CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

CASE NO. 16-1352
Consolidated With Case No. 16-1355

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Petitioner,

CAPITOL CORRIDOR JOINT POWERS AUTHORITY,
Petitioner,

v.

FEDERAL RAILROAD ADMINISTRATION and the
UNITED STATES OF AMERICA,
Respondents.

FINAL JOINT REPLY BRIEF OF PETITIONERS NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND CAPITOL CORRIDOR JOINT POWERS AUTHORITY

Review of FRA Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations (Issued Aug. 11, 2016)

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STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), copies of the following pertinent statutes and regulations are set forth in the separately bound Addendum filed with Petitioners' Opening Brief:

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GLOSSARY OF ABBREVIATIONS

Amtrak ..... National Passenger Railroad Company

APA ..... Administrative Procedure Act

DOT ..... Department of Transportation

FRA ..... Federal Railroad Administration

Guidance ..... FRA, *Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations* (Issued Aug. 11, 2016)

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SUMMARY OF ARGUMENT

The Federal Railroad Administration's ("FRA") Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations ("Guidance") is a legislative rule that should have been promulgated as a regulation following notice and comment for at least four reasons: (1) because the FRA itself committed to that process under its own regulations; (2) because the

FRA invoked and relied on its general legislative authority to issue the Guidance, (3) because the Guidance amends the System Safety Plan Rule, which was issued as a legislative rule, and (4) because of the new duties and mandatory procedures the Guidance imposes on State sponsors of intercity passenger railroads.

The FRA's Brief attempts to shift the focus away from those determinative factors by arguing that the Guidance is not a final agency action and is not therefore subject to judicial review. Brief for Respondent ("FRA Br.") at 21-34. The FRA argues that the Guidance "merely reiterates pre-existing requirements and advises parties . . . on how to achieve compliance with federal rail safety requirements." *Id.* Accordingly, the FRA argues, the Guidance is more like a statement of existing law than a new rule and is neither final nor legislative.

In making that argument, however, the FRA ignores the regulatory context of the Guidance, the actual language of the Guidance, the very real impact of the Guidance, and the FRA's own statements and actions. Instead of addressing the actual text and effect of the Guidance, the FRA relies on a generalized, *post hoc* characterization of the Guidance that, in Jedi-like fashion, casts a verbal fog over the Guidance in an effort to charm the Court into believing that "this is not the final order you are looking for." But it is, and the FRA cannot cherry-pick language from the Guidance to obfuscate its substantive impact.

The reality is that the Guidance *does* impose new compliance obligations on State sponsors. The Guidance creates a new regulatory regime that divides State sponsors into two newly minted categories and subjects each to different regulatory requirements and procedures. For one category, the Guidance establishes a mandatory process for State sponsors that choose to contract with entities other than Amtrak – what the FRA now calls "non-integrated" routes – to obtain FRA approval of their plan for regulatory compliance. For the other category, the Guidance establishes a path for State sponsors to avoid that regulatory burden by contracting with Amtrak for all intercity passenger rail services – what the FRA now labels "integrated" routes. Because of the novelty of this new regulatory scheme and the burdens it imposes, it is not surprising that the FRA committed itself to following notice and comment procedures. Because the scheme imposed by the Guidance is not mandated by (or reconcilable with) the Passenger Rail Investment and Improvement Act of 2008[1] or any other statute or regulation, it is also not surprising that the FRA relied on its general legislative authority to promulgate it.

The FRA's argument that it has always believed State sponsors to have a

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[1] Pub. L. No. 110-432, div. B (Oct. 16, 2008) (Addendum of Statutes and Regulations ("Addendum") 143–206).

role in complying with safety regulations applicable to intercity passenger rail services they fund does not make the Guidance non-final or non-legislative. Because the Guidance crystallizes that position from the abstract into mandatory regulatory obligations, requires compliance with new requirements, and changes the legal standards for compliance by State sponsors, it is both final and legislative. Under clear Circuit precedent, the Guidance should be vacated and remanded to follow the notice and comment procedures required for legislative rules.

ARGUMENT

I. THE FRA FAILS TO SHOW THAT THE GUIDANCE IS NOT A FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW

A. The Guidance Meets The Legal Test For Final Agency Action

The Supreme Court has set forth a two-part test to determine when an agency action is "final" within the meaning of 5 U.S.C. § 704: "First, the action must mark the 'consummation' of the agency's decision making process, – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quoting *Chicago & S. Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948) and *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The Court has recently affirmed its longstanding

"'pragmatic' approach" to finality: even where a guidance document is not directly enforceable, it is reviewable if it warns the regulated community of legal consequences under other laws for failing to follow the substance of the guidance. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). The Guidance readily meets this two-part test.

1. The Guidance is the Consummation of FRA Decision-Making

There is no dispute that the Guidance is the "consummation" of the FRA's decision-making process, and the FRA does not seriously argue otherwise.[2] At most, the FRA suggests that the regulatory process is not complete because the Guidance calls for further regulatory proceedings to determine the appropriate role of the State sponsor with respect to compliance. FRA Br. at 23-24. That does not defeat finality, however. Because the Guidance creates a mandatory process with which State sponsors must comply, it is a final agency action. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252-53 (D.C. Cir. 2014) (establishing a new regulatory process is a final agency action, even if the results of that process are not known).

2. The Guidance Determines Obligations and Has Legal Consequences

An agency action can be final even if it is not formally published or is

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[2] *See* Brief of Petitioners North Carolina Department of Transportation and Capitol Corridor Joint Powers Authority ("Pet. Br.") at 2-3.

described by the agency as non-final. *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). The true test is the *effect* of the agency action. *Id.* at 1023. A guidance document that establishes a clear and binding way to comply with existing law is a reviewable final agency action. *Gen. Elec. Corp. v. EPA*, 290 F.3d 377, 384-85 (D.C. Cir. 2002). Similarly, the fact that agency guidance is based on pre-existing agency policies and positions does not make it non-final. The evolution of an agency's position from a general theory of *potential* regulatory responsibility to the implementation of *specific* regulatory obligations has the effect of "crystalliz[ing] an agency position into a final agency action within APA § 704's meaning." *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000). The Supreme Court has further recognized that a guidance document that has the effect of denying access to a safe harbor is a final agency action. *Hawkes*, 136 S. Ct. at 1814-15. The principles articulated in those cases demonstrate that the Guidance is a final agency action.

Prior to the Passenger Rail Investment and Improvement Act, and prior to the Guidance, State sponsors had no explicit regulatory obligations to the FRA other than the limited number of laws that all parties agree impose independent obligations on certain State sponsors by virtue of ownership of the railroad right-of-way or other specific circumstances. FRA Br. at 31; Guidance ¶ II.C.ii (Joint

Appendix ("J.A.") 1). For all other obligations, as the FRA acknowledges, the FRA looked solely to Amtrak, with whom State sponsors contracted to provide the service, for compliance. FRA Br. at 8-9. Even if the FRA held the view – never expressed in regulation or other binding form – that State sponsors were in some way responsible for compliance, that responsibility was latent, informal, and unenforced. The Guidance imposed that view in a way that compels regulatory compliance for the first time and readily meets the test for final agency action.

First, Petitioners are unaware of any pre-Passenger Rail Investment and Improvement Act example of the FRA imposing penalties or taking enforcement action against a State sponsor of intercity passenger rail based solely on the FRA's view of a state Sponsor's latent responsibility for safety. In its Brief, the FRA asserts that it has pursued enforcement actions against State sponsors. FRA Br. at 29. The FRA did not cite any specific example, but cited broadly to annual reports of FRA enforcement actions. Petitioners have searched the FRA annual enforcement reports available on the FRA's website and did not find any example of an enforcement action against a State sponsor based on their role as a sponsor of intercity passenger rail service.

Second, the Guidance creates a new regulatory regime in order to enforce the FRA's position. The Guidance divides State sponsors into two categories, each

subject to different legal obligations. State sponsors of "integrated routes" – where a State sponsor chooses to contract only with Amtrak – are not subject to any new obligations and "FRA may continue to deal directly with any contract provider of safety-related service for an intercity passenger rail operation as necessary for FRA Regulatory Matters." Guidance ¶ II.C.iii (J.A. 1). State sponsors of "non-integrated routes" – where a State sponsor chooses to contract with any entity other than Amtrak for the operation or maintenance of trains – are subject to a new and different set of requirements. Non-integrated State sponsors "must work with the FRA to establish a plan that assures regulatory safety-related requirements are being met." *Id.* ¶ II.E (J.A. 1). The Guidance also requires non-integrated State sponsors to designate a single point of contact for safety, compliance, and enforcement matters. *Id.* ¶ II.A (J.A. 1). None of those new requirements are expressly required by the Passenger Rail Investment and Improvement Act, other statute, or regulation and the FRA cites no specific legal basis for those provisions of the Guidance.

Third, for the first time, the FRA imposes affirmative safety-related obligations directly, and primarily, on State sponsors who otherwise perform no safety-related functions. It does this even though (1) the actual function of the State sponsor remains that of a funder and contract-grantor, and (2) a railroad

service provider, whether Amtrak or another entity, will be "the contract provider of safety-related service for the [intercity passenger rail] operation." *Id.* ¶ II.C.iii (J.A. 1). That is clearly a change in the law and the express imposition of a new legal obligation on entities that do not perform any safety-related functions.

Fourth, these changes have clear legal consequences. State sponsors must comply with the process established by the Guidance and bear the associated costs. The creation of this new process is enough to confer finality. *See Nat'l Mining Ass'n*, 758 F.3d at 252-53. Failure to comply with the Guidance also has consequences, even if not stated explicitly. Absent FRA approval, a non-integrated State sponsor would be subject to enforcement action for not having adequate safety plans in place. The example of Indiana DOT provides ample proof that the FRA will take enforcement action against non-integrated State sponsors based solely on their non-integrated status. *See* Letter from R. Lauby to R. Zier dated Aug. 7, 2014 (J.A. 13–14).

Fifth, the new process has real impacts on State sponsors' conduct. In addition to the fundamental change of having to comply with the new procedures and requirements of the Guidance, the Guidance encumbers non-integrated State sponsors' procurement practices by requiring them to consult with the FRA prior to issuing a request for proposals or awarding a bid for intercity passenger rail

services. Pet. Br. at 33-34. Finally, the Guidance creates a "safe harbor" for integrated State sponsors from complying with the System Safety Plan Rule or from the other compliance obligations to which non-integrated State sponsors are now subject. Under *Hawkes*, these factors are sufficient to confer finality.

B. The FRA's Arguments Against Finality Are Unavailing

The FRA's specific arguments that the Guidance is not a final agency action fail to overcome the manifest effect of the Guidance on State sponsors in general, and non-integrated State sponsors in particular.

1. Even If the FRA's View on the Compliance Obligations of State Sponsors Has Been "Longstanding," the Guidance Is Final Agency Action Because It Applies That View In a Regulatory Context for the First Time

The linchpin of the FRA's argument is that the Guidance is not a change from the FRA's "longstanding" view that State sponsors "share responsibility for ensuring that the railroad services they provide are compliant with federal rail safety requirements." FRA Br. at 38. Accordingly, the FRA argues, the Guidance is not "entirely original" and thus cannot be considered "final." *Id.* at 27-30. But the test for finality is not whether the animating policy behind the action is "longstanding," but whether the action establishes rights or obligations and has legal consequences. *Supra* 4-6. Nor is there any requirement that a final agency action be "entirely original," and the FRA cites no authority to support that

argument. The FRA's arguments rely on the incorrect legal standards for finality.

Moreover, even if the FRA has held the views expressed in the Guidance for a long time, the FRA is not excused from following APA procedures when it implements that view by imposing new legal obligations on a regulated entity. *See Independent Equip. Dealers v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (noting that a document "implementing" a law or policy would be a final agency action); *Barrick Goldstrike Mines*, 215 F.3d at 49 (series of informal agency actions can "crystallize" into a final agency action).

Even on its own terms, the FRA's argument fails because the FRA's view of State sponsor responsibility has never been expressed in a statute or regulation. Indeed, it appears to have been stated only rarely in any public document. The only example cited by the FRA was a general statement in the denial of a petition for reconsideration of a regulation; it did not itself have the force or effect of law. FRA Br. at 28.

Moreover, the "longstanding view" of the law expressed in the Federal Register notice was *not* the notion that State sponsors were in any way responsible for compliance with safety regulations. The Notice states that "the liability standard contained in [49 C.F.R. § 238.9] (a)(1) is consistent with longstanding Federal law." Section 238.9(a)(1) prohibits "railroads" from using equipment that

does not comply with the stated safety standards. Section 238.9(a)(1) does not articulate a rule that a State sponsor that merely funds a route by contracting with a railroad has compliance obligations independent of the contractor that actually performs the regulated activity.

The FRA's only example of a previous regulation that appears to impose compliance obligations on State sponsors undercuts the FRA's argument because *it was imposed through notice and comment procedures.* FRA Br. at 32 (citing *Passenger Train Emergency Preparedness (Final Rule)*, 63 Fed. Reg. 24,630, 24,642 (May 4, 1998)). That regulation required State sponsors to "participate" in preparing an emergency preparedness plan, a far less onerous requirement than actually developing a preparedness plan. Moreover, that regulation relates only to Passenger Train Emergency Preparedness plans, not, as the Guidance does, to *all* railroad safety regulations. The fact that the FRA imposed that limited responsibility on State sponsors through notice and comment rulemaking underscores the need to use notice and comment procedures when imposing broader responsibility for numerous other safety regulations.

At bottom, the FRA's argument is a bootstrap that would allow an agency to articulate a view in some informal and non-binding context, let it incubate over a period of years, and then impose it on regulated entities without notice and

comment in the guise of "guidance" that merely "describes" a "longstanding" position. Such a result frustrates the intent of the APA and orderly rulemaking. FRA's approach is the kind of abuse of agency guidance documents that AAR ably decries in its amicus brief, *see* Brief for Amicus Curiae Association of American Railroads ("AAR Br.") at 7-15, and that underscores the need to require the FRA to follow notice and comment procedures in connection with the Guidance.

2. The Fact That State Sponsors Continue to Have Independent Compliance Obligations Does Not Make the Guidance Non-Final

The FRA argues that because some State sponsors were and remain subject to independent safety-related obligations, the Guidance does not impose new obligations. FRA Br. at 31 (citing Guidance ¶ II.C (J.A. 1)). But the Guidance goes beyond those preexisting obligations and imposes *additional* compliance obligations on *all* non-integrated State sponsors for safety regulations that previously had been the sole responsibility of the "contract provider of safety-related service."

If the FRA were merely continuing enforcement of the subset of independent obligations, there would be no need for the Guidance and no need to distinguish between integrated and non-integrated State sponsors. The only reason to issue the Guidance is because the compliance obligations of State sponsors have changed. The Guidance excuses integrated State sponsors from the obligation to prepare a

System Safety Plan, for example, and allows them to rely on Amtrak for that and other compliance obligations. *Compare* System Safety Plan Rule, 49 C.F.R. § 270.101 (Addendum 123) *with* Guidance Example (J.A. 3). But, the Guidance requires non-integrated State sponsors to establish their own compliance with the System Safety Plan Rule and other FRA regulatory matters that formerly were addressed directly by the contract provider, simply because the contract provider is not Amtrak.

3. The Guidance Is Not Merely Descriptive of Compliance Policy

The FRA argues that the Guidance is not a final agency action because it "imposes no new obligation, but simply offers two possible ways" for State sponsors to meet their safety obligations. FRA Br. at 22–23. The FRA emphasizes that the Guidance uses non-mandatory words like "may" and does not read like an "ukase." FRA Br. at 24. This argument lacks merit. As this Court made clear in *Appalachian Power*, an agency cannot avoid reviewability (or notice and comment requirements) through mere language or labeling. The true test is the *effect* of the agency action. 208 F.3d at 1023. The Guidance clearly has the effect of a final agency action.

First, the plain language of the Guidance itself undercuts the FRA's argument because it states that non-integrated State sponsors "*must* work with

FRA" to establish compliance. Guidance ¶ II.E (emphasis added) (J.A. 1). On its face, that creates a new, mandatory duty. The FRA attempts to escape the plain meaning of its own words by arguing that "must" does not create a mandatory requirement and that Petitioners "attached far more importance to 'must'" than is warranted. FRA Br. at 32-24. This argument is absurd. The word "must" *means* a requirement, and by its plain meaning imposes a mandatory duty.[3] The FRA cannot just walk away from the plain language of the Guidance.

Second, as detailed above, the "two ways" of compliance themselves represent a change in the legal framework and impose new legal obligations on State sponsors. *Supra* 7-9. The FRA's "offer" of "two possible ways" of compliance is tantamount to an admission that the Guidance is a final agency action: it clearly creates a new legal regime for the evaluation and determination of compliance. The fact that the underlying substantive obligations have not changed is immaterial, because the Guidance creates a mandatory process to impose those obligations directly on State sponsors for the first time. *Nat'l Mining Ass'n*, 758 F.3d at 252-53 (creating a permitting process is a final agency action); *Gen. Elec.*, 290 F.3d at 384-85 (creating binding path to compliance is a final

[3] The American Heritage Dictionary defines "must" as "To be obliged or required by morality, law, or custom: *Citizens must register in order to vote.*" American Heritage Dictionary (5th ed. 2017).

agency action).

Similarly, the fact that the Guidance leaves open the possibility that a State sponsor "may" not have to take up any safety responsibilities in Amtrak's absence, or have to perform any safety tasks itself, FRA Br. 23-24, does not make the Guidance any less of a final agency action. Regardless of the outcome of the process, the Guidance imposes on State sponsors an affirmative obligation for the first time to submit to FRA review to assure compliance. Further, "may" cuts both ways, and the result of the process "may" also result in the FRA ordering a State sponsor to perform those tasks directly or assume other new obligations. Because State sponsors were *never* under any such threat before, the Guidance creates new regulatory burdens and consequences.

Third, the Guidance is not merely descriptive of the existing regulatory framework. It creates new distinctions among State sponsors, imposes different legal requirements for each class of State sponsor, and establishes a new process for non-integrated State sponsors to demonstrate compliance with "FRA Regulatory Matters." Guidance ¶¶ II.D-E (J.A. 1). Those are changes to the legal rules for non-integrated State sponsors because under the prior compliance scheme State sponsors did not have to establish compliance themselves, unless there was an independent legal obligation. Even if the FRA has always believed that State

sponsors are ultimately responsible for compliance, the Guidance changes that position by *removing* that obligation for integrated State sponsors.

The cases cited by the FRA do not help its argument. *Center for Auto Safety & Public Citizen, Inc. v. NHTSA*, 452 F.3d 798, 808 (D.C. Cir. 2006), involved guidelines that simply stated the agency's view on the legality of certain actions. Those guidelines did not prescribe any future conduct or define new rules of conduct; they were purely interpretive. As explained above, the Guidance does far more than that.

Similarly, *Independent Equipment Dealers*, involved a letter that simply stated EPA's views on what existing law required – essentially a form of legal opinion. 372 F.3d at 426. The Court drew a clear distinction between that letter, "that left the world just as it found it," and actions "implementing, interpreting, or prescribing law or policy" that would be considered reviewable final agency action. *Id.* at 428. As shown above, the Guidance did not leave the world just as it found it, but rather imposed an entirely new regulatory scheme on State sponsors.

National Association of Home Builders v. Norton, 415 F.3d 8, 14 (D.C. Cir. 2005), is similarly distinguishable because the process at issue in that case was voluntary, and was only "recommended" by the agency. Here, the Guidance sets forth a mandatory legal regime in the wake of the Passenger Rail Investment and

Improvement Act that imposes new obligations on State sponsors, both substantive and procedural. Because the Guidance imposes specific and new regulatory obligations on State sponsors, it is a final agency action and no amount of *post hoc* rationalization by the FRA can change that.

4. The Guidance is a Final Agency Action, Not Just Some "Conversation"

In a final effort to distance itself from the legal effects of the Guidance, and in a curious attempt to shift responsibility to Petitioners for its failure to follow notice and comment procedures, the FRA argues that the Guidance is not final because it merely continues a conversation started by the State sponsors themselves. FRA Br. at 32-33. This is a mere word game. Whatever led up to the issuance of the Guidance, the Guidance establishes a new, mandatory regulatory process for non-integrated State sponsors and a new regulatory regime for all State sponsors. Indeed, State sponsors requested that the FRA state their legal obligations in the wake of the Passenger Rail Investment and Improvement Act and the Indiana DOT dispute because there was no existing law to guide them. At that time, the FRA promised that those legal obligations would be spelled out following notice and comment. Letter from R. Lauby to K. Browning dated Mar. 12, 2015, at 2 (J.A. 23). Now that the FRA has purported to provide those answers, it cannot avoid judicial review by blaming the regulated community for

asking for the new rules and by deciding unilaterally not to follow notice and comment procedures. Moreover, going forward, any "discussion" between State sponsors and the FRA under the Guidance would not be voluntary but mandatory. The Guidance is not the continuation of a "conversation" or "dialogue" that is somehow immune from judicial review; it is a legislative rulemaking that is reviewable by this Court.

The FRA's reliance on *General Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004), is misplaced. FRA Br. at 32-33. The decisive factor in *General Motors* was that the letters at issue "neither mark[ed] the consummation of EPA's decision-making process nor impose[d] new substantive rights or obligations on field personnel, the States, or third parties." 363 F.3d at 450. The Court characterized the letters as part of an ongoing dialogue about an ongoing enforcement process that, in and of themselves, were not agency decisions. *Id.* Here, the Guidance effectively ended the conversation requested by the State sponsors by providing a new legal process non-integrated State sponsors must follow to meet their compliance obligations. The fact that there may be further conversations between the FRA and individual State sponsors regarding compliance with the Guidance does not change the fact that the Guidance imposed

new legal requirements on State sponsors, which makes the Guidance subject to judicial review.

II. THE FRA FAILS TO SHOW THAT THE GUIDANCE IS NOT A LEGISLATIVE RULE

Much of the FRA's argument that the Guidance is not a legislative rule is simply a restatement of the FRA's incorrect view that the Guidance does not change or add to State sponsors' legal obligations. FRA Br. at 34-42. For the same reasons set forth above with respect to the FRA's finality argument, the FRA's arguments fail to demonstrate that the Guidance is not a legislative rule requiring the FRA to comply with notice and comment procedures. *Supra* 4-19. None of the FRA's additional arguments have merit.

A. The Guidance Bears Multiple "Hallmarks" of a Legislative Rule

The FRA argues that the Guidance is not legislative because it does not bear "any other hallmarks of a legislative rule." FRA Br. at 36. The FRA's arguments misconstrue both the Guidance and the "hallmarks" of a legislative rule.

First, the FRA argues that the Guidance "does not purport to supply a basis for novel enforcement action against regulated parties," because it restates the FRA's prior position on a State sponsor's compliance obligations. *Id.* That is incorrect, as discussed above. *Supra* 10-13. Moreover, this Court has rejected that

argument when, as here, the guidance document adds to, or makes mandatory, a prior non-mandatory agency position. *Gen. Elec.*, 290 F.3d at 384-85.

Second, the FRA argues that the fact that the Guidance was not published in the Federal Register makes it non-legislative. FRA Br. at 36. But that argument too has been rejected. *Appalachian Power*, 208 F.3d at 1021. Moreover, if FRA's position were correct, agencies could evade notice and comment for all rules by simply refraining from publication.

Third, the FRA denies that it relied on its general legislative authority pursuant to 49 U.S.C. § 20103(a) (Addendum 59). FRA Br. at 36. The FRA argues that its statement in the Guidance that the FRA "has jurisdiction over intercity passenger rail (IPR) operations in all areas of railroad safety" was "an underlying premise" but did not invoke the FRA's rulemaking authority to "prescribe regulations and issue orders for every area of railroad safety . . . ." FRA Br. at 36–37.

But, the FRA does not and cannot explain why it would invoke its overarching regulatory authority as a "premise" if it were not exercising that authority. If the FRA were issuing true guidance or similar interpretive material it would have invoked the material it was explaining or interpreting, not the greater authority to issue regulations. Instead, however, the FRA did the opposite,

indicating its legislative intent. Moreover, the Guidance was the FRA's response to the "changes in fact and circumstance" effected by the Passenger Rail Investment and Improvement Act "which notice and comment rulemaking is meant to inform." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Because the policy decisions on how to implement the Passenger Rail Investment and Improvement Act have wide ramifications for State sponsors, the FRA should be required to exercise its general legislative authority through the mandated notice and comment procedure in order to ensure the FRA bases its final decision and explains its policy choices on a fully developed record.

Fourth, the FRA's repeated arguments that the Guidance is based on the FRA's longstanding view of the law fail to overcome the substantive impact of the Guidance. The Guidance establishes the equivalent of a permitting process by requiring non-integrated State sponsors to obtain FRA approval of their overall compliance scheme, providing another "hallmark" of a legislative rule. *Nat'l Mining Ass'n*, 758 F.3d at 252-53 ("An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule."). The Guidance has the effect of requiring State sponsors "to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit," which is a legislative rule. *Appalachian Power*, 208 F.3d

at 1022. Even by providing that integrated State sponsors can *avoid* additional regulatory scrutiny, the Guidance creates the kind of "safe harbor" that indicates a legislative rule. *See Hawkes*, 136 S. Ct. at 1814-15.

B. The Guidance is Legislative Because it Amends a Regulation

The FRA does not contest the principle that an amendment to a regulation must be promulgated by notice and comment. The FRA argues, however, that the Guidance did not amend, and is consistent with, the System Safety Plan Rule. FRA Br. at 39–40. This *post hoc* rationalization is unpersuasive. The FRA attempts to evade the clear effect of the Guidance by arguing that the Guidance "merely recognizes the common sense notion that a State sponsor can *meet* its obligations under the federal rail safety requirements by contracting with an entity that already has implemented appropriate safety measures." FRA Br. at 38. Tellingly, the FRA does not offer a citation to support that statement, and there is none.

The System Safety Plan Rule is very clear that every "railroad," which the System Safety Plan Rule defines broadly to include any State sponsor, must prepare a System Safety Plan. System Safety Plan Rule, 49 C.F.R. §§ 270.5, .101(a) (Addendum 123-24). Indeed, the FRA expressly rejected State sponsors' request to delegate that obligation to a contracted party, underscoring that the FRA

intended to fix the System Safety Plan obligation on State sponsors. *System Safety Program*, 81 Fed. Reg. 53,849, 53,861 (Aug. 12, 2016) (codified at 49 C.F.R. part 270) (Addendum 88).[4]

In contrast, the Guidance is very clear that integrated State sponsors do not need to prepare their own System Safety Plan but may rely on Amtrak's System Safety Plan to meet System Safety Plan Rule obligations. Guidance, Example (J.A. 3). Under the Guidance, if a State sponsor seeks to rely on any other entity's safety plan, it must "work with" the FRA and hope the FRA accepts that other entity's plan. *Id.* The Guidance expressly allows for the possibility that a non-integrated State sponsor may have to develop its own plan, a possibility that *does not exist* for integrated State sponsors. There is simply no way to read the Guidance as anything but creating an exception to the System Safety Plan Rule for integrated State sponsors.

At bottom, the FRA's argument rests on a meaningless generalization that any differences between the System Safety Plan Rule and the Guidance are irrelevant because there must be an System Safety Plan in place for every

[4] Petitioners and other State sponsors have challenged these aspects of the System Safety Plan Rule through Petitions for Reconsideration, which remain pending before the FRA. *See* Pet. Br. at 23 n.24. As the FRA notes, the effective date of the System Safety Plan Rule has been stayed pending the FRA's resolution of these Petitions. FRA Br. at 15 n.3.

"railroad" and there are just different ways to get there for integrated and non-integrated State sponsors. FRA Br. at 39-40. But that abstraction ignores the very real difference in burdens imposed by the two methods. Integrated State sponsors are not required to do anything other than provide information at Amtrak's request; they can rely completely on Amtrak's System Safety Plan.

Non-integrated State sponsors, however, must comply with the System Safety Plan Rule on their own by working with all of their contractors to (1) create a comprehensive System Safety Plan, (2) designate a single point of contact, (3) submit the System Safety Plan (and plans to comply with other safety regulations) to the FRA, and (4) obtain FRA approval following an individualized review process. By creating two different rules for compliance, the FRA has plainly changed the terms of the System Safety Plan Rule to create one rule for integrated State sponsors and another rule for non-integrated State sponsors.[5] Moreover, as discussed above, *supra* 6-7, the FRA cited no statutory authority for this distinction

[5] The FRA's observation that the Guidance predated publication of the System Safety Plan Rule in the Federal Register, is irrelevant. FRA Br. at 15, n.3. First, the FRA had released the System Safety Plan Rule "informally" prior to its formal publication. The fact that the System Safety Plan Rule was published after the Guidance is apparently due to the Federal Register publication schedule rather than any substantive reason. Second, the FRA was plainly working on both documents at the same time and chose to put them on different tracks. The FRA cannot avoid treating the Guidance as the amendment that it clearly is by "gaming" the timing of official publication to release the amendment before the original.

between State sponsors, further underscoring that the FRA relied on its general legislative authority to promulgate a legislative rule.

C. The FRA Committed Itself to Follow Notice and Comment Procedures

The FRA Associate Administrator expressly committed the FRA to follow notice and comment procedures before issuing the Guidance. Letter from R. Lauby to K. Browning dated Mar. 12, 2015 (J.A. 22–24); Pet. Br. at 55-56. Under FRA's own regulations, that commitment is binding, and requires the FRA to follow notice and comment procedures even if they were otherwise inapplicable. 49 C.F.R. § 211.15(b).

In response, the FRA argues that the notice and comment promised was meaningless because the scope of the Guidance changed. FRA Br. at 41. That is simply a non-sequitur. There is no regulation, rule, or law that allows an agency to switch from a self-declared notice and comment path to an informal path just because the scope of a proposed rule has changed, and the FRA does not cite any authority to support its position. To the contrary, under well-established law, a change in scope of a proposed rule requires *more* notice and comment, not less. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (change in scope of proposed rule requires new NPRM); *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259-60 (D.C.

Cir. 2005) (same). The FRA's Associate Administrator committed the agency to notice and comment procedures precisely because of the broad implications of the issue, as authorized by the FRA's own regulations. Having made that commitment, the FRA could not abandon it and the FRA offers no authority for that about-face.

D. Informal Collaboration and Dialogue Cannot Substitute for Notice and Comment

The FRA argues that its failure to engage in notice and comment was harmless error because the FRA provided "extensive collaborative and informal dialogue initiated at the request of the States . . . ." FRA Br. at 42. As the cases cited by the FRA itself underscore, however, an agency cannot claim harmless error unless there is "no 'uncertainty at all as to the effect' of the agency's failure to utilize notice and comment." FRA Br. at 43 (quoting *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003)). The "no uncertainty" rule must be read narrowly. As this Court stated in *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002) (quoted in *Sprint Corp.*, 315 F.3d at 376), allowing a broader understanding of the harmless error rule would

> virtually repeal section 553's requirements: if the government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument - not presented informally - section 553 obviously would

> be eviscerated. The government could avoid the necessity of publishing a notice of a proposed rule and perhaps, most important, would not be obliged to set forth a statement of the basis and purpose of the rule, which needs to take account of the major comments - and often is a major focus of judicial review.

The FRA attempts to fit into the "no uncertainty" rule by arguing that the "inevitable" outcome of the process was to require State sponsors to "comply with regulatory and administrative burdens." FRA Br. at 43. That argument relies on a level of generality that obscures the real effects of the Guidance. The FRA could have treated integrated and non-integrated State sponsors the same, allowing both to rely on the compliance plans of their contractors, whether Amtrak or another contractor. Alternatively, the FRA could have required all State sponsors to submit their own compliance plans for individualized FRA review. Moreover, there is no way to know what the FRA would have done had it received more comments from additional State sponsors, Amtrak, alternative contractors, and other stakeholders, rather than the limited set of commenters the FRA chose to include in its informal process. There was nothing "inevitable" about the final terms of the Guidance, and the FRA has failed to demonstrate that there was "no prejudice" as a result of its failure to follow notice and comment procedures otherwise required by the APA and the FRA's own regulations.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant the Petitions for Review, and schedule the case for oral argument.

Respectfully submitted this 8th day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2017, I electronically filed the foregoing FINAL JOINT REPLY BRIEF OF PETITIONERS NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND CAPITOL CORRIDOR JOINT POWERS AUTHORITY with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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