program, and that since the majority of intercity passenger or commuter railroads already had APTA system safety programs, there would not be a significant cost for these railroads to implement the regulatory requirements of the Rule. (81 FR 58350, 58351). In contrast to the railroads studied during the rulemaking, NCDOT does not participate in the APTA system safety program and NCDOT is unaware of any State sponsor that does participate. 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 and

negative impacts on the overall insurance market likely to occur as a result of the Rule's mandate. If FRA had intended Sponsors to implement SSPs, the financial impact on Sponsors should have been studied during the rulemaking process as was required.

Moreover, it does not appear FRA took into account that implementing the Rule will likely require 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 costs are significant and cannot be readily determined. And, because these additional, duplicative costs 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 SSO Program recently mandated by the Federal Transit Administration (FTA), the FRA and U.S. Department of Transportation have not identified any source of funding to assist the State sponsors. 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 intercity passenger service remains an option. And, in the event that States discontinue intercity passenger rail service because they determine the Rule's financial burden is too great, they may, as NCDOT noted above with respect to the GCA, 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.

Significantly, FRA has not explained how applying the Rule to State sponsors of intercity passenger rail service would enhance the safety of rail transportation and, since indeed, it would not. As the FRA appears to recognize in the Guidance, in most cases it is the Sponsors' service

providers, and not the 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 Sponsors contract for the provision of intercity passenger rail service 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 intercity passenger rail service, and the FRA's surveillance programs and attendant threat of enforcement action acts as a powerful incentive to ensure compliance among those entities. Sponsors do not, and in NCDOT's case cannot[2], perform the safety-related functions of a railroad themselves, and the Rule fails to identify any gap in the oversight of intercity passenger rail service 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 intercity passenger rail services, the Rule is more likely to degrade it by placing primary responsibility for the development of an SSP with the intercity passenger rail service entities that are least qualified to develop it.

Additionally, FRA's attempt to define 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 of intercity passenger rail service.

[2] As noted above, NCDOT is not authorized to directly conduct railroad operations, N.C. Gen. Stat. § 136-44.36.

As set forth above, it is clear that compliance with the Rule will be impractical and unreasonable for Sponsors such as NCDOT and is contrary to the public interest by threatening the financial viability of intercity passenger rail service while doing nothing to enhance safety.

5. *Conclusion.*

Based on the foregoing, it is clear that the application of the Rule to NCDOT and other Sponsors of intercity passenger rail service is not practicable, is unreasonable, and is not in the public interest. FRA should amend the Rule as set forth above, and stay the effective date of the Rule until resolution of any petitions for reconsideration.

Respectfully submitted this 3rd day of October, 2016.

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