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June 24, 2016

By Hand Delivery

Chief
Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: STB Finance Docket No. 36048, Petition by the National Railroad Passenger Corporation (Amtrak) for Relief Pursuant to 49 U.S.C. §24905

Dear Section Chief:

Enclosed for filing in the above-referenced docket are the original and ten copies of Amtrak's Petition for Relief Pursuant to 49 U.S.C. §24905. Also enclosed is a disc containing the enclosed filings and a check in the amount of \$300.00 for the filing fee for the Application.

Please time and date stamp the extra copies of the filings and return it with our messenger. If you have any questions, please contact me.

Respectfully submitted,

Thomas R. Waskom

Thomas R. Waskom
Attorney for National Railroad Corporation

Enclosures
FILED
June 24, 2016
Surface Transportation Board

FEE RECEIVED
June 24, 2016
Surface Transportation Board

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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In re National Railroad Passenger Corp.) **STB Finance Docket No. 36048**
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AMTRAK'S PETITION FOR RELIEF PURSUANT TO 49 U.S.C § 24905

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*Counsel for National Railroad
Passenger Corporation (Amtrak)*

Pursuant to Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24905, Petitioner National Railroad Passenger Corporation (Amtrak) files this Petition with the Surface Transportation Board (the Board) seeking an order (a) “determin[ing] the appropriate compensation” amounts between Amtrak and the Massachusetts Bay Transit Authority (MBTA), a political subdivision of the Commonwealth of Massachusetts, in accordance with the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (the Uniform Policy) developed and adopted by the Northeast Corridor Commission (the Commission), and (b) “enforc[ing] its determination on the ... parties.” 49 U.S.C. § 24905(c)(2). Amtrak has filed a Memorandum in Support of its Petition setting out its grounds in detail.

A. The Board’s Jurisdiction

In Section 212, Congress created the Commission to develop a standardized policy for allocating costs for facilities and services along the North East Corridor (NEC) and directed that the “public authorities providing commuter rail passenger transportation on the Northeast Corridor shall implement new agreements for usage of facilities or services based on the formula” developed by the Commission. 49 U.S.C. § 24905(c)(2). Section 212 states that if any state commuter rail entity refuses to implement a new agreement as required, the Board must “determine the appropriate compensation ... in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903.” *Id.*

As described in detail in the accompanying memorandum, the Commission undertook a comprehensive and collaborative process to draft the Congressionally-required policy. The Commission adopted the standardized policy, called the Uniform

Policy, on September 17, 2015 and forwarded it to the Board and Congress on October 2, 2015. Nevertheless, MBTA has refused to implement the Uniform Policy. Thus, new agreements have not been implemented as required by Section 212, and the Board therefore must determine the appropriate compensation amounts for the services itemized in 49 U.S.C. § 24905(c)(2).

B. The Reasons the Petition Should be Granted

The Board is statutorily required to determine the appropriate compensation amounts. For the reasons set forth in the accompanying memorandum, the Board should determine the appropriate compensation between MBTA and Amtrak based on the Uniform Policy developed by the Commission.

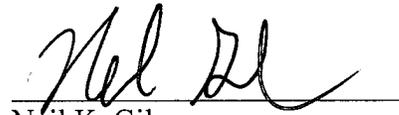
C. Relief Sought Through the Petition

Amtrak requests that the Board determine the appropriate compensation under PRIIA Section 212 between Amtrak and MBTA, retroactive to October 1, 2015. Amtrak further requests that the Board enforce its determination upon Amtrak and MBTA.

June 24, 2016

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Respectfully Submitted,



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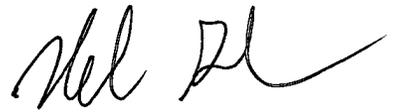
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*Counsel for National Railroad
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CERTIFICATE OF SERVICE

I hereby certify that I have this day, June 24, 2016, caused to be sent by express mail, next day delivery, copies of Amtrak's Petition for Relief Pursuant to 49 U.S.C. § 24905 and Memorandum in Support of the Petition to:

Massachusetts Bay Transit Authority
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(857) 368-8600
John.Englander@State.ma.us



Neil K. Gilman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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In re National Railroad Passenger Corp.) **STB Finance Docket No. FD-36048**
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**AMTRAK'S MEMORANDUM IN SUPPORT OF ITS PETITION
FOR RELIEF PURSUANT TO 49 U.S.C § 24905**

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Pursuant to Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24905, Petitioner National Railroad Passenger Corporation (Amtrak) files this Petition with the Surface Transportation Board (the Board) seeking an order (a) “determin[ing] the appropriate compensation” amounts between Amtrak and the Massachusetts Bay Transit Authority (MBTA),¹ in accordance with the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (the Uniform Policy) developed and adopted by the Northeast Corridor Commission (the Commission); and (b) “enforc[ing] its determination on the ... parties.” 49 U.S.C. § 24905(c)(2).² The Uniform Policy is attached as Exhibit A.

I. Preliminary Statement

In Section 212, Congress mandated that the Commission develop a standardized policy for allocating costs for facilities and services along the Northeast Corridor (NEC). The Commission includes all stakeholders with vested interests in the continued health and success of the NEC. Accordingly, the Commission undertook a comprehensive and collaborative process to draft the Congressionally-required standardized policy, which provides an equitable, uniform funding methodology. All stakeholders had input into the standardized policy, formalized as the

¹ MBTA is a political subdivision of the Commonwealth of Massachusetts with whom Amtrak contracts directly. Mass. Gen. Laws ch. 161A, § 2. It is governed by the Board of Directors of the Massachusetts Department of Transportation (“MassDOT”). Mass. Gen. Laws. ch. 161A, § 7. At the Commission and in negotiations with Amtrak, MassDOT has spoken for MBTA.

² Amtrak is currently negotiating with other state commuter rail entities that service Connecticut, Maryland, New Jersey, New York and Rhode Island. Amtrak reserves the right to amend this petition to add additional respondents if it is unable to reach agreements with those entities by July 30, 2016. Three state commuter rail entities (Southeastern Pennsylvania Transportation Authority; Delaware Transit Corporation; and the Northern Virginia Transportation Commission and Potomac & Rappahannock Transportation Commission, jointly operating the Virginia Railway Express) have already executed new agreements with Amtrak that comport with Section 212 and the Uniform Policy

Uniform Policy, which the Commission adopted on September 17, 2015 and forwarded to the Board and Congress on October 2, 2015.³

The purpose of the Uniform Policy – and Section 212 itself – was to set the terms for the agreements between Amtrak and the state commuter rail entities for compensation for services and facilities along the NEC. Section 212 required Amtrak and these state commuter rail entities to “implement new agreements for usage of facilities or services based on the formula proposed” in the Uniform Policy by October 1, 2015. 49 U.S.C. § 24905(c). But MBTA has refused to implement the Uniform Policy. In fact, MBTA filed suit earlier this year in federal court in an effort to prevent Amtrak and the Commission from complying with the statute.⁴

If even one of the state commuter rail entities refuses to implement the Uniform Policy, then it is no longer uniform, and defeats Congress’ intent and mandate in Section 212. In such cases, Congress empowered the Board to “determine the appropriate compensation ... in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903, after taking into consideration the” Uniform Policy.⁵ The Board will have the benefit of the Uniform Policy, a roadmap provided by the Commission for determining each entity’s allocated costs. The Board should now perform its statutory duty and determine the appropriate compensation between Amtrak and MBTA consistent with the Uniform Policy. The Board should then enforce its determination on the parties.

³ After the final version of the Uniform Policy was forwarded to Congress on October 2, 2015, minor technical revisions were made at Commission meetings, as permitted by statute. See 49 U.S.C. § 24905(c)(3). Those revisions are not material to the cost allocation formula at issue here.

⁴ See *Massachusetts Bay Transp. Auth. v. National Railroad Passenger Corp., et al.*, Case No. 1:16-cv-10120-MLW, in the District Court for the District of Massachusetts, Complaint (MBTA Compl.) attached as Exhibit B.

⁵ The “section 24903” referenced in this paragraph is the former 49 U.S.C. § 24904.

II. Factual Background

A. The Historical Background Demonstrates the Need for a Uniform Cost Allocation Policy.

Section 212 required the Commission to develop a standard formula for determining and allocating cost, revenues, and compensation for NEC commuter rail passenger transportation. This law is firmly rooted in a historical record which demonstrates that a uniform cost allocation policy is necessary for economically efficient commuter transportation in the NEC.

1. The Historical Relationships Between Amtrak and the Commuter Rail Services.

During the 1950s and 1960s, the majority of the country's privately owned railroads offering passenger service became unprofitable. This was partly due to poor business decisions and the rise of alternative transportation modes – most importantly, air travel and interstate highways. In 1968-69, the Pennsylvania Railroad, the New York Central Railroad, and the New York, New Haven, and Hartford Railroads merged to form the Penn Central Transportation Company (Penn Central). Penn Central quickly failed, and by 1970, went bankrupt. In the wake of Penn Central's collapse, Congress created Amtrak in 1970 to provide intercity passenger rail service.

Thereafter, Amtrak took over responsibility for intercity passenger service from the freight railroads in return for access to their tracks at incremental cost. At the time of its formation, four freight railroads exchanged their facilities, equipment, and capital for common stock in Amtrak, which is still held by their successor companies today.

In the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-1210, Feb. 5, 1976, now codified at 49 U.S.C. § 24901 *et seq.*, Congress directed Amtrak to acquire the NEC rail line, which included the spur lines from Philadelphia to Harrisburg, Pennsylvania and from New Haven, Connecticut to Springfield, Massachusetts. Amtrak currently owns the right-

of-way between Washington, DC and Boston, MA, with the exception of two stretches: (1) the New Haven Line between New Rochelle, NY and New Haven, CT, which in New York State is owned by the New York Metropolitan Transportation Authority (MTA), and in Connecticut is owned by the Connecticut Department of Transportation (CTDOT); and (2) the Attleboro Line, from the Massachusetts/Rhode Island border to Boston-South Station, which is owned by the Massachusetts Bay Transportation Authority (MBTA).

2. The Lack of Uniformity in the Agreements Between Amtrak and the Commuter Rail Entities Created Funding and Governance Problems.

Over the next fifteen years, the NEC will require serious improvements to its infrastructure simply to keep it operating in good repair at its current capacity. These improvements involve complex planning, engineering, contracting, and construction services to take place over several years, and are unworkable given the current reliance on annual appropriations and one-time grants. In order to make the improvements necessary to the NEC, Amtrak and its contractors must have consistent and reliable funding from year-to-year. Currently, the lack of uniformity in federal policy between Amtrak, commuter rail entities, and other owners creates serious funding and governance problems that, if not resolved, will hamper the sustainability of passenger rail service on the NEC.

B. Congress Mandated that the Stakeholders, and if Necessary the Board, Develop and Implement a Standardized Cost Allocation Policy.

In 2008, to resolve the planning, funding, and decision-making issues discussed above, Congress intervened and established the Commission. Section 212 of PRIIA directed the Commission to develop a standardized formula to fully and uniformly allocate costs along the NEC.

Section 212 directs the Secretary of Transportation to establish the Commission with members representing Amtrak, the Department of Transportation, the Federal Railroad

Administration, each of the States (including the District of Columbia) that constitute the NEC, and non-voting representatives of freight railroad carriers using the NEC. 49 U.S.C. § 24905(a)(1)(A-D). The Commission is required to, among other tasks, develop a “standardized policy for determining and allocating costs, revenues and compensation for Northeast Corridor commuter rail passenger transportation...that use Amtrak facilities or services or that provide such facilities to Amtrak” and to “develop a proposed timetable for implementing the policy.” 49 U.S.C. § 24905(c)(1)(A-B).

If Amtrak and any state commuter rail entity are unable to reach a new agreement in accordance with the Uniform Policy and on the timetable established by the Commission, the statute requires the Board to “determine the appropriate compensation for such usage in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903(c), after taking into consideration the policy developed under paragraph (1)(A), as applicable.” 49 U.S.C. § 24905(c)(2). Section 212 further mandates that the “Board shall enforce its determination on the party or parties involved.” *Id.* Congress thus granted final decision-making authority to the Board and gave the Board the discretion to make its own determination and to enforce that determination.

C. The Commission’s Uniform Policy Reflects the Reasoned Judgment of the Members.

The Commission, which includes representatives of all parties with an interest in the development of the NEC, has given careful consideration to how to most effectively make and allocate the costs of the infrastructure improvements necessary to ensure the successful operation of the NEC railways in the future. In contrast to the piecemeal planning and funding contemplated in the past, the Commission has evaluated the NEC in its entirety and has

developed the Uniform Policy, which sets forth a cost allocation methodology that is in accordance with Section 212.

1. The Principles Governing the Uniform Policy

The Uniform Policy was created with two primary goals in mind: first, that users pay costs that are associated with and proportional to their use of facilities, and second, that those costs be allocated based on specific activities and, to the extent possible, based on measurable data.

The Uniform Policy excludes certain types of expenses. Primarily, it uses the “Principle of Primary Use” to determine whether costs are sole-benefit, and therefore should be borne by a single operator, or common-benefit, and should be shared among operators under the Policy in proportion to their use. Under the Principle of Primary Use, facilities and services are not allocable if they:

- (1) Are provided by the operator for the use of its own passengers or for other sole-benefit purpose;
- (2) Are used primarily by the operator’s passengers or other sole-benefit purpose;
- (3) Are used only incidentally by other operators or their passengers; and
- (4) Do not result in significant additional cost to the operator providing them, when other operators or their passengers use them.

Policy § 5.1.2. Additionally, Section 5.2 sets forth other costs that are not shared under the Policy (e.g. on-board train services, rolling stock equipment).

Revenues are also to be allocated according to the guiding principles outlined above. Where costs associated with activities that generate revenues are allocated, the corresponding revenues must also be allocated.

2. Allocation of Costs Under the Uniform Policy

a) *Operating Costs*

Operating costs are any costs that are associated with operating and maintenance activities. The Uniform Policy divides operating costs into five Cost Elements:

- **Maintenance of Way:** means those costs that are related to the maintenance of the NEC right-of-way. This category is further divided into several cost categories: track, signals, communications, bridges, other structures, electric traction, and support activities.
- **Dispatching:** includes expenses associated with Centralized Traffic Control and block tower operations involved in the dispatching of NEC trains.
- **Policing:** includes labor and other costs incurred for police officers engaging in routine patrols or responding to incidents on the right-of-way or in yards.
- **Propulsion Power:** includes the cost of electricity and other support activities used in commuter and intercity train operations.
- **Station Operating Costs:** includes cost of certain activities at stations that are shared by intercity and commuter passengers. Station management, ushers, policing, utilities, and station maintenance are a few of the activities eligible for sharing under this category.

For each Cost Element and, where applicable, each cost category, the Policy sets forth in detail what costs may be included (“eligible costs”), how the cost will be divided amongst the partners (“allocation method”), and why the Commission chose the allocation method (“justification”). Policy § 5.3. For example, the § 5.3.1.2 of the Policy sets forth that for “Communications and Signals” eligible costs include inspection and testing of signals, relays, switches, cable and wiring, moveable bridge components, etcetera, that those costs should be assessed based on train movements, and that allocating costs based on train movements is appropriate since communication and signal costs are directly correlated to train frequencies.

While operating and maintenance activities occur NEC-wide, the activities vary by the infrastructure and train services in a given area. As a result, the Policy divides the NEC into specific “Operating Segments” to ensure costs are fairly allocated geographically and

proportionally by those who use the rails and services provided in each individual Operating Segment.

b) Capital Investment

The Uniform Policy sets forth an allocation plan for investments in the NEC's infrastructure. Continuing reliable intercity and commuter railway service in the NEC requires considerable investment in the NEC's capital assets on an on-going basis. Section 4.2 of the Policy sets forth the planning process for capital investments, and Section 5.5 explains how those investment costs are to be shared among the NEC partners.

The Policy contemplates charging each operator a "Baseline Capital Charge" (BCC) determined by the operator's relative use as a percentage of the "Normalized Replacement" amount. The Normalized Replacement amount is based on the number of each asset type, the average useful life of each asset type, and the unit cost per asset type. The Normalized Replacement amount is then allocated to each operator based on the operator's usage of the infrastructure. This approach has the benefit of determining verifiable costs and allocating them to operators in correlation with their use of the infrastructure on an NEC-wide basis. Thus, the costing is based on a transparent formula and fairly apportioned in accordance with § 24905(c).

c) Indirect Costs

Indirect costs are costs that are not assigned to a unique objective, but are costs that are incurred by an operator or owner in support of their maintenance or capital work. Indirect costs are allowable under certain federal regulations, such as those appearing in Titles 23 and 48 of the Code of Federal Regulations and OMB Circular A-87. Under the policy, indirect costs are grouped by "cost pool." Each cost pool includes indirect costs associated with a particular unit or corporate area, which are then divided by a representative allocation measure (cost base), like

total costs or direct labor, to get an overhead rate. The cost base must reflect an equitable measure of the costs being allocated.

d) Liability and Insurance Costs

Under the Policy, existing agreements between owners and operators will continue to govern the allocation of insurance, liabilities and other risk-related costs. To the extent that there is a conflict between costs allocated under the Policy and existing liability agreements, the Policy sets forth six guiding principles to resolve any such conflict. They are:

- i) Liability costs will not be allocated to any party that has a contractual indemnification for such costs.
- ii) Payments made to third parties are not allocable.
- iii) In locations shared by more than two operators, if a bilateral arrangement affects the exposure of a third operator not party to the bilateral arrangement, the owner shall advise the third operator of the arrangement and the potential impact on its exposure.
- iv) Where parties have agreed to pay risk fees in exchange for another party agreeing to take responsibilities for certain liabilities, that arrangement is not affected by the Policy and those fees are not allocable.
- v) Insurance costs and payments are not allocable.
- vi) The Policy does not preclude parties from making bilateral arrangements to purchase joint insurance and share claims payments.

3. Calculating The Dollar Amounts of the Allocated Costs Under the Uniform Policy

After the stakeholders reached an agreement on the terms of the Uniform Policy, Commission staff collected from Amtrak and the state commuter rail entities the data required to compute the cost allocation.⁶ The Commission contracted with AECOM to develop the funding model and perform the calculations. AECOM has since calculated the amounts owed between

⁶ Although all of the state commuter rail entities, including the MBTA, agreed to participate in this process by supplying the requested financial data in a timely and adequate manner to Commission staff, the MBTA did not do so.

Amtrak and all of the state commuter rail entities. The Commission and AECOM continued to perform due diligence since then to fine-tune the calculations. In July 2015, AECOM provided its final calculations to the Commission staff, which in turn, provided it to the Commission members. The Commission approved the “Fiscal Year 2016 Financial Obligations Pursuant to the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy” on September 17, 2015. The resolution approving the Financial Obligations included obligations related to operating and capital costs for Amtrak and the relevant commuter/state agencies.

D. MBTA Has Refused to Comply with Section 212.

MBTA is openly refusing to comply with Section 212, and has filed an action in the District Court for the District of Massachusetts, seeking the imprimatur of a federal court for its attempt at nullification of the statute. But adoption of a comprehensive, uniform funding policy is necessary to ensure the continuing viability and health of the NEC. The history of the relationship between Amtrak and MBTA – and the history of recent negotiations in particular – demonstrate the extent to which MBTA will go to upend adoption of such a policy.

MBTA owns the Attleboro line, the portion of the NEC that runs from the Rhode Island border to Boston. From 1987 to 2002, MBTA contracted with Amtrak for Amtrak to maintain the Attleboro line and operate the dispatching service for MBTA. By 2002, MBTA was paying Amtrak \$160 million a year for that service. MBTA then decided to put the contract out for bid. Amtrak did not participate in that bidding process, but ultimately agreed to continue to control dispatching and maintenance of the line –without any monetary compensation by the MBTA. This new arrangement was memorialized in the 2003 Attleboro Line Agreement, which has since been amended five times.

As the Commission was developing the Uniform Policy, Amtrak tried to work with the MBTA to amend the Attleboro Line Agreement a sixth time, in a way that would comport with

the Uniform Policy and comply with Section 212. That process began in May 2014, when Amtrak representatives met with the Massachusetts Deputy Secretary of Transportation to discuss the issue. Following that meeting, Amtrak repeatedly contacted MBTA to follow up, but MBTA did not respond. Amtrak's entreaties at the quarterly commission meetings were likewise refused.

On January 27, 2015, MassDOT sent the Board a statement of the grounds for its dissent from the Uniform Policy. None of the grounds identified has merit or warrants rejection of the Uniform Policy. In short, Massachusetts was disappointed that it did not see its preferences adopted for each aspect of the Uniform Policy. But the collaborative process mandated by Congress does not ensure that one Commission member will get everything it wants to the exclusion of other stakeholders' interests. Trade-offs were required and made.

On March 19, 2015, Amtrak representatives met with Massachusetts' new Secretary of Transportation, Stephanie Pollack. Secretary Pollack acknowledged that Section 212 would require an amendment to the Attleboro Line Agreement.

On July 2, 2015, Amtrak proposed to MBTA a Sixth Amended Attleboro Line Agreement, which would implement the terms of the then-interim Uniform Policy. Under the sixth amended version, Amtrak would no longer provide maintenance and dispatching services for MBTA at no cost; but neither would the cost revert to pre-2003 levels. Instead, the Sixth Amendment called for cost allocation pursuant to the Uniform Policy: MBTA must pay \$28.8 million for 2016. Over the next two months, Amtrak repeatedly sent this draft amendment to MBTA but received no response.

In August 2015, AECOM provided its calculations to the Commission, including its calculations of the cost allocation between Amtrak and MBTA. As expected, the revised cost

allocation called for increased contribution from MBTA. Astrid Glynn, the Rail and Transit Administrator for MassDOT, stated that she was working on a “financial proposal” for Amtrak, but nothing was forthcoming for months.

Amtrak and MBTA representatives met in November 2015, but MBTA again refused any suggestion that the parties amend the Attleboro Line Agreement to comply with Section 212. The parties again met on January 7 and 14, 2016, with the same result. Amtrak has offered a payment plan to MBTA, rather than calling for the funds up front. That, too, has been rejected by MBTA.

Finally, on January 26, 2016, MBTA responded to Amtrak’s request that the parties implement the Uniform Policy. Instead of the \$28.8 million MBTA would owe under the Uniform Policy developed by the stakeholders and adopted by the Commission, MBTA offered to pay \$10 million annually.

The good faith of MBTA’s offer is in real doubt, though, because the next day it filed suit in federal court in Massachusetts against Amtrak and the Commission. *See Massachusetts Bay Transp. Auth. v. National Railroad Passenger Corp., et al.*, Case No. 1:16-cv-10120-MLW, in the District Court for the District of Massachusetts (*MBTA v. Amtrak, et al.*). MBTA alleges that the Uniform Policy violates the United States Constitution for several reasons, and that Amtrak has repudiated the Attleboro Line Agreement by seeking to implement the provisions of the Uniform Policy as mandated by Section 212.

After MBTA filed suit, MBTA did not serve the complaint on Amtrak, and the parties attempted to negotiate a resolution. But after five months, it has become clear that MBTA will not agree to terms that comport with Section 212, necessitating this action. MBTA served the complaint on Amtrak on June 24, 2016.

III. The Board Should Determine and Enforce the Appropriate Compensation Amount Between Amtrak and MBTA Pursuant to the Formula in the Uniform Policy.

In drafting Section 212, Congress anticipated that some states might refuse to implement new agreements with Amtrak based on the policy developed by the Commission notwithstanding its directive that they “shall implement [such] new agreements.” 49 U.S.C. § 24905(c)(2). In that circumstance, Amtrak may petition the Board, and the Board must “determine the appropriate compensation ... in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903.” *Id.* Thus, the Board’s substantive decision is governed by Section 212, and the procedures the Board must follow are found in Section 24903 (formerly Section 24904).

Under Section 24903, if Amtrak and another operator cannot agree on compensation for transportation over rights of way and facilities, “the Surface Transportation Board shall order that the transportation continue ... and shall determine compensation ... for the transportation not later than 120 days after the dispute is submitted.” 49 U.S.C. § 24904(c).

A. The Uniform Policy Was Properly Developed and Adopted Under Section 212.

As the Senate Report on PRIIA explained, in Section 212 Congress “required the Commission to develop a proposal for determining the proper cost allocations and access fees for NEC passenger and commuter trains” in order “to address historical differences in the fees paid.” Report of the Committee on Commerce, Science & Transp. on S. 294 at 10. Congress ordered the Commission to

develop a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation, as defined in section 24102 of this title, on the Northeast Corridor main line between Boston, Massachusetts, and Washington, District of Columbia, and the Northeast Corridor branch lines connecting Harrisburg, Pennsylvania, Springfield, Massachusetts, and Spuyten Duyvil, New York, that use Amtrak facilities or services or that provide such facilities or services to Amtrak.

49 U.S.C. § 24905(c)(1)(A). As explained above, the Commission did just that in developing and approving the Uniform Policy.

The Commission fulfilled the mandate Congress gave it. The Uniform Policy is “a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation.” *Id.* It sets out in detail the methods for allocation all categories of the costs for facilities and services for the Northeast Corridor.

Moreover, the Uniform Policy is the result of a collaborative process. Commission staff presented a draft of the Uniform Policy to Commission members in December 2014. Over the next several months, the members had an opportunity to offer and vote on amendments to the Uniform Policy, and the members – including Massachusetts – actively did so. Some amendments were adopted – for instance, New Jersey’s proposal to allow the parties to litigate disputes in federal court. *See* 6/18/2015 Minutes at 4. Other amendments were considered, vetted, and rejected. For instance, Massachusetts proposed that the Commission delete the section (4.2.1.1) of the Uniform Policy that recognizes that the FRA will provide a Service Development Plan (SDP) to guide investments along the NEC. *See id.* at 8. Massachusetts’ concern was “that the Commission may not wish to adopt the FRA’s SDP.” In light of the fact that the Uniform Policy expressly states that “[t]he Commission will consider endorsing the SDP” – not that it was endorsing the FRA’s SDP – the Commission declined to delete Section 4.2.1.1. *See id.*

On September 17, 2015, the Commission approved the Uniform Policy by a vote of 15 to 2 with one abstention. Massachusetts and New York voted no, and New Jersey abstained. Importantly, no stakeholder, including MBTA, has suggested that the Uniform Policy falls short of the statutory requirements of Section 212.

B. The Board Should Adopt the Terms of the Uniform Policy for Purposes of Its Determination.

The Commission has performed its obligations under Section 212 and “develop[ed] a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation, as defined in section 24102 of this title, on the Northeast Corridor main line between Boston, Massachusetts, and Washington, District of Columbia.”⁷ 49 U.S.C. § 24905(c)(1)(A). But because MBTA has refused to “implement new agreements for usage of facilities [and] services based on the formula proposed” by the Commission, the responsibility now falls to the Board “to determine the appropriate compensation ... after taking into consideration the policy developed” by the Commission. 49 U.S.C. § 24905(c)(2).

This should be a simple process. Section 212 calls upon the Commission to “develop the standardized policy for determining and allocating costs, revenues, and compensation.” The Commission has done that. Now the Board can use that policy and the formula contained within “to determine the appropriate compensation” under the terms of the Uniform Policy. AECOM has calculated the amount that MBTA will owe Amtrak in the first year under the Uniform Policy. The Board can incorporate that data into its determination, and enforce its finding on the parties.

MBTA has offered no alternative to the Uniform Policy and the calculations performed thereunder that would comport with the statutory goals; nor should the Board consider any alternative. Importantly, the Board should not allow a single entity to force a change to the

⁷ MBTA might argue that the Attleboro line is somehow exempted from Section 212 because MBTA rather than Amtrak owns the right of way. But Section 212 clearly applies to the NEC starting in Boston – thus encompassing the Attleboro line – and covers not only lines “that use Amtrak facilities or services,” but also those “that provide such facilities or services to Amtrak. 49 U.S.C. § 24905(c)(1)(A)

Policy simply because it does not like (for whatever reason) a clear, significant federal mandate. The Board need not rework the terms of the Uniform Policy in ways that the other stakeholders might or might not have anticipated, and might or might not have considered and rejected.

The Uniform Policy is the result of long negotiations, and its terms reflect the give and take of a deliberative process. Changing a handful of terms might result in an outcome that, for instance, MBTA finds palatable, but that the rest of the Commission members do not support. That is the exact result that Congress sought to avoid through the procedure set out in Section 212.

The Board should determine allocations based on the Uniform Policy as a whole, and enforce that determination on the parties. The policy is designed to ensure fairness to all of the stakeholders, including MBTA. Accordingly, the most prudent course is for the Board to weigh and then adopt the terms of the Uniform Policy, determine the costs as calculated by the Commission's consultant, and enforce its determination on the parties.

IV. Conclusion

For the reasons stated above, the Board should determine the appropriate compensation amounts between Amtrak and MBTA, in accordance with the Uniform Policy developed and adopted by the Commission, retroactive to October 1, 2015, and enforce its determination on the parties.

June 24, 2016

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VERIFICATION

I, William H. Herrmann, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verification.

Executed on this 24th day of June 2016, in the District of Columbia.



William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation

Exhibit A



Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy

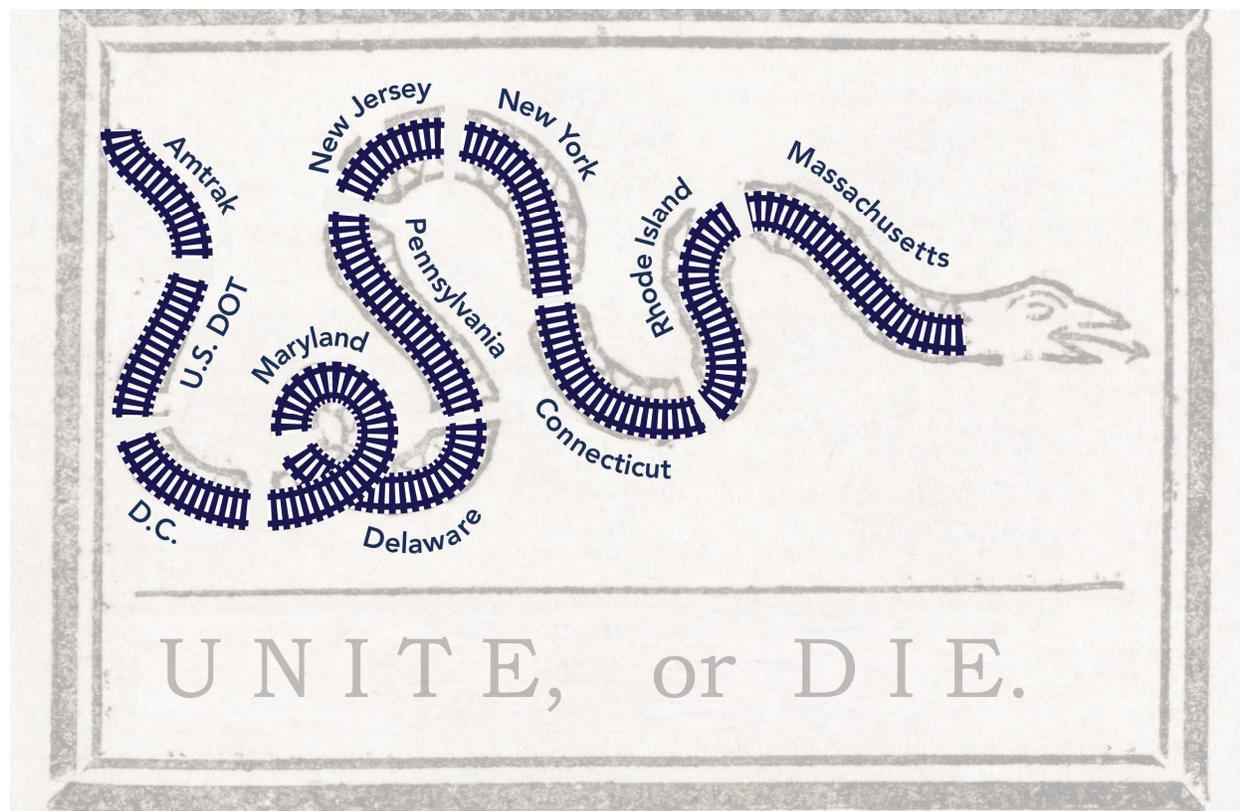


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1. Introduction and Background

The Northeast Corridor Infrastructure and Operations Advisory Commission (the Commission) was established by Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), codified at 49 U.S.C. § 24905¹ (Section 24905), to create a new forum for collaborative planning and decision-making for the Northeast Corridor (NEC, or the Corridor). The NEC rail network includes the main line from Washington, DC, to Boston, MA, and additional feeder corridors. In addition to Amtrak's intercity service on the Corridor, ten commuter authorities and six freight railroads operate on the NEC's main line and feeder corridors.

PRIIA directs the Commission to create a cost-sharing arrangement for NEC infrastructure used for commuter and intercity rail services. This policy establishes the required cost-sharing methods and provides national and regional policy recommendations to support them. Together, the new cost-sharing arrangement and policy recommendations seek to advance the development of the NEC.

For the NEC to continue to be the nation's premier rail corridor, all stakeholders may need to change business practices significantly to conform to the policy. This policy also contains recommendations for changes in law and administration that require federal and state action.

Many public- and private-sector stakeholders have long advocated for improvements to the policy framework and funding models that support the NEC. But, these initiatives have rarely translated into sustained focus and action by the Corridor's owners and operators. Now, confronted with aging infrastructure, rising demand, and constrained capacity, NEC service providers, Northeast state and local governments, and the federal government must develop a new partnership. This partnership is essential to ensure the Corridor's continued viability as the backbone of the region's transportation system and a catalyst for economic growth.

This policy is a milestone in this new partnership. It is the result of unprecedented collaboration by NEC partners to generate solutions necessary to stabilize and, over time, improve the Corridor.

1.1 Findings

- (1) The NEC contributes to the nation's economic growth and generates public benefits by supporting essential intercity, commuter, and freight rail services.
- (2) The NEC is composed primarily of publicly-owned or publicly-financed infrastructure and facilities that have deteriorated and now require extensive repair and modernization.
- (3) These needs cannot be met without substantial action and investment by the federal government.
- (4) Rail transportation offers economic and environmental advantages with respect to land use, air pollution, energy efficiency, conservation, safety, and cost per ton-mile of freight movement to such extent that preserving, maintaining, and enhancing the NEC is in the national interest.

¹ See Appendix 1.2 for the complete text of Section 24905.

1.2 Principles

- (1) All service providers are committed to covering the costs of their respective uses of NEC infrastructure—including a formula charge for the normalized replacement of capital assets—to prevent the Corridor from deteriorating further and to ensure that the essential rail services they provide continue.
- (2) Dedicated funding by each service provider for the normalized replacement of NEC infrastructure must be matched by increased and sustained federal investment to return the Corridor to a state-of-good-repair and meet future demand and growth.
- (3) Provided that necessary funding is made available to Amtrak to continue to operate its national network, net revenues produced from NEC intercity service should be reinvested in Amtrak’s NEC service, equipment, and infrastructure.
- (4) A new set of relationships is required to successfully manage, stabilize, and improve the NEC.
- (5) These new relationships must be built on trust and partnership—grounded in collaboration, transparency, and a commitment to establishing new governance and investment practices that benefit the public interest.
- (6) Projects undertaken on the NEC pursuant to this policy must be done in a cost-effective, efficient manner while balancing the need to minimize impacts on riders.
- (7) Federal, state, and local policy should treat the NEC as a single system. The Corridor’s success depends on a unified vision for the entire network.

1.3 The Northeast Corridor

The NEC is one of the great railroad corridors of the world. Each day, its 457-mile main line between Boston, MA, and Washington, DC, carries 710,000 commuter rail and 40,000 Amtrak passengers on over 2,000 trains. It supports the transportation needs of a regional workforce that contributes \$50 billion annually to the United States gross domestic product. It provides reliable access to core employment centers that contain one of every three jobs in the larger NEC Region—a region that, if it were its own country, would have the fifth largest economy in the world. The NEC also plays an important role in supporting the broader transportation system—a one-day loss of the NEC could cost the nation \$100 million in additional highway congestion, productivity losses, and other transportation impacts.²

Though the NEC continues to post historically high ridership levels, this success belies the fact that NEC infrastructure is deteriorating and reaching the practical limits of its capacity to carry additional passengers. The Commission published a report on the infrastructure challenges the NEC faces.³ It describes major infrastructure assets like the 1873 Baltimore and Potomac Tunnels in Maryland, the 1910 Portal Bridge in New Jersey, and the 1896 Norwalk River Bridge in Connecticut—all of which contain aging components that impede reliability and capacity limitations that restrict ridership growth.

² *The Northeast Corridor and the American Economy* (Northeast Corridor Infrastructure and Operations Advisory Commission, 2014), available at <http://www.nec-commission.com/reports/nec-and-american-economy/>

³ *Critical Infrastructure Needs on the Northeast Corridor* (Northeast Corridor Infrastructure and Operations Advisory Commission, 2013), available at <http://www.nec-commission.com/critical-infrastructure-needs/>

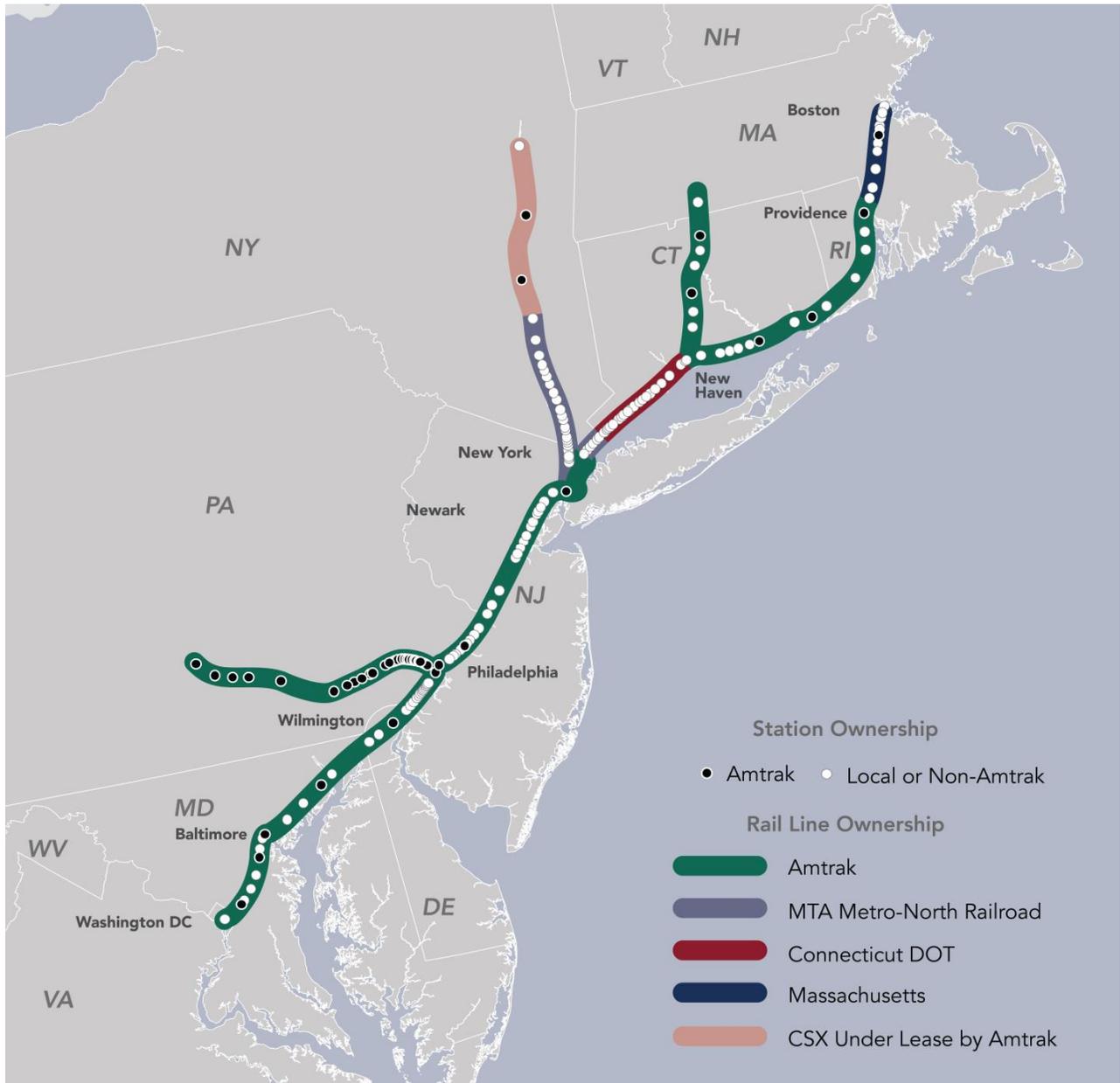
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The NEC is a shared resource with multiple right-of-way and station owners and service providers. Amtrak is the only service provider that operates from end-to-end, though ten commuter authorities, in addition to six freight carriers, also rely on the NEC rail network for some portion of their service.

Figure 1: The NEC Rail Network



Figure 2: Ownership of the NEC Rail Network



The following commuter service arrangements currently exist on the NEC:

- (1) Massachusetts Bay Transportation Authority (MBTA). MBTA also operates service south of Providence under contract for the Rhode Island Department of Transportation (RIDOT).
- (2) Shore Line East (SLE). Amtrak operates SLE service under contract to the Connecticut Department of Transportation (CDOT).
- (3) Metro-North Railroad (MNR)
- (4) Long Island Rail Road (LIRR)
- (5) New Jersey Transit (NJT)
- (6) Southeastern Pennsylvania Transportation Authority (SEPTA). SEPTA operates service under contract for Delaware Transit Corporation (DTC).
- (7) Maryland Area Regional Commuter (MARC). Amtrak operates MARC service under contract to the Maryland Transit Administration.
- (8) Virginia Railway Express (VRE)

Amtrak owns the right-of-way between Washington, DC, and New Rochelle, NY, and between New Haven, CT, and the Rhode Island-Massachusetts border. The New York Metropolitan Transportation Authority (NYMTA) and CDOT own the New Haven Line, which is operated and controlled by MNR. The MBTA owns the right-of-way from the Massachusetts-Rhode Island border to Boston-South Station, known locally as the Attleboro Line. Amtrak dispatches and maintains the right-of-way in Massachusetts under an agreement with the MBTA.

Station ownership varies and includes Amtrak, commuter authorities, states, local governments, and other entities.

1.4 The Northeast Corridor Commission

The Corridor's partners are committed to modernizing the NEC rail network. Because the rail system serves multiple states and crosses many jurisdictions, federal, state, and local governments in the region and rail service providers must join together to successfully develop and implement an effective modernization program. The Commission was chartered to facilitate collaborative planning and unified action.

In PRIIA, Congress recognized the need to improve coordination on the Corridor and amended Section 24905 to direct the U.S. Secretary of Transportation to establish the Commission to promote mutual cooperation and planning and to advise Congress on Corridor policy. The Commission is composed of one member from each of the NEC states (Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, and Maryland) and the District of Columbia; four members from Amtrak; and five members from the U.S. Department of Transportation (USDOT). The Commission also includes non-voting representatives from NEC freight railroads, states with feeder corridors that connect to the NEC, and commuter authorities not directly represented by a Commission member.

The Commission provides coordinated regional leadership to focus on near-term strategies to stabilize the NEC and establish a foundation for future growth.

1.5 Governance Structure Causes Planning and Investment Challenges

The current NEC ownership, operational, and governance structure poses significant challenges to efficiently operating, planning for, and funding the NEC's needs. Although the term "governance" can mean different things, in this policy it describes management, policies, guidance, processes, and decision-making, in addition to proper oversight and accountability.

1.5.1 Historical Context

The current ownership of, and operations on, the NEC stem from the failure of the Penn Central Transportation Company (Penn Central) in 1970, which was the largest corporate bankruptcy in U.S. history until the collapse of Enron in 2001. Penn Central was formed through the merger of the Pennsylvania Railroad, the New York Central Railroad, and the New York, New Haven and Hartford Railroad in 1968-69, which brought together under one entity the previously separately operated rail lines that today comprise the Northeast Corridor.

Penn Central and the majority of the country's other privately owned railroads found providing passenger service to be unprofitable by the 1960s. Though decades of poor business decisions played a considerable role in the company's failure, the railroad industry was also burdened by excessive regulation and taxation. Freight competition from the federally subsidized Interstate Highway System decreased the railroads' market share, and the diminished profits caused railroads to defer maintenance of capital assets. By the time Penn Central declared bankruptcy, the NEC and much of the territory served today by commuter authorities had been starved of capital investment for years.

Penn Central's bankruptcy triggered legislative and regulatory actions to consolidate and reform a railroad industry near collapse. To preserve intercity passenger service, Congress created the National Railroad Passenger Corporation (Amtrak) in the Rail Passenger Service Act of 1970.⁴ Amtrak assumed the responsibility for intercity passenger service from private railroads and in return received priority access rights to their tracks at incremental cost.⁵ Four private railroads contributed facilities, equipment, and capital to Amtrak in exchange for common stock, which is still held by successor companies.⁶

Amtrak is organized as a federally chartered, private, for-profit corporation in the District of Columbia. Through USDOT, the federal government owns all issued and outstanding preferred stock.⁷ Though the composition of its Board of Directors has changed over time, today it is composed of nine members, including Amtrak's President/CEO. Seven members are nominated by the President and confirmed by the U.S. Senate. The Secretary of Transportation is an ex-officio board member.⁸

⁴ Pub. L. No. 91-518, 84 Stat. 1327

⁵ 49 U.S.C. § 24308(a)(2)(B)

⁶ *Intercity Passenger Rail: Issues Associated with a Potential Amtrak Liquidation*, GAO-RECD-98-60 (U.S. Gen. Accounting Office, 1998), available at <http://www.gao.gov/products/RCED-98-60>

⁷ Amtrak 2013 Annual Report, available at <http://www.amtrak.com/ccurl/1000/237/Amtrak-Annual-Report-2013.pdf>

⁸ 49 U.S.C. § 24302(a)

Concurrent with Amtrak’s formation, the NYMTA and CDOT arranged to acquire the New Haven Line from the Penn Central trustees.⁹ In 1973, the MBTA purchased the NEC infrastructure in Massachusetts.¹⁰ Three years later, the Railroad Revitalization and Regulatory Reform Act of 1976¹¹ (4R Act) and the Amtrak Improvement Act of 1976 provided funding for Amtrak to purchase, among other assets, NEC territory and facilities that had not already been acquired.¹²

Table 1: Summary of Legislative/Historical Events

Date	Event	Implications
1970-71	Bankruptcy of Penn Central	NYMTA and CDOT acquire New Haven Line; creation of Amtrak
1973	Sale of Right-of-Way around Boston	Massachusetts (MBTA) buys portion of Providence-Boston Line in Massachusetts and many other lines, including the Stoughton Branch, from Penn Central
1973	3R Act	Stabilization of railroad industry; creation of Conrail
1976	4R Act, Amtrak Improvement Act	Authorized total of \$120M for Amtrak to acquire NEC properties from Conrail; note and mortgage issued.
1978	Transfer of Right-of-Way in Rhode Island	Providence & Worcester Railroad transfers 5.4 miles of NEC to Amtrak
1980	Staggers Rail Act	Eased economic regulation of railroad industry
1981	Northeast Rail Service Act (NERSA)	Transferred Conrail’s responsibility for commuter rail operations to local transit authorities (including service on the NEC); directed the ICC to determine appropriate methods for compensation for use of the Corridor
1983	End of Conrail’s obligation to provide commuter service	Commuter services transferred to state or metropolitan transit authorities (MBTA, MNR, NJT, SEPTA and MARC), which—except for MARC—purchased the portions of their systems’ track and rights-of-way not on the NEC main line
2008	Passenger Rail Investment and Improvement Act (PRIIA)	Framework for establishing national and regional policy for the NEC through the creation of the NEC Commission, charged with establishing cost-sharing requirements for the Corridor

⁹ Baer, Christopher. *A General Chronology of the Pennsylvania Railroad Company Its Predecessors and Successors and Its Historical Context: 1970*, available at http://www.prrths.com/newpr_r_files/Hagley/PRR1970.pdf

¹⁰ Baer, Christopher. *A General Chronology of the Pennsylvania Railroad Company Its Predecessors and Successors and Its Historical Context: 1973*, available at http://www.prrths.com/newpr_r_files/Hagley/PRR1973.pdf

¹¹ Pub. L. No. 94-210, 90 Stat. 119 (1976)

¹² See, e.g., Pub. L. No. 94-210, § 701(b), 90 Stat. 121

The USDOT holds a non-interest bearing mortgage note¹³ equal to the cost of acquisition for this property, plus amounts invested by the federal government. No payments on the note are due until its maturity date on December 31, 2975. USDOT holds a second promissory note on Amtrak’s property and equipment. To assist Amtrak with obtaining private financing, USDOT subordinated its lien on Amtrak equipment purchased after 1983.¹⁴

Other federal action was required to stabilize the railroad industry. The Regional Rail Reorganization Act of 1973 (3R Act) was enacted to recognize the federal interest in preserving and investing in rail service, particularly in the Northeast.¹⁵ It established another government funded private company, the Consolidated Rail Company (Conrail), to take over the potentially profitable lines of bankrupt rail carriers and made Conrail responsible for the commuter rail operations of its predecessor railroads.¹⁶ Congress also provided funding to improve the degraded infrastructure and equipment.

Despite considerable federal capital investments to improve rolling stock and equipment and rebuild infrastructure during the 1970s, Conrail was not profitable. The turning point for Conrail came after Congress passed the Staggers Rail Act of 1980 (Pub. L. No. 96-448), which eased economic regulation of the industry. It enabled railroads, including Conrail, to set rates that would fully recover operating and capital costs by route mile, to end cross-subsidies of unprofitable route segments by profitable segments, and to more easily abandon responsibility for routes that lost money altogether.

The Northeast Rail Service Act of 1981 (Pub. L. No. 97-35) arranged for Conrail to cede responsibility for commuter rail operations to local transit authorities, exempted it from state taxes, and relieved it from certain labor provisions. Conrail posted its first annual profit later that year and in 1987 the federal government sold its ownership interest through—at the time—the largest initial public offering in the nation’s history.

Conrail’s success story stands in sharp contrast to Amtrak’s story. Amtrak has struggled both politically and organizationally to find stability amid shifting policies and politics regarding federal responsibility for intercity passenger rail. The federal government has failed to provide Amtrak with consistent policy or financial commitments to support the mission it has prescribed for the company, or to support intercity passenger rail in general. This has hampered Amtrak's ability to both set and achieve goals, including the improvement of its most important asset, the NEC.

1.5.2 Fragmented Federal Funding and Oversight

Complicating the implementation of this policy, infrastructure investments involve complex planning, engineering, contracting, and construction activities that take place over a number of years. These processes benefit from predictable and stable capital funding resources, which is generally lacking due to the current reliance on annual budgeting and appropriations and one-time competitive grants.

Further, under federal law, commuter and intercity passenger rail services are treated differently due to their differing markets, economics, and service characteristics, with commuter rail service considered “public

¹³ 49 U.S.C. § 24907

¹⁴ Congressional Budget Office, *The Past and Future of U.S. Intercity Passenger Rail Service* (2003), available at <https://www.cbo.gov/publication/14769>

¹⁵ Section 101(a) of the 3R Act (87 Stat. 985)

¹⁶ Section 301 of the 3R Act (87 Stat. 985)

transit” while intercity rail service is not. As a result, even though both services operate over the same tracks, often stopping at the same stations, they are regulated, overseen, and funded differently by the federal government. Apart from safety, which is regulated by the Federal Railroad Administration (FRA) for both intercity and commuter rail, federal policy is not designed to support the NEC as a system. But, especially on the NEC, customers often rely on connectivity with the other services to complete their trips, requiring a multimodal perspective on service planning and investment.

The divergent treatment also occurs within the Congressional committee structure and is often duplicated at the state and local levels.

1.5.2.1 Amtrak

The federal government funds intercity passenger rail service primarily through appropriations to Amtrak. However, since 2009, federally authorized programs have also resulted in appropriations of grants to states for intercity passenger rail planning and investment.

Since its inception, Amtrak has relied on annual federal appropriations to subsidize its nationwide operations and to make capital investments. Since 2003, grants to Amtrak are requested annually both by the Administration through the USDOT budget request and directly by Amtrak through its Federal Grant and Legislative Request.¹⁷ The FRA disburses and oversees Amtrak’s federal grant funds, which the House and Senate Appropriations Committees choose to appropriate separately, in the form of an operating grant and a separate grant for capital and debt service.

In recent years, Amtrak has directed less than \$300 million¹⁸ per year from its federal capital grants to NEC infrastructure. Though Amtrak’s NEC services produce a net operating surplus for the company, these revenues are generally used to cover losses from Amtrak’s long-distance and state-supported operations.

The current rate of capital investment is woefully inadequate when the needs of the Amtrak-owned NEC territory alone are estimated to require approximately \$900 million annually over 15 years simply to bring the railroad—at its current capacity—into a state-of-good-repair.¹⁹

Notwithstanding the federal government’s fiduciary responsibility and policy interest in the Corridor, Congress has continually failed to provide funding to Amtrak to ensure the viability for all of its passenger rail services, let alone to recapitalize and improve NEC infrastructure.

1.5.2.2 Commuter Rail

Federal planning requirements and programs that support commuter-related investments on the NEC are subject to surface transportation law and administered by the Federal Transit Administration (FTA) and, in some cases, the Federal Highway Administration (FHWA). Commuter authorities receive federal grants through FTA formula programs financed by federal gasoline tax receipts deposited into the Mass Transit Account of the Highway Trust Fund. The federal gasoline tax funding the Highway Trust Fund has not been

¹⁷ 49 U.S.C. § 24315(b)

¹⁸ Amtrak FY2014 Legislative and Grant Request

¹⁹ Amtrak FY2011 State of Good Repair Assessment. Excludes costs to replace tunnels and other major structures.

raised since 1993, nor is it adjusted for inflation to keep pace with authorized expenditures. Since 2009, Congress has temporarily extended the solvency of the Highway Trust Fund with transfers from the general fund of the U.S. Treasury.

While FTA funding supports limited NEC commuter rail investments, there is also no direct funding program to the NYMTA, CDOT, or MBTA to support ongoing investment to benefit both intercity and commuter rail.

1.6 Cost Sharing

An essential near-term task for setting the NEC on a sustainable path is developing and implementing a standardized formula to determine and allocate costs, revenues, and compensation for the use of intercity and commuter services and facilities.

1.6.1 Background on Northeast Corridor Costing Methods

Determining the appropriate methods to allocate costs on the NEC is not a new endeavor. This issue has been debated since the restructuring of the railroads in the 1970s. In general, compensation by one railroad for access to right-of-way infrastructure and facilities owned by another railroad is standard practice in North America and around the world.

In 1981, Congress intervened in the dispute between the Northeast railroads. Section 1163 of the Northeast Rail Service Act directed the Interstate Commerce Commission (ICC) to determine the appropriate methods for compensation to Amtrak from affected commuter authorities for right-of-way related costs over the NEC. Section 1163 also directed the ICC to determine the appropriate method for compensation to Amtrak from Conrail for freight services on the Corridor.

In 1983, the ICC adopted final procedures in Ex-Parte 417 for compensating Amtrak for use of its properties by commuter and Conrail freight services. The ICC determined that the appropriate compensation standard was based on avoidable, or incremental, costs. An avoidable cost standard is premised on a dominant user and a minority user (or users) and assigns to the minority user only those costs that could be directly avoided “but for” the existence of the minority user. In the rulemaking, the ICC found Amtrak to be the dominant user, although it acknowledged that the factors resulting in that conclusion (pertaining to ownership and operating traffic) could change over time.²⁰

The principles and methods set forth in Ex-Parte 417 formed the basis for access and services agreements for many years. It should be noted that the ICC (and now the Surface Transportation Board) always had the authority to settle a dispute, but the parties generally preferred to reach agreement on a voluntary basis.

Since 1983, commuter traffic on the NEC has steadily increased, and voluntary agreements have not always produced outcomes in the long-term interests of the parties themselves or the NEC as a whole. Therefore, Congress intervened in 2008 and directed the Commission to develop a standardized method to fully allocate costs.

²⁰ *Costing Methodologies for the Northeast Corridor: Commuter Service*, Ex-Parte 417 (Interstate Commerce Commission, 1983), reported at 367 I.C.C. 192

1.6.2 Section 24905

Section 24905 requires the Commission to develop a standardized formula to ensure each intercity and commuter service is assigned the costs associated with its sole-benefit use of the NEC and a proportional share of costs resulting from joint-benefit use.

In the past, users have individually negotiated access and services agreements with owners. Over time, this has resulted in disparate arrangements, policies, and business practices. The bilateral nature of negotiations between owners and users has often resulted up to this point in serving short-term, parochial interests, often to the detriment of the Corridor's longer-term, regional interests.

The administrative costs of these agreements should not be overlooked. If all NEC-related agreements are counted—including agreements pertaining to real estate, property rights, master force accounts, individual projects, and stand-alone engineering services—they number in the hundreds.

A standardized formula should, over time, streamline business practices between the parties. Even more significantly, it will bring transparency and accountability for all parties to act in the long-term interests of the NEC network.

A fundamental assumption in reaching agreement and implementing a new cost-sharing policy is that all services must cover the costs associated with their use of this shared asset and that these increased contributions should leverage higher levels of federal, state, local, and private investment.

2. Implementation

This section of the policy summarizes the terms of the partnership set forth in the policy and describes how the policy will be administered.

2.1 Summary Terms

Table 2 is a summary of policy’s key terms.

Table 2: Summary of Terms

Element	FY2016, FY2017, FY2018	FY2019, FY2020
Cost Sharing		
Operating	100%	100%
Baseline Capital Charge	\$425m obligation * (phase-in of cash outlay)	\$530m obligation ** (phase-in of cash outlay)
Capital – Other	Allocated match or share	Allocated match or share
Project Delivery		
Reporting	Initiated	Ongoing
Program Monitoring	Initiated to verify improvements	Ongoing
Federal Investment		
Transition Assistance	No less than \$125m/year in net new Federal funds to the NEC	N/A
Long-Term Program	Develop for implementation no later than FY2019	Implement no less than \$400m/year in net new Federal funds to the NEC
Mid-Term Evaluation		
Baseline Capital Charge	In FY2018, assess progress on: <ul style="list-style-type: none"> • Project Delivery • Federal Program 	Baseline Capital Charge reduced if ***: <ul style="list-style-type: none"> • Project Delivery not satisfactory • Federal Investment insufficient
Other Factors	<ul style="list-style-type: none"> • Operating costs • Other elements of the policy and new issues 	

* In 2015 real dollars based on 80% of Normalized Replacement amount calculation

** In 2015 real dollars based on 100% of Normalized Replacement amount calculation

*** Reduction to no less than \$425m in 2015 real dollars in accordance with Section 2.2.2

2.2 Policy Term

The policy term is five years, beginning October 1, 2015 until September 30, 2020 (FY2016-FY2020). The policy remains in effect until the Commission replaces or annuls it.

2.2.1 Annual Performance Review

Each year, the Commission will hold an annual performance review, which will consider if owners and operators are conforming to the policy and whether the policy is working as intended.

It is anticipated that the first review will be completed by June 1, 2017, to inform any amendments. Amendments will be considered no later than July 31, 2017. The review will assess timeliness, completeness, and accuracy of any performance measures established through the policy and agreements. The review will also evaluate operational performance of train service, capital program implementation, and the status of state and federal funding to support the Corridor beyond the first year.

The first performance review will also evaluate progress toward implementation of other policy objectives, such as new liability provisions and improvements to project delivery, or other items as proposed.

Each annual performance review will also address any concerns with the accuracy or transparency of information shared by owners and operators and will indicate improvements that owners and operators need to undertake. It will also outline policy elements that are satisfactory and elements that are not. Elements pertaining to federal funding will be identified.

The Commission will coordinate transmission of the annual review, together with supporting documentation, to the Committee on Transportation and Infrastructure of the House of Representatives and the Senate Committees on Commerce, Science, and Transportation and Banking, Housing, and Urban Affairs, the Appropriations Committees of each chamber, the Secretary of Transportation, and others, as appropriate.

2.2.2 Mid-Term Evaluation

There will be a Mid-Term Evaluation completed no later than March 31, 2018, to assess the policy's effectiveness. The Commission will consider any necessary changes to incorporate new information and lessons learned into the policy.

The Commission will also determine whether to adjust the Baseline Capital Charge (BCC) for policy's final two years.

The evaluation will consider the following criteria:

- An evaluation of NEC project delivery, performed by USDOT
- Availability of federal funds to restore and improve NEC infrastructure and facilities in accordance with Section 3.1
- Development of a new approach to liability provisions on a Corridor-wide basis in accordance with Section 4.4
- Significant changes in operating costs
- Other policy elements, and any new issues

If the Commission determines that meaningful progress has been achieved, the Commission will vote to increase the BCC, in accordance with the total Normalized Replacement calculation. At this time, the projected BCC—in real FY2015 dollars—would be \$530 million.²¹

If the Commission does not find that meaningful progress has been achieved, the Commission will reduce the BCC during FY2019 and FY2020 to no less than \$425 million in 2015 real dollars and may implement other changes to the policy and agreements in accordance with Section 4.4.²²

2.3 Implementing the Policy via Agreements

The requirements set forth in this policy will be incorporated into existing or new individual agreements between Amtrak and Commuter Authorities, including any agreements for recapitalization of shared infrastructure. The policy term is not required to match the duration of each agreement. However to the greatest extent possible, the agreement terms will be identical for each agreement to ensure that the policy is implemented consistently across the NEC, as required by Section 24905.

2.4 Amendments to the Policy

Amendments to the policy may be brought forth at any time and considered pursuant to Commission bylaws. Agreements will be amended, as necessary, to incorporate changes to the policy. Any amendments must be accompanied by a schedule for implementation. The policy is likely to be amended over time and, therefore, strategies should be considered to streamline the process for incorporating policy revisions into agreements.

2.5 Schedule for Early Action Provisions

The implementation timetable balances expeditious action with feasibility, recognizing the deadlines set forth in Section 24905, limits on the financial and staffing resources required, and the NEC's acute investment needs.

- No later than December 17, 2014, vote whether to adopt the policy
- No later than February 3, 2015, submit Indirect Cost Plans, and detailed cost data to be allocated
- The FY2016-2020 Capital Plan will be considered by the Commission no later than May 1, 2015
- No later than June 30, 2015, submit Staffing and Resource Plans
- Best efforts will be made to execute agreements prior to October 1, 2015
- The financial obligations under this policy commence on October 1, 2015. Payments obligated under this policy are subject to funds being available (as stated in Section 2.6) and non-payment is subject to remedies described therein.
- The interim methods for additional capital projects will apply to any new agreements with effective dates of October 1, 2015, or later

²¹ See Section 5.5.2.

²² Ibid.

2.6 Failure to Meet Payment Obligations

Payments obligated under this policy are subject to funds being available. If a party fails to meet its required financial commitment under the policy, some operators could bear more than their proportionate share of costs. This will be addressed specifically within individual agreements and may include remedies such as:

- Financial penalties, including appropriate interest charges for late payments
- Reimbursement of costs and fees associated with the termination or restoration of service
- Other arrangements consistent with the policy's overall intent

2.7 Dispute Resolution

Consistent with the partnership principles this policy establishes, resolving disputes within the Commission's ordinary business practices and committee functions is strongly preferred.

To resolve disagreements related to the interpretation and application of the policy, an owner or operator may take the following steps after notifying the Commission in writing:

- (1) Request that the Commission establish an ad-hoc committee composed of three members to determine appropriate interpretation of the policy and make a recommendation to resolve the issue within 60 days. The ad-hoc committee will include, at minimum, one representative from USDOT.
- (2) If the recommendation from the ad-hoc committee does not resolve the issue, the owner or operator may:
 - (A) By mutual agreement of the parties to the dispute, seek resolution through litigation in the federal courts;
 - (B) Request mediation from the Surface Transportation Board (STB), or any other means of Alternative Dispute Resolution; or
 - (C) Request that the STB resolve the dispute.

For issues not related to the policy, dispute resolution provisions within existing agreements will continue to apply. Furthermore, the processes described in this policy do not supersede or replace any legal remedies available to the parties.

The Commission will amend the policy, if necessary, to ensure that the resolution of any dispute is uniformly implemented across the Corridor.

2.8 Transparency Measures

This section describes certain steps the Commission will adopt to promote transparency among its members, non-voting representatives, and designees.

2.8.1 Master Non-Disclosure Agreement

Adoption of the policy will cause the parties to share more information to enable understanding of how costs are developed and allocated, including proprietary information that may contain detailed financial data, train

and infrastructure performance data, contractual information, service plans, capital investment plans, and other information that will increase transparency and support collaborative decision-making.

To ensure that proprietary information is released only to individuals authorized by the Commission, the Commission will develop a Master Non-Disclosure Agreement (NDA) that will enable the Commission to share confidential information provided by individual operators with Commission members, other operators, representatives, or their designees to the extent permitted by law. The NDA will cover all information shared with the Commission as a result of this policy unless the material has otherwise been made available to the public.

2.8.2 Sharing of Agreements

All agreements and amendments, or portions therein, that are subject to the policy, will be shared with the Commission within ten business days after execution, subject to the NDA's terms. If a Commission member becomes aware that one or more parties have failed to implement the policy, the member will notify the Commission.

2.9 Staffing and Resource Plans

Successful implementation of the policy requires all parties to invest human capital and other financial resources. Amtrak and Commuter Authorities will share implementation plans with the Commission no later than June 30, 2015. The implementation plans should focus on resourcing for capital planning and program delivery and also describe:

- Designated staff or consultant resources to carry out the functions and participate in carrying out this policy, with an emphasis on capital planning, programming and project delivery accounting, operations, and legal, as appropriate) including lead points of contact
- Identification of internal systems or processes that must be modified to comply with the policy
- Anticipated funding sources for financial contributions
- Schedules for internal approval of new contracts or contract amendments required by the policy

3. Integration with Federal Policy

Current federal policy affecting the NEC, including federal funding and the way such funding is provided, should change in tandem with policy implementation. This is necessary to ensure that the new methods of collaboration and joint funding established by this policy are not impeded by federal laws and regulations designed for a prior era.

The following recommendations are essential to the successful implementation of the policy and the NEC's future success.

3.1 Federal Investment

The following section sets forth requirements and recommendations for the needed federal funding commitment to the Corridor.

3.1.1 Transition Assistance

The Commission recommends that the federal government provide additional capital funds for the NEC to match the increased capital funding commitment by operators and demonstrate the federal-state partnership that is essential to the Corridor's success. This transition assistance will also support the efficient ramp-up of payments and corresponding investments by filling gaps in cash flow due to the varying funding sources employed and the timing of payments by each operator.

In FY2016, FY2017, and FY2018, the Commission proposes that the federal government provide no less than \$125 million per year in net new capital funds for investment in the NEC.

3.1.2 NEC Federal Investment Program

The current system for providing capital funds to the NEC creates many challenges described in detail in Section 1.5.2. The amount of federal funds appropriated to Amtrak is insufficient to maintain—let alone improve—its NEC capital assets. There is also no direct funding program for all owners to support ongoing investment that benefits both intercity and commuter rail. In addition, not knowing the amount of funding available and the timing of receiving appropriated funds from one year to the next has made long-term capital planning and investment a significant challenge.

The Mid-Term Evaluation of the policy will consider whether the federal government has provided transition assistance and implemented a long-term NEC Federal Investment Program capable of restoring the NEC to a state-of-good-repair and improving it to support continued demand and growth.

If the federal government has provided transition assistance and establishes an NEC Federal Investment Program no later than FY2019, which provides no less than \$400 million per year in net new capital investment in the Corridor, operators will increase their capital contributions as described in Section 2.2.1.

A long-term NEC Federal Investment Program should adhere to the following principles:

- (1) Once the NEC Capital Plan is adopted, the federal government should provide funding equal to 80 percent of the total amount to be invested above the BCC to the project sponsors identified in the plan, similar to the terms for highway and transit projects. The level of annual federal funding should be sufficient to fund 80 percent of the cost of the investments proposed for that year in the NEC Capital Plan. It has been the long standing position of NEC stakeholders that the federal government has primary responsibility for restoring the infrastructure to a state-of-good-repair.
- (2) Federal funds for the NEC should be authorized for multiple years, as are federal investments for highway and transit projects, and utilize contract authority mechanisms to provide program predictability. These two features—multi-year authorizations and the ability to commit against future year funds—would bring needed stability to build the workforce and other resources necessary to efficiently execute capital programs.
- (3) Federal funds should be directed to eligible NEC recipients as a contribution towards a comprehensive capital plan as agreed to by the Commission, rather than as grants to individual projects, recognizing that local financial grant management systems in many cases must allocate federal funding to projects, not programs. Because a capital project undertaken in one location has implications for what projects can be undertaken elsewhere, due to factors such as required outages and workforce availability, the funding process should respect the plan’s integrity.
- (4) The net operating surplus generated by Amtrak’s NEC services should be available to reinvest in NEC infrastructure, facilities, and equipment. Sufficient federal funds should be made available to Amtrak to continue to operate and invest in its national network.

3.2 Harmonization of Requirements

The different treatment of commuter and intercity rail under federal law means there is no single set of rules or point of contact at the federal level when NEC projects involving multiple participants are proposed. Action to harmonize the requirements that come with the use of federal dollars from different federal programs is necessary.

These efforts will require both administrative changes at the USDOT and other federal agencies, along with statutory changes. Additionally, various state laws and regulations should conform with federal provisions to the greatest extent possible.

To address this, USDOT should bring together staff and resources of the FTA, FRA, FHWA, and other relevant federal entities to harmonize standards, requirements, and administer an NEC-related federal program. This work should specifically include:

- Streamlining the application of USDOT rules and procedures, including flow-down provisions, for NEC projects so that a single set applies, when appropriate, to each project sponsor
- Establishing one set of oversight procedures for the expenditure of federal funds. NEC projects that receive both FRA and FTA funds should not be subject to different oversight processes run by two separate USDOT modal administrations.
- Reviewing capital investments proposed for the NEC Capital Plan for policy, legal, and programmatic compatibility with USDOT goals, policies, and procedures
- Determining whether deviations from scope, schedule, and budget warrant corrective action
- Support other activities related to the NEC, such as planning and research

3.2.1 Buy America

With the exception of grants to Amtrak, use of FRA or FTA grant funds and other financial assistance are subject to statutory Buy America requirements that generally require that iron, steel, and manufactured products procured with federal funds be made in America. Although the wording of the provisions that apply to FRA and FTA are similar, key differences exist. Also, the FTA and FRA implement the requirement differently. This means that in practice, different procurement standards apply to rail materials based on whether such materials are purchased with FRA grant funds or FTA grant funds. Congress, FRA, and FTA should harmonize these standards so one set of rules is applicable for such grants and financial assistance where possible, or otherwise ensure that multiple and conflicting Buy America standards are not applied to projects.

3.2.2 National Environmental Policy Act (NEPA)

FRA and FTA should adopt a policy to establish cooperating agency or co-lead status on all NEC capital projects. Over the longer term, the FRA and FTA should revise their NEPA (42 U.S.C. § 4321 *et seq.*) procedures such that FRA and FTA funds can be used on any NEC project without special intervention. Each modal administration should specifically change their procedures to recognize that any rail project that qualifies as a Categorical Exclusion is automatically recognized across USDOT.

Although NEPA is a single federal statute covering all federal funds, FRA and FTA have issued separate regulations and/or guidance applying the law to the projects they each fund. Because these regulations differ, a Finding of No Significant Impact or a Record of Decision granting NEPA approval prepared by the FRA is not always valid for expending FTA funds, and vice versa. One approval could serve both purposes if the two agencies opt to become co-lead agencies at the initiation of the NEPA process. This has resulted in situations in which funding from both agencies was anticipated from the beginning, but where joint funding was not foreseen. Inconsistent requirements have delayed projects and increased costs and administrative burdens unnecessarily.

3.2.3 Labor Provisions

Consistent with current law, USDOT should ascertain the feasibility of streamlining the application of federal rules to NEC projects, whereby transit labor provisions under Section 13(c) (49 U.S.C. § 5333(b)) might not be applied to Amtrak, which is already subject to the Railway Labor Act (45 U.S.C. § 65 *et seq.*), when Amtrak uses FTA funds to carry out NEC operations or investments benefiting both intercity and commuter rail services. Similarly, Commuter Authorities might not be newly subject to the provisions of the Railway Labor Act if Amtrak or FRA funding is provided for an investment or operation carried out by a Commuter Authority that benefits both intercity and commuter rail services.

3.2.4 Disaster Relief Funds

NEC infrastructure is vulnerable to natural disasters and other disruptions. In the case of Hurricane Sandy, federal disaster relief funds were provided to Amtrak and commuter authorities by a special act of Congress, but this was an anomaly. Under the Stafford Act (the federal government's underlying disaster relief statute (42 U.S.C. § 5121 *et seq.*)), Amtrak is not eligible to receive federal disaster relief.

The policy recommends amending the Stafford Act so that federal disaster relief funds provided by the Federal Emergency Management Agency (FEMA) can be used to repair NEC infrastructure, facilities, and equipment.

To the extent federal disaster relief funds are made available for NEC joint-benefit activities, these will be applied against total costs, rather than as a credit to any one party's allocated share. As a consequence, any costs of joint-benefit projects covered by federal disaster relief funds are not allocable.

3.2.5 Other Legislative Recommendations

The Commission recommends that the federal government provide the STB with the necessary authority and resources to carry out the duties set forth for the Board in this policy.

4. Corridor Governance Topics

This chapter recommends a new framework for management, policies, guidance, processes, and decision-making for the NEC, in addition to proper oversight and accountability. Implementation of the policy is intended, over time, to improve the reliability and performance of the NEC rail system.

This policy recognizes that the Commission is an advisory body, without regulatory powers, and also that the Commission is not an operating entity. In addition, the policy does not supersede the independent or sovereign authority of the entities subject to Section 24905.

4.1 Transparency and Reporting

The following section describes data-collection and reporting practices to support continuous improvement in planning and implementing future service decisions and capital investments. Building on existing practices, the measures described here will establish greater accountability by all parties to one another and are expected to improve operational performance as well as program and project implementation for all NEC services and activities.

All transparency and reporting practices are meant to establish a uniform understanding of network activities and are not meant to replace, or duplicate, existing regulatory obligations or oversight responsibility.

4.1.1 Asset Assessment Practices

The Commission will work to establish cost-effective NEC asset management and engineering assessment best practices no later than March 31, 2017, to support the accurate assignment of costs, as well as to inform capital planning and investment decisions. Proposed NEC asset assessment practices require USDOT to concur.

These practices will:

- (1) Be consistent with FTA requirements under 49 U.S.C. § 5326 and, to the extent practical, Amtrak practices
- (2) Ensure a consistent approach and transparency around the asset assumptions that inform capital plans and programs
- (3) Provide consistency and greater specificity for the calculations of financial obligations

4.1.2 Reports

The Commission will prepare quarterly and annual reports to summarize findings and recommendations, if any, related to capital program delivery, operating costs, and train operations.

The Commission will collect, standardize, analyze, and distribute information to address:

- (1) Capital Program Delivery: Performance against the approved capital program as to scope, schedule, and budget, including project or program budget adjustments, outstanding issues, and reasons for any project

or program delays. Over time, reports may include recommendations to improve Corridor-wide capital program delivery performance.

- (2) Operating Costs: On a quarterly basis, owners will report Corridor operating costs
- (3) Train Operations: Information regarding train operations will support measuring performance. Performance measurements will support the Commission’s statutory requirement to make recommendations on improvements for intercity, commuter, and freight rail service operations.²³ The Commission will report on NEC dispatching protocols and train performance and may make recommendations to improve train operations, productivity, and efficiency.

4.2 Capital Plan and Program Development and Delivery

The NEC does not have a comprehensive, Corridor-wide infrastructure capital planning and investment program. Although all parties make capital investments in their service territories, these investments have reflected each entity’s priorities. The lack of formal coordination across the network—to define needs and to agree on desired outcomes and necessary investments to achieve those outcomes—has limited the region’s ability to maximize funds for investment. This has also hindered cost-effective project delivery, which requires advance planning for workforce development, resource allocation, service outages, procurement, and other factors.

To improve project delivery, this policy sets forth a process to enhance coordination by establishing long-term goals and the means to achieve them. Unless superseded by federal legislation or federal grant guidance describing an alternative process, the Commission will follow the approach described in this chapter and develop the necessary procedures for implementation.

4.2.1 NEC Planning

The Commission will develop a Corridor-wide capital plan that integrates the individual capital and service plans developed by each operator. The capital planning process must include all work to be performed on or impacting the NEC, regardless of funding source, including sole-benefit, joint-benefit, and third-party projects, to develop a complete picture of corridor activities.

The policy recognizes that owners and operators must comply with federal, state, and local processes and requirements in formulating, budgeting, and adopting capital plans and programs. The policy reinforces the need for coordination to carry out such processes and requirements.

The planning process is composed of three elements:

- (1) NEC Service Development Plan (SDP). Identifies long-range goals for service outcomes and a capital strategy for achieving these outcomes
- (2) NEC Five-Year Capital Plan. More specific capital investments in infrastructure to be made over a five-year period to implement the SDP, once available. The NEC Five-Year Capital Plan will further describe and refine the SDP’s capital strategy to provide the data for determining funding and operational requirements. The NEC Capital Plan will have a component that identifies work to be undertaken with

²³ 49 U.S.C. § 24905(b)(2)(C).

expected available funding and a component that identifies work that could be undertaken with additional funding but within the realities of available workforce, track space, and project development and deployment constraints.

- (3) NEC One-Year Capital Spend Plan. Specific capital investments to be undertaken with available funding during the upcoming federal fiscal year

4.2.1.1 NEC Service Development Plan

The SDP provides an overall framework to guide investments along the entire NEC. The first SDP will address the period through 2040 and will be produced by the FRA as a part of NEC FUTURE. After that, the Commission will update the SDP, not less than every 10 years. Updates will account for service and infrastructure initiatives that have become operational, those that remain pending, and other changes in policy and conditions.

The SDP provides the business case for the selected investment program by defining the long-term service and market objectives—service outcomes—in addition to identifying the capacity needs, infrastructure investments, and appropriate phasing—capital strategy—required to achieve them, and quantifying the associated transportation and other benefits. To define the long-term service and market objectives, rail travel demand forecasts, operations and capacity modeling, and other analytical tools will be employed. The SDP groups capital investments into phases that deliver specific increments of improved reliability, capacity, or service. In the near-term, these capital investments would address state-of-good-repair needs and initiate improvements to support new service. Each phase identifies compatible and prioritized Corridor-wide capital investments associated with service outcomes in support of both immediate short-term benefits that have independent utility and the long-term strategy.

Where feasible, the SDP should also identify changes in operations, institutional structure, or performance that can deliver benefits to customers that are more cost-effective than infrastructure investments.

The Commission will consider endorsing the SDP produced by NEC FUTURE and approving future SDPs.

4.2.1.2 NEC Five-Year Capital Plan

The NEC Five-Year Capital Plan further refines the SDP capital strategy to provide the data for determining funding and operational requirements over a five-year period. It will be updated annually. The NEC Five-Year Capital Plan will contain a component that is fiscally constrained and a component that is not.

The core of the NEC Five-Year Capital Plan is anticipated investments based on available funding and resources. Available funding may include state or commuter authority capital budgets, special federal grants, federal formula grants, third-party agreements, and BCCs.

Owners will develop investment plans for the first two years of the NEC Five-Year Capital Plan with sufficient geographic specificity to demonstrate whether each operator's BCC will be expended in its territory.

This demonstration of geographic specificity will be a tool for anticipating BCC expenditures and potential investment shortfalls. An owner must use BCCs for eligible investments in an operator's territory in the year

it receives the contribution.²⁴ Geographic specificity for BCC-eligible spending is not required for years three, four, and five of the NEC Five-Year Capital Plan but should be provided where practical.

If an owner or operator pays its BCC using a funding source that must be associated with a discrete set of capital projects, such as a bond, owners and operators will cooperate to comply with all legal obligations associated with the funding source.

The NEC Five-Year Capital Plan will also identify needed and desired capital investment that could occur with additional funding in each of the five years. Basic Infrastructure needs requiring additional funding will be developed according to programmatic category but do not require geographic specificity. Proposed capital investments (Basic Infrastructure, Mandated, Major Backlog, Improvement projects, etc.²⁵) will be included only if they are feasible within the constraints of available workforce, track outage requirements, and the project development process (planning, engineering, permitting, construction, etc.).

Development of the NEC Five-Year Capital Plan will begin in the fall with the first year of the Plan covering the subsequent federal fiscal year. Owners will develop draft NEC-related capital plans for their territories that can be executed based on available funding (constrained) and capital project activities that are desired but require additional funding. Investments selected for funding beginning with the FY2017-FY2021 NEC Five-Year Capital Plan will be justified with a description of the methods and criteria used to make the selection. Draft plans and criteria for inclusion of additional projects will be developed in coordination with operators. Operators will submit to owners proposed capital projects and related service plans that have funding available and desired capital projects and service plans that require additional funding for their respective territories. Owners will incorporate funded and aspirational capital project activities submitted by operators into their respective capital plans as feasible and appropriate based on factors such as project readiness, available resources and outages, and service and performance objectives. Owners will then submit plans to the Commission for review by all owners and operators.

Following this initial round of information sharing, the Commission will draft a Corridor-wide plan that will provide both a service-territory-specific and Corridor-wide understanding of the proposed projects and activities. The Commission will distribute the plan to all owners and operators for their review and comment. Iterative revisions of the draft NEC Five-Year Capital Plan will take place until the Commission decides whether to endorse a final NEC Five-Year Capital Plan no later than May 1st of each year.

The Commission will transmit the NEC Five-Year Capital Plan to the Committee on Transportation and Infrastructure of the House of Representatives and the Senate Committees on Commerce, Science, and Transportation and Banking, Housing, and Urban Affairs, the Appropriations Committees of each chamber, the Secretary of Transportation, and others, as appropriate. If an NEC Five-Year Capital Plan is not endorsed, the Commission will transmit a letter instead, explaining why it was not.

4.2.1.3 NEC One-Year Capital Spend Plan

The NEC One-Year Capital Spend Plan will be formed from the first year of the NEC Five-Year Capital Plan before the start of that federal fiscal year. If the funding level is equal to the level available when creating the

²⁴ See Section 6.3.

²⁵ See Section 5.5.2.1.

NEC Five-Year Capital Plan, the presumption is that the NEC One-Year Capital Spend Plan will be the same as the first year of the NEC Five-Year Capital Plan, refined to reflect updates based on events since its adoption and including any appropriate programmatic contingency to manage costs and schedules. If additional funding becomes available, expansion of the NEC One-Year Capital Spend Plan to include new projects will follow coordination and approval procedures identical to the procedures for the NEC Five-Year Capital Plan.

For the FY2017 NEC One-Year Capital Spend Plan, owners will make best efforts to produce a resource-loaded schedule, identify any long-lead procurement items, and describe any service impacts that may result from delivering the plan. This information will be required for all subsequent spend plans.

If an NEC One-Year Capital Spend Plan is not adopted by the start of a federal fiscal year, the relevant year of the most recently approved NEC Five-Year Capital Plan will be effective until an NEC One-Year Capital Spend Plan is adopted. If there is no previously adopted NEC Five-Year Capital Plan for the year, BCCs may be spent on Basic Infrastructure and Mandated capital projects only. No BCC funds may be expended on any capital project beyond Basic Infrastructure and Mandate projects not authorized in an approved NEC Five-Year Capital Plan or One-Year Capital Spend Plan.

The Commission will transmit the NEC One-Year Capital Plan to the Secretary of Transportation. If the NEC One-Year Capital Spend Plan is not adopted, the Commission will transmit a letter instead, explaining why it was not.

4.2.2 Project Delivery

Implementing the NEC One-Year Capital Spend Plan efficiently will require creative solutions for project delivery and workforce assembly. Within the capital planning process, operators will propose and consider the appropriate project sponsor to deliver a particular project or activity, in accordance with applicable agreements, laws, and collective-bargaining agreements. Owners may partner with operators to deliver projects in the NEC Five-Year Capital Plan, in which case they would be expected to enter into an agreement describing how expenses would apply toward the spending commitments required by each party under the policy.

USDOT has an oversight role of USDOT-funded capital projects on the NEC and will use its authority to help support and ensure successful project delivery by monitoring and taking appropriate actions regarding:

- Setting and maintaining accurate cost estimates;
- Setting and maintaining detailed project schedules;
- Adequacy of project management training; and
- Adequacy of data and reporting.

USDOT will report on its findings related to project delivery oversight to the Commission every six months and will make recommendations if there are any specific areas of concern.

In addition, owners will provide reports to the Commission that provide management level project information for capital projects focused on budget, scope, and schedule information so that the Commission may produce the reports under Section 4.1.2.

The Commission will develop an early warning procedure to be used by owners or operators responsible for carrying out projects to notify operators when issues arise that may adversely impact the scope, schedule, and budget of project and program activities. Improved communications practices will provide transparency and provide the necessary opportunities to provide guidance and assistance to resolve issues.

USDOT will determine if owners have made adequate progress to improve project delivery to inform the Mid-Term Evaluation of the policy set forth in Section 2.2.2.

4.3 Operations

All operators require high-quality train performance to meet customer needs. Clear policies, procedures, and timely information are necessary to ensure transparent decision-making in regard to actions that affect train services.

4.3.1 Treatment of Capacity

In certain segments, the Corridor has reached the practical limits of its capacity. This means that, without investment in infrastructure or changes in operating patterns, no more train trips can be added to serve additional customers. The Corridor's capacity constraints also mean that routine—let alone major—construction often requires taking tracks out of service.

To accommodate service demands in the coming decades, projects and/or initiatives for NEC Capital Plans will be proposed—in accordance with the SDP—to provide additional trains to serve the region's mobility needs.

A framework for the treatment of Corridor capacity begins with the following understanding:

- (1) Adoption of the policy does not alter pre-existing statutory, contractual, or property rights.
- (2) Documentation of these various rights is necessary to establish a baseline and determine the extent to which the NEC is encumbered.
- (3) This documentation will inform a discussion on how best to define capacity as it pertains to the NEC.
- (4) In some cases, increasing train-consist capacity and making scheduling and other operational changes may be more cost-effective than infrastructure investments.
- (5) Within the framework of applicable rights, access should be priced on fair and reasonable terms.

The Commission will document the existing statutory, contractual, and property rights that pertain to the Corridor to inform the development of an information framework to enable the Commission to make recommendations about future capacity requirements, pursuant to Section 24905.

4.4 Liability

The Commission establishes the following goals for liability provisions in existing and new agreements:

- (1) Eliminate “but for” liability and indemnity provisions and adopt “no fault” liability provisions so that each party takes responsibility for costs associated with their own equipment, employees, and passengers. “No fault” arrangements are beneficial because they limit litigation.

(2) Allocate liability associated with shared-use infrastructure and third party claims.

The Commission will develop a new approach to liability provisions no later than March 31, 2018, that should be applied and implemented Corridor-wide no later than the end of the policy term. A new approach may require changes to federal and state law, which should be taken into consideration when considering alternatives and discussing a timeline for implementation.

Prior to implementation of a Corridor-wide approach and to the extent permitted by state law, operators may amend existing liability arrangements through negotiated agreements consistent with the overall intent of the policy.

5. Cost Allocation Methods

This section describes the methods that comprise the standardized formula and will form the basis of agreements to implement Section 24905.

5.1 Principles for Developing a Standardized Formula to Determine and Allocate Costs, Revenues, and Compensation

5.1.1 Costs and Metrics

- (1) Costs addressed in this policy are composed of expenses due solely to each individual operator and expenses reflecting proportional use and recapitalization of shared NEC infrastructure.
- (2) Costs subject to this policy are linked to specific activities, based on sound data and verifiable statistics, where practicable.
- (3) The methods are driven by statistics that reflect proportional use of NEC infrastructure. Train operating statistics are based on timetables and train manifests, calculated periodically, and include scheduled revenue and non-revenue movements.

5.1.2 Principle of Primary Use

Determining whether costs are sole-benefit or common-benefit should reflect the Principle of Primary Use, under which costs for providing facilities or services are not allocable if the facilities and services meet all of the following criteria:

- (1) Provided by an operator for the use of its own passengers or for other sole-benefit purpose;
- (2) Used primarily by the operator's passengers or other sole-benefit purpose;
- (3) Used only incidentally by other operators or their passengers; and
- (4) Does not result in significant additional cost to the operator providing them, when other operators or their passengers use them

5.1.3 Cost-Effectiveness

The policy must balance achieving the desired level of precision and the costs associated with precision.

5.1.4 Compensation

Provided that compensation agreements do not impair the ability of Amtrak or Commuter Authorities to fulfill their obligations under the policy, the parties may:

- (1) Implement compensation agreements for assets or services not addressed within the policy.
- (2) Agree to terms that exceed compensation amounts due under the policy, provided such agreements do not result in cross-subsidization of commuter rail passenger, intercity rail passenger, or freight rail transportation.

5.1.5 Revenues

Provided that the costs associated with activities that generate revenue are borne exclusively by or allocated to the operator responsible for the activity, revenues are excluded from allocation. However, if costs associated with activities that generate revenue are allocated—other than infrastructure costs related to train service allocated under this policy—the corresponding revenues must also be allocated.

5.1.6 Special Studies

The method selected for allocating a particular cost may not be appropriate for a particular section of territory. In such cases, an alternative method may be developed through a special study. If a special study is employed to inform cost allocation, the operator requesting the study must obtain the Commission’s approval of the study design, or the Commission may elect to sponsor the study. The results of a special study will be effective only through an amendment to this policy.

The following special studies are underway as of December 3, 2014, and are scheduled for completion during FY2015:

- Stations Special Study: Analysis of cost drivers and appropriate usage metrics for allocating NEC station costs with potential suggestions for refining the cost-allocation methods set forth in this policy
- Right-of-Way Special Study: Analysis of cost drivers and appropriate usage metrics for allocating NEC right-of-way costs with potential suggestions for refining the cost-allocation methods set forth in this policy

The following special studies will begin in FY2015:

- Electric Traction Propulsion Power Special Study: A special study regarding electric traction propulsion power for the NEC service territory between New York and Boston
- Freight Special Study: A special study on freight usage and cost impacts

5.2 Exclusions

Unless otherwise specified, the following costs are excluded from the costs to be shared under this policy:

- (1) Maintenance and recapitalization of sole-benefit infrastructure
- (2) On-board train services
- (3) Rolling stock equipment maintenance and storage, switching, and staging
- (4) Other services that may be provided upon request, such as equipment rental, ticketing and cross-honoring of tickets, training, course development, claims handling, and policing, engineering, and other professional services
- (5) Infrastructure access, property acquisition unrelated to allocable activities under this policy, and train slot sales and purchases
- (6) Fare revenues
- (7) Certain liability, insurance, and risk-related costs as described in Section 5.7

- (8) Any portion of costs of joint-benefit projects paid for or recovered by federal disaster relief funds, in accordance with Section 3.2.4

5.2.1 Treatment of Section 209

PRIIA Section 209 required that a standardized methodology be developed and implemented to allocate the costs of short-distance Amtrak routes (not including the Northeast Corridor main line) among the States and Amtrak.²⁶ Under PRIIA Section 212, the costs allocated to Commuter Authorities may not include any portion of costs allocated to Amtrak for intercity passenger rail service, including those that may be allocated to Amtrak by the PRIIA 209 methodology. How Amtrak and States incur and further allocate intercity passenger rail costs allocated to Amtrak under this policy is governed by the PRIIA 209 methodology and associated implementing agreements between the States and Amtrak.

5.3 Operating Costs

Operating and maintenance activities occur NEC-wide, but these activities vary by the particular infrastructure in a geographic area and the train services within that area. Therefore, to allocate costs associated with operating and maintenance activities, the method divides the NEC into geographic segments to support consistent allocation of costs. All common-benefit costs are applied to an Operating Segment. A complete table of Operating Segments is appended to this policy. Within an Operating Segment, each common-benefit cost will be assigned one or more allocation metrics.

²⁶ Pub. L. 110-432, div. B, title II, § 209(a) 122 Stat. 4917 (2008).

Table 3: Operating Allocation Metrics

Cost Element	Cost Category	Train Moves	Train Miles	Electric Unit Miles	Unit Miles	Gross Ton Miles	Special Study
Maintenance of Way	Track					X	
	Signals	X					
	Communications	X					
	Bridges					X	
	Other Structures					X	
	Electric Traction			X			
	Support Activities					X	
Dispatching	Dispatch Centers; Block Towers	X	X				
Policing	Right-of-Way				X		
	Yards				X		
Propulsion Power	Electric traction propulsion power						X

5.3.1 Maintenance-of-Way

Maintenance-of-Way (MoW) means those costs that are related to the maintenance of the NEC right-of-way.

5.3.1.1 Track, Bridges, Structures, and Support Activities

Eligible Costs. Includes track and bridge maintenance and inspection, track geometry car inspection, ditching, grading, surfacing, brush cutting, grinding, welding, spot-tie replacement, protection support (i.e., watchman/flagging), and related structures maintenance. Support activities include information systems, roadway machinery, and vehicles.

Allocation Metrics. Gross Ton Miles for non-terminal segments and Train Movements for terminal zones.

Justification. These activities are driven primarily by the weight of the vehicle traveling over these components as measured by Gross Ton Miles. This measure is derived from train schedules and manifests.

Train Movements is selected for the Washington and New York terminal zones because trains travel at much lower speeds over smaller areas of territory and therefore more accurately reflect costs.

5.3.1.2 Communications and Signals

Eligible Costs. Includes the inspection and testing of signals, relays, switches, cable and wiring, moveable bridge components, road crossing components, track circuits, signal lines, solid state equipment and control house equipment; the maintenance and repair of signal and communication equipment; and maintenance and inspection of cables, ducts, voice systems, radio systems, PBX and other communication network components.

Allocation Metric. Train Movements.

Justification. Communication and signal costs are directly correlated to train frequencies. Trains generate signals when operating over the right-of-way, regardless of the number of units in the train consist.

5.3.1.3 Electric Traction Infrastructure

Eligible Costs. Include inspection, testing, maintenance and repair (including activities performed using catenary inspection vehicles and wire trains) of the catenary system, transmission system, catenary structure, third-rail system, electrical substations, and railroad-owned frequency converters.

Allocation Metric. Unit Miles for equipment powered by electric locomotives or multiple units (EMUs) for non-terminal segments and Train Movements for equipment powered by electric locomotives or EMUs for the terminal zones.

Justification. The majority of costs relate to maintenance of the catenary system, due to wear and tear of overhead wires and supporting electrical substations. Therefore, a measure reflecting the volume of usage is appropriate to apportion these costs. Electric unit miles are measured from each operator's manifest and schedule and traced to the designated Operating Segments. Electric train movements is the appropriate metric for the Washington and New York terminal zones because of the amount of complex and expensive electric traction infrastructure contained within a short segment. In addition, monitoring train movements is more practical in the shorter terminal segments.

5.3.2 Dispatching

Eligible Costs. Costs, including labor expenses and overhead associated with Centralized Traffic Control (CTC) and block tower operations.

Allocation Metric. Train Miles for non-terminal segments and Train Movements for terminal zones.

Justification. The number of dispatchers needed to safely direct trains across the NEC is the primary driver of costs related to dispatching. Many variables affect how much time a dispatcher is actively engaged with a particular train. Train Miles reflects the number of trains and the time a dispatcher must devote while monitoring and directing movements over a specific portion of the railroad. Train Movements is selected for the Washington and New York terminal zones because trains travel at much lower speeds over smaller areas

of territory, and therefore more accurately reflect costs. Regardless of distance traveled, a dispatcher must monitor all movements occurring in the terminal.

5.3.3 Policing

Eligible Costs. Includes labor and other costs incurred for police officers engaging in routine patrols or responding to incidents on the right-of-way or in yards.²⁷ Policing associated with the agent of primary jurisdiction are deemed common-benefit costs, together with any policing costs incurred by other operators' policing forces that such agent of primary jurisdiction deems appropriate for inclusion.

Allocation Metric. Unit miles for non-terminal segments and by train movements for terminal zones.

Justification. Police protect passengers and the infrastructure on which trains operate to ensure safe train operations. The volume of train operations, as reflected by unit miles, is appropriate to apportion the costs of policing right-of-way infrastructure. The train operating schedule and the units operated on each train is constructed, in part, based upon the capacity of the infrastructure available to support safe and reliable train operations. Policing to support that infrastructure is best allocated based on the proportional volume of trains provided by each operator. Train volume is best reflected by the unit mile metric.

5.3.4 Electric Traction Propulsion Power

Eligible Costs. Includes electricity for train operations (billed by utility companies and electric generation suppliers); operations and maintenance (O&M) of frequency convertors and substations (owned by utility companies); labor costs for load dispatchers and power directors; professional energy consulting costs for provision of on-going analysis, procurement support, tariff assistance, and contractual assistance; and legal costs for other initiatives requiring external legal support.

Allocation metric. Consumption of electricity in kilowatt-hours.²⁸ Any operator that will no longer require Electric Traction Propulsion Power will provide notice to the Commission six months in advance. The allocation among owners and operators will be recomputed to represent the change effective on the date that the operator will no longer use Electric Traction Propulsion Power.

Justification. The majority of expenses are costs associated with utility and electric generation companies that supply electricity for train operations. The payments made to these companies and suppliers are based primarily on a rate per kilowatt-hour (kWh) consumed. Many of the existing agreements between operators rely on special studies to simulate the number of kWhs consumed by each operator. Therefore kWhs consumed by each operator is the most reasonable allocation metric because it represents the most equitable distribution of electric traction propulsion expense to each operator.

²⁷ Policing costs associated with stations are addressed in the Stations section of this document.

²⁸ A periodic special study performed by an engineering consulting firm will determine the relative use of electricity in kilowatt-hours for train operations by all users of traction power in the NEC. Portions of the NEC will require separate studies due to unique electric traction systems and the types of rolling stock equipment used.

Interim Treatment for Territory from New York to Boston. A study that is comparable to the method used south of New York is required to address electric traction propulsion power from New York to Boston. Prior to the completion and implementation of the study results, electric unit miles will be used as the metric.

5.4 Station Operating Costs

Train stations on the NEC always contain platforms and a station building. Many of these station buildings are major public centers that contain features that are not uniquely transportation-related, such as retail shops and services, dining facilities, and office space. However, when people make decisions about modes of transport, the station experience is a factor. Therefore, maintaining stations in a manner that is pleasing to customers (clean, well-lit, with certain amenities) is in the interests of all operators, in addition to the civic and business communities.

Given the unique nature of station facilities across the NEC, the following methods prescribe guidance to determine and allocate costs associated with station usage. However, many stations require some level of individual analysis.

This policy is not intended to assign costs to service that is not subject to Section 24905. Operators are encouraged, however, to attract investment in stations from other parties to improve the customer experience.

5.4.1 General Principles

- (1) The Commission recommends that wherever practicable within their accounting systems, owners track costs eligible for allocation by service type.
- (2) Costs associated with station areas, facilities, or activities that are used exclusively by a single operator are not eligible for allocation to another operator.
- (3) Costs associated with station areas, facilities, or activities that are used by more than one operator are included in the common-benefit cost pool for allocation to operators.
- (4) The identification of sole-benefit and common-benefit costs should reflect the principle of primary use.
- (5) Common-benefit costs are allocated among operators based on usage metrics that represent an equal weighting of ridership (measured by passenger on-off counts) and station usage (measured by train stops).

Table 4: Station Cost Categories Excluded From Common-Benefit Cost Pool

Cost Category	Description	Justification
Baggage Handling	Costs associated with unloading, loading and storage of baggage and parcels on trains or in stations	Solely benefits an individual operator
Ticket Sales	Costs associated with selling, storing, receiving and accounting for, instruments used to collect Passenger Revenue on trains or in stations	Solely benefits an individual operator
Redcaps	Costs associated with assisting passengers entraining and detraining trains, including interface with baggage handling, for trains	Solely benefits an individual operator

Table 5: Treatment of Station Common-Benefit Cost Categories

Cost Category	Description	Eligible for Spatial Analysis	Method
Ushers	Costs of announcing track assignments of arriving and departing trains and directing passengers to and from station platform entrance gates	No	Ushers serve both commuter and intercity rail users. All are considered common-benefit costs.
Security and Policing	Costs of patrolling and protecting stations, platforms and station facilities	No	Security and policing costs are associated primarily with commuter and intercity rail users.
Station Operations	Costs of station cleaning and trash removal	Yes	To the extent that these costs involve multiple areas within the station, they will be subject to assignment to sole-benefit and common-benefit station areas on a square footage basis, with costs assigned directly to sole-benefit areas and common-benefit costs allocated based on shares of passenger on-off counts and train stops
Utilities	Costs of electric power, heating fuel and/or steam used for station operations purposes	Yes	
Station Maintenance	Costs of basic maintenance of stations	Yes	

The allocation of station operating costs is composed of the following steps:

- (1) Identification of all station costs associated with station operations (police/security, utilities, station operations, station ushers, station maintenance)
- (2) Exclusion of costs associated with sole-benefit activities (e.g., ticketing, redcaps, and baggage handling.)

- (3) For those cost categories that require spatial analysis, identify any sole-benefit areas of the station and allocate a proportion of those costs to the operator based on station square footage
- (4) Assignment of remaining common-benefit costs by an equal weighting of train stops and passenger on/off

In cases where the proportion of costs eligible for allocation is not distinctly tracked within an owner's accounting system:

- Sole-benefit costs should be calculated based on the share of station square footage that is used only by an individual operator
- Common-benefit costs should be calculated based on the share of square footage that is deemed shared space

5.4.2 Station Operating Plans

If an owner is expected to allocate \$1 million or more in annual operating costs at a single station to another operator subject to Section 24905, owners will develop Station Operating Plans for a three-year period in coordination with all operators at the station. Station Operating Plans will provide additional clarity regarding the anticipated service levels and related operating costs expected for the upcoming three-year period. The Station Operating Plans should include staffing and manpower levels for all shared activities.

The costs of developing a Station Operating Plan will be shared proportionally among the operators at the station. Station Operating Plans must be completed no later than six months prior to the beginning of the three-year plan period. Station Operating Plans will be updated at least every two years, unless the parties agree on an alternative schedule.

5.5 Capital

Intercity and commuter rail service reliability depends on the condition of NEC infrastructure. For operators to continue to serve their customers and for the NEC to continue to be a catalyst for economic growth, ongoing investment in capital assets is required to achieve and maintain a state-of-good-repair.

The capital planning and programming process described in Section 4.2 provides the opportunity to shape near-term actions as well as the long-term vision for the NEC. It also sets forth a process in which operators directly influence and determine shorter-term objectives to collaboratively develop capital plans and programs.

The following section sets forth methods to allocate capital costs.

5.5.1 Baseline Capital Charge²⁹

The Baseline Capital Charge is the capital charge assigned to each operator based on factors that reflect asset condition and relative use that is calculated as a percentage of the Normalized Replacement amount.

5.5.2 Normalized Replacement Amount

The Normalized Replacement amount is based on the population of each asset type, the average useful life of each asset type, and the unit cost for each asset type

This concept presumes assets are maintained in a state-of-good-repair, which is not the case across the NEC. However, this approach provides an objective, data-driven method for determining a required level of annual investment in maintenance and recapitalization of capital assets to establish a formula charge.

The benefits of this approach are as follows:

²⁹ See Appendix 1.1 for definitions for capitalized terms.

- (1) Assets can be monitored through field inspection, unit costs can be verified, and useful life estimates can be determined by technical experts;
- (2) The components of the BCC provide a link between the assets and the required investment amount to sustain a state-of-good-repair;
- (3) Funding contributions correlate to actual use of the infrastructure; and
- (4) Administrative and transaction costs are minimized.

Normalized Replacement amounts were developed for the capital segments (see Appendix 1.5) to establish interim geographic specificity for the calculation of BCCs. FY2015 Normalized Replacement amounts will be adjusted annually for inflation using the method for inflating operating costs set forth in Section 6.1. New assessments, incorporating the asset assessment practices established under Section 4.1.1, will be completed no later than March 31, 2018.

Updates to the data and assessments used to derive Normalized Replacement amounts require the Commission's approval and must include a timetable for implementing any adjustments to BCCs. Such adjustments to BCCs must be applied to all owners and operators.

PRIIA Section 211 requires Amtrak to provide USDOT with a periodic state-of-good-repair assessment of the NEC assets it owns or manages. This report forms the basis for developing BCCs and contains an inventory of physical assets for each asset category and the estimated average unit replacement cost for each asset category. The assessment also identifies the estimated useful life for each asset category.

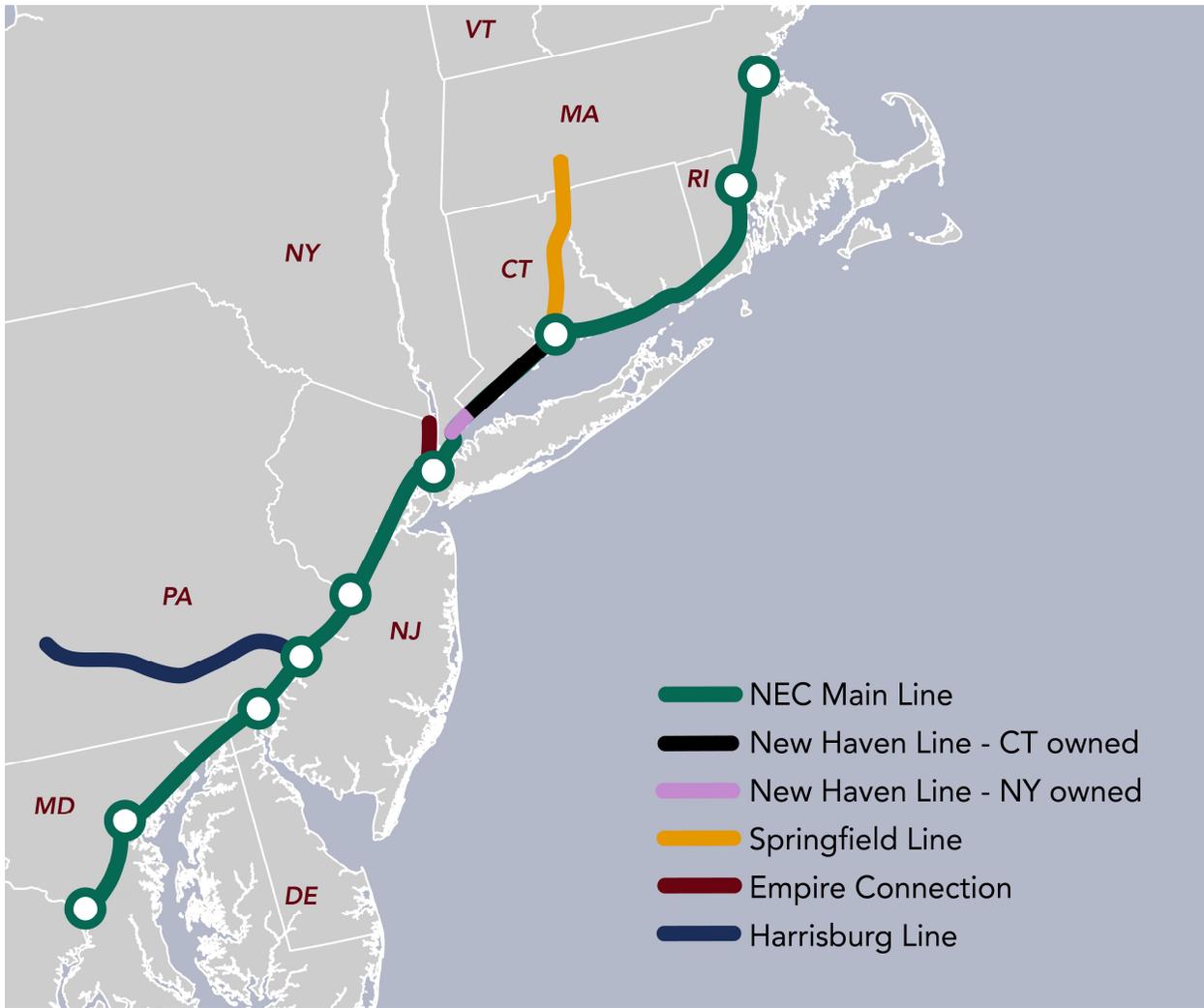
For Amtrak owned or managed territory, Normalized Replacement amounts are developed using Amtrak's state-of-good-repair assessment for source data and are determined as follows:

- (1) For each asset category (e.g., ties, catenary poles, signal houses, etc.), the number of assets in that category is divided by the average useful life of those assets, resulting in the average number of assets to be replaced each year.
- (2) This annual replacement number is then multiplied by the average unit replacement cost for those assets, resulting in the Normalized Replacement amount for that asset category.
- (3) The Normalized Replacement amount for each asset category is allocated to each operator using the usage metrics established for allocating operating costs pursuant to Section 5.3 across the segments identified in Figure 3.
- (4) The allocated amounts for each asset category are added together, resulting in a total Normalized Replacement Amount.

For Connecticut-owned territory, Normalized Replacement amounts for each asset category are developed based on the number of track miles and Amtrak's average Normalized Replacement amounts per track mile for the NEC Main Line. For New-York-owned territory, Metro-North Capital Planning provided Normalized Replacement Amounts for each asset category. The Normalized Replacement amounts for New York and Connecticut service territories and asset categories were then allocated using the usage metrics established for allocating operating costs pursuant to Section 5.3.

Adjustments for service changes will be performed annually, by applying the estimated operating statistics for the prospective year to the current Normalized Replacement amounts.

Figure 3: Map of Segments Used For Calculating BCCs



5.5.2.1 Prioritization of Baseline Capital Charges

BCCs will be programmed in the following order of priority:

- (1) Basic Infrastructure
- (2) Mandated
- (3) Major Backlog
- (4) Improvements

5.5.2.2 Prioritization, Implementation, and Variances

Owners and operators may agree to direct a portion of their BCCs to Mandated, Major Backlog or Improvement projects when appropriate, consistent with the prioritization set forth in Section 5.5.2.1. The components of Mandated, Major Backlog or Improvement projects that address Normalized Replacement may be funded with BCCs without seeking a variance. Variances from the prioritization process will be highlighted during the capital planning process described in Section 4.2.1 and the following will apply:

- (1) Owners and operators may, subject to Commission approval, agree to use BCCs in the user's territory on other state-of-good-repair activities, including Major Backlog projects. Approval will not be unreasonably withheld.
- (2) Owners and operators will prepare a variance analysis showing the effects of expending BCCs for the proposed use. This will include the benefits of the proposed use, the opportunity costs of diverting the funds, and any additional relevant factors.
- (3) Any BCCs applied toward Major Backlog or Improvement uses will be applied to overall project costs rather than any specific operator's allocated share of project costs. This rule will not apply where the funds provided under the variance are used only to assist cash flow as described below.
- (4) The Commission will consider this variance when considering NEC capital plans (see Section 4.2).

As part of approving the capital plans, the Commission may approve the variance outright, or it may approve the variance as a cash flow management measure to assist an operator undertaking a Major Backlog or Improvement project that is at risk (e.g., of not being fully funded, falling behind schedule, or losing funding). The amount of any variance will be adjusted to factor the costs of project components that are for the Normalized Replacement of Basic Infrastructure. If the Commission approves a variance to assist with cash flow, it may include terms that the operator will have an increased BCC in future years equivalent to the amount of the variance, with an appropriate interest charge.

5.5.3 Other Capital Projects

No later than June 30, 2016, the Commission will develop permanent allocation methods for Stations, Mandated, Major Backlog, and Improvement projects. Allocation methods are not intended to supersede any existing arrangements between the parties for specific projects, or phases of projects, that are subject to current agreements and are underway as of the implementation date for the relevant portion of the policy, unless the parties agree otherwise.

For projects or programs that span several categories as defined in Section 5.5.2.1 and are difficult to classify, operators may enter into cost-sharing agreements that include reasonable variations to these methods as long

as the Commission finds that such agreements generally comply with policy's intent. The agreements must be made available to the Commission.

There may be circumstances in which an operator may wish to advance a project without contributions from other operators. To advance the project, the operator must request an exception to the policy from the Commission.

Procedures for obtaining an exception to the policy will be developed no later than June 30, 2016.

5.5.3.1 Interim Method for Capital Projects at Stations

The following approach will be used for station capital projects until a permanent method is adopted.

- (1) BCCs may be used to fund station projects if:
 - (A) The project is in an approved NEC capital plan with funding identified. Any use of BCC funds in NEC capital plans will be limited to aspects essential to transportation such as station platforms and lighting, platform access and egress, and passenger safety, unless the Commission makes an exception; or
 - (B) The project is required to enable the safe use of the station for transportation purposes, regardless of whether it is in an endorsed NEC capital plan.
- (2) Non-BCC funded projects may advance upon mutual agreement between operators. For all such discretionary station projects:
 - (A) Each party's share of the cost will be established using the same method established for allocating station operating costs in Section 5.4. These activities must be included in the approved NEC Five-Year Capital Plan, and funding must be identified and committed before that project activity begins.
 - (B) Station projects that include a component that increases the capacity of the railroad (e.g., platform additions that allow for more trains to serve the station), the allocation of costs will include consideration of the principles set forth in Section 4.3.1.
 - (C) For station projects or features that provide only an ancillary benefit to other operators (under the principle of primary use defined in this policy), the main beneficiary may advance with the project (or those features of the project) without contributions from the other operators, provided it appears in an approved NEC Capital Plan, and a justification is provided.

5.5.3.2 Interim Method for Major Backlog

The following approach will be used to apportion responsibility for Major Backlog projects until a permanent method is adopted.

Major Backlog projects are expected to advance with significant new contributions above existing funding levels from the federal government. This section describes how the other contributions will be shared.

For Major Backlog projects that include an improvement component, an estimate will be developed to represent an optimized, in-kind replacement cost. This could be an independent engineer's assessment of the cost of replacing the asset in kind, while adhering to modern safety and performance standards—or by any

other method that the Commission may adopt. The replacement cost will be allocated using the method established for allocating operating costs in Section 5.3.

If Major Backlog projects are anticipated to support significantly different amounts of service in future years, as identified in the SDP, these expected service goals will be applied to allocate costs, rather than current service statistics. This is due to the duration of the useful life of these assets.

For any improvement component (the balance of the project estimate after subtracting the replacement cost), the cost will be allocated in accordance with the method for Improvement projects.

BCCs may be applied toward Major Backlog projects pursuant to Section 5.5.2.2.

5.5.3.3 Interim Method for Improvements

The following approach will be used to apportion responsibility for Improvement projects until a permanent method is adopted.

The costs of an Improvement project will be divided into the following three categories:

- (1) Features that increase capacity or create additional train slots. An operator that pays for new capacity obtains the right to use it and may provide others with access to the new capacity under fair and reasonable terms, consistent with applicable obligations and law.
- (2) Features that improve trip time, including higher speeds or reliability. The Commission will develop a formula approach to calculate the benefit accruing to each operator that includes how trip time improvement and delay reduction benefit each party.
- (3) Other features. These features will be allocated in proportion to the sum of the allocated costs in the other two categories.

A “principle of primary benefit” may apply for features that provide only an ancillary benefit to other operators, in which case the project sponsor may advance the project (or portions of the project) without contributions from others, in accordance with the NEC capital plans. These projects must be identified in the NEC capital planning process and a justification provided.

For Improvement projects that involve the replacement of Basic Infrastructure, a replacement value may be developed and allocated based on the asset-specific formulas described in Section 5.3.

Generally, Improvement projects will add to the overall asset base, increasing the operating and capital costs in that territory. Therefore, when an Improvement project is proposed as part of the capital planning process, these costs should be included in the analysis that is provided to the Commission.

5.6 Indirect Costs

Indirect costs are those costs that cannot be assigned to a unique objective and whose benefits can be reasonably assignable to the cost allocated under the policy.

Federal obligations, such as those appearing in Titles 23 and 48 of the Code of Federal Regulations and OMB Circular A-87, require the recovery of indirect costs associated with work performed under those regulations.

To distribute indirect costs to the cost objectives served, cost pools representing distinct areas of activity must be identified. These cost pools usually include indirect costs associated with a specific unit or corporate area. The cost pools are then divided by a representative allocation cost base such as total costs or direct labor, resulting in an overhead rate. The cost base chosen must allow for the equitable and reasonable distribution of the indirect costs to the cost objectives being supported.

Indirect costs related to sole-benefit activities are not allocable per this policy. A list of exclusions from General and Administrative (G&A) overhead is included as Appendix 1.7.

5.6.1 Indirect Cost Allocation Plan

Amtrak and Commuter Authorities submitting costs for allocation that also wish to include their indirect costs as part of the allocation process are required to share with the Commission an Indirect Cost Allocation Plan, which will:

- (1) Include a list and description of the overhead rates applied and the allocation base chosen in the overhead rate's calculation.
- (2) Indicate what costs have been excluded from the overhead cost pool(s) with special attention paid to costs that can be clearly linked to the core passenger train operation function or other sole-benefit activities (e.g., marketing, information systems supporting ticket sales, etc.).
- (3) Include a list of the overhead rates to be applied to costs subject to allocation and details supporting the costs being used to calculate the overhead rate that identifies the departments (e.g., engineering, corporate finance) and cost elements (e.g., labor, services).
- (4) Include supporting general ledger detail.
- (5) Cite the applicable regulation that has been followed in calculating overhead rates.

5.7 Treatment of Liability and Insurance Costs

Existing agreements between owners and operators specify how liability, insurance, and other risk-related costs are allocated. These agreements have been negotiated over time and under differing legal environments, resulting in a patchwork of arrangements.

Until a long-term approach is implemented, there may be conflicts between costs allocated by the policy and existing contractual liability arrangements. To reduce these conflicts, the following principles apply:

- (1) Liability related costs will not be allocated to any party that has a contractual indemnification for such costs.
- (2) Payments made to third parties are not allocable, whether paid for out of a deductible or using insurance. This includes, for example, payments resulting from claims related to train incidents, capital projects or maintenance activities, or trespasser incidents.
- (3) In locations shared by more than two operators, bilateral arrangements may affect the exposure of a third operator that is not party to the bilateral arrangement. In such cases, the owner shall advise the operator of the new arrangement and the potential impact on its exposure.
- (4) In some agreements, parties have agreed to pay risk fees in exchange for another party agreeing to take responsibility for certain liabilities. These arrangements are not modified by the policy, and risk fees are not subject to cost allocation.

- (5) All operators incur insurance costs. In many cases, agreements require the parties to purchase a certain level of insurance. Because these insurance arrangements are inextricably linked with the liability provisions, the cost of purchasing such insurance (e.g., insurance premiums) will not be allocated to other operators (either directly, or as overhead) unless otherwise agreed to between the parties. Likewise, insurance payments resulting from an insured loss will not be shared with other operators, unless otherwise agreed to between the parties.
- (6) This policy does not preclude parties from making bilateral arrangements to jointly purchase insurance and distribute claims payments (e.g., when undertaking a shared benefit capital project).

5.8 Environmental Remediation

The Commission acknowledges that remediating environmental contamination often creates barriers to efforts between owners and operators to maintain and improve the NEC. Therefore, no later than January 1, 2016, the Commission will develop and adopt a comprehensive, corridor-wide approach to allocating the costs of environmental remediation, taking into consideration existing laws and regulations, and other appropriate factors.

Pending adoption of the comprehensive approach, the following will apply to Basic Infrastructure and Mandated projects:

- (1) If any project necessitates environmental investigation, removal, or remediation work (Environmental Work), the costs for Environmental Work within the project footprint may be considered a project cost, unless the Environmental Work cannot be effectively managed or completed as part of the project. If this occurs, a separate Mandated project may be created (Environmental Project).
- (2) Owners and operators may agree to pay for environmental remediation with funds other than BCCs.
- (3) No more than 5 percent of an operator's annual BCC will be applied toward Environmental Work without that operator's written consent.
- (4) Environmental Projects will be funded with an operator's BCC only with that operator's written consent.
- (5) Third party claims will not be funded with an operator's BCC without that operator's written consent.
- (6) The policy will not supersede pre-existing judgments or settlement agreements.

Remediation costs for Improvements or Major Backlog projects will be allocated by agreement between operators as consistent as possible with the methods established in the policy for those project categories.

5.9 Treatment of Freight

The NEC carries freight traffic in addition to intercity and commuter trains. Section 24905 requires that the standardized formula is to be implemented by "Amtrak and public authorities providing commuter rail transportation" only. However, the statute also prohibits cross-subsidization among intercity, commuter, and freight rail services. This section describes the methods used to address freight cost impacts in the near-term and to set forth procedures to ensure the policy adheres to cross-subsidization prohibition.

Methods of accounting for, and charging, freight carriers for use of the NEC are not uniform. In general, Amtrak sets freight rates that approximate fully allocated operating costs. Other owners may establish access fees that support other policy goals, such as providing rail access for shippers at reasonable rates to prevent

diversion of rail freight to trucks. In other instances, compensation from freight carriers are governed by trackage rights agreements.

In FY2012, approximately 5 percent of total NEC operating costs were recovered through freight railroad payments. Initially, until more granular freight carrier data can be collected, the policy treats freight revenues as an offset to only the total operating costs in each Operating Segment, since all remaining operating costs are allocated between passenger operators. Total freight revenues for each owner are applied to each segment based on the relative share of freight traffic on that owner's segments (not to exceed the total operating cost of any segment). Freight revenues from this method and any related profits or losses are retained by the owner, but will not affect the costs allocated to others because both freight revenues and costs are the responsibility of the owner.

Each owner will share with the Commission a plan to collect and track freight data for a six-month period, beginning no later than July 1, 2015. This data will be used to determine if any changes to the policy are needed to ensure that freight cost impacts on both an operating and capital basis are treated appropriately.

The policy does not prevent owners from establishing their own policies and rates for freight carriers, as informed by each state's goods movement objectives and regulated by STB, but owners may not pass the costs of these subsidies to operators.

6. Payment Procedures

This section describes the responsibilities and processes for calculating and administering invoices and payments. Where two owners are invoicing each other, the parties may agree to credit the smaller payment against the larger payment to reduce the number of invoices, provided that all gross transaction amounts are included on the invoices and in each owner's ledgers for record-keeping purposes. Invoicing provisions will be in accordance with individual contracts, unless otherwise specified.

6.1 Calculation of Monthly Operating Charges

The process for calculating operating costs and allocating these costs between Amtrak and Commuter Authorities (excluding electric traction propulsion power) is as follows:

- (1) Actual operating expenses for the three most recent available fiscal years will be collected.
- (2) All expenses from each fiscal year will be adjusted for inflation in two steps:

Step 1: The expenses will be adjusted based on the percentage change in the AAR Index from the mid-point of the fiscal year to the most recently available quarterly AAR Index.

Step 2: The Moody's Analytic inflation rate will be applied to adjust costs to the mid-point of the prospective fiscal year, subject to the approval of the Commission.

This process will be applied to the common-benefit costs in each Operating Segment. The resulting value in each Operating Segment will be divided by three to determine the three-year average, indexed cost. An example of this process is provided in Appendix 1.5.

- (3) The expected prospective year's operating statistics will be applied to these average, indexed costs, and then divided by twelve, resulting in a flat Monthly Operating Charge paid by each operator. After the prospective year has ended, actual costs from the prospective year will be rolled forward into the calculation for the next three years of Monthly Operating Charges, constituting the reconciliation of actual costs.

Further detail regarding the schedule and process for allocating and review of operating costs is included in Appendix 1.4.

6.2 Calculation of Electric Propulsion Power Charges

- (1) Each owner will provide estimated costs for the prospective fiscal year. The estimates will be used to determine estimated monthly payments by each operator. On a monthly basis, estimated costs will be compared to actual costs, and the difference will be reflected in a credit or an added charge in the next monthly estimated payment.
- (2) Special studies for electric propulsion power will be performed no less than every three years. The calculation of kWh usage for each operator will be based on service plans and statistics agreed to by the affected parties as part of the special study. Because the study is not necessarily updated every year, the service plans and related statistics may be based on a different time period from those used for the

allocation of other cost categories. Amtrak or a Commuter Authority may request an interim update to the study, in which case the results will supersede the results of the prior study at the beginning of the next fiscal quarter. The operator requesting the interim update will be responsible for paying the full cost of the interim update to the study.

6.3 Capital Payments

The following procedures will be followed unless the operators agree on an alternative payment schedule that is transparent and adheres to the policy’s intent.

In accordance with the terms set forth in Section 2.1 and the calculations performed pursuant to Section 5.5.2, the table below describes the relationship between the BCC and the minimum amount of funds paid (cash outlay) in a given year.

Table 6: Phase-In of Cash Outlay
 Stated in FY2015 real dollars, to be adjusted in accordance with Section 2.2.2 and Section 5.5.2

Federal Fiscal Year	Normalized Replacement Amount	BCC	Minimum Cash Outlay Requirement
FY2016	\$530M	80% of Normalized Replacement (\$425M)	60% of Normalized Replacement (\$318M)
FY2017	\$530M	80% of Normalized Replacement (\$425M)	70% of Normalized Replacement (371M)
FY2018	\$530M	80% of Normalized Replacement (\$425M)	80% of Normalized Replacement (\$425M)
FY2019	\$530M	100% of Normalized Replacement (\$530M)	90% of Normalized Replacement (\$477M)
FY2020	\$530M	100% of Normalized Replacement (\$530M)	100% of Normalized Replacement (\$530M)

- (1) The BCC for each operator is calculated as a percentage of the Normalized Replacement amount.
- (2) The cash outlay requirement is calculated as a percentage of the Normalized Replacement amount.
- (3) Owners will estimate actual cash flow in each operator's territory for the upcoming fiscal year. The amount paid during each fiscal year will be the lesser of the operator's BCC set forth in Table 6 or the expected cash flow for BCC-eligible expenses by the owner in the territory in that fiscal year. The resulting payment is called the BCC Amount Paid.
- (4) In FY2016-FY2019, operators may choose to expend funds at 60-90 percent of the Normalized Replacement amount as set forth in Table 6. If an operator plans to fund less than the BCC (but no less than the minimum cash outlay requirement), the operator must notify the Commission in writing no later than October 1 of the year prior to the year in which payments will be due (e.g., no later than October 1, 2017 for the fiscal year that begins October 1, 2018). If an operator expends less than the BCC for any given fiscal year, then the BCC Amount Paid during that

fiscal year will be the lesser of the reduced payment amount or the expected cash flow for BCC-eligible expenses by the owner in the territory in that fiscal year.

- (5) For FY2016 payments, operators must notify the Commission in writing no later than February 1, 2015.
- (6) The process for development and reporting how this is accomplished will be transparent, and may include direct assignment of BCCs to specific projects or activities to conform to bond covenants or other requirements, as may be agreed to between the parties.
- (7) Payments are made monthly at one-twelfth of the BCC Amount Paid.
- (8) Owners shall develop and maintain a system for tracking value delivered on scope, schedule, and budget of work performed versus the NEC One-Year Capital Spend Plan.
- (9) Notwithstanding the tracking system set forth above or the communications protocols set forth in Section 4.2.2, if an operator believes any deviation from the plan or other unforeseen developments is problematic, the operator may refer the matter to USDOT for review.
- (10) After the close of each one-year period, the BCC Amount Paid will be compared to the actual amount expended in the territory. Any expenses in the operator's territory exceeding the BCC Amount Paid, up to the amount of any unpaid BCC obligations, or minimum cash outlay requirement if an operator elected to pay this amount in a given year fiscal year, will be added to the following year's BCC Amount Paid in equal monthly payments. Any BCC Amount Paid but not spent in the operator's territory will be handled as follows:
 - (A) If owners demonstrate in the capital spend plan that the difference between the BCC Amount Paid and actual amount expended could be spent during the upcoming year, no credit will be given.
 - (B) If the capital spend plan shows that the difference could not be spent in the upcoming year, the operator will be credited the difference between the BCC Amount Paid and the actual amount expended on the next monthly invoice.
- (11) In every year where the BCC Amount Paid is less than the BCC, an obligation of the operator to the owner of the amount of the difference shall carry over for three years or the duration of the policy, whichever is shorter. Operators will use the capital planning process to program the carryover obligation within the required timeframe.
- (12) The requirement for owners to spend their BCCs on BCC eligible activities does not expire.
- (13) In any year, owners may program and/or spend up to 10 percent more than their BCC obligation in their operating territory and apply any overage against their BCC obligations in the subsequent three years, unless the Commission selects a higher threshold.
- (14) Owners and operators may, subject to Commission approval, agree to use BCCs in the user's territory on other state-of-good-repair activities, including Major Backlog projects. Approval will not be unreasonably withheld.
- (15) Consistent with Section 24905, owners and operators may, with Commission approval, agree that an owner or operator may fund all or part of its BCC or its allocable share of a project or program with an in-kind capital contribution, provided it is linked to funding an approved NEC Five-Year Capital Plan. If an in-kind capital contribution is proposed, the method for its valuation will be included in the agreement between the owner and operator.

6.4 Unanticipated Service Changes

The policy covers only unanticipated service changes during ordinary Corridor operations. Unanticipated service changes or reductions due to extraordinary events are not covered, but may be considered separately by the Commission on a case-by-case basis.

During the capital planning process described in Section 4.2.1.2, proposed capital projects and corresponding prospective service plans are submitted to owners. To be incorporated into model v1, owners and operators must identify and submit anticipated service changes for the upcoming fiscal year on or before January 31. To be incorporated into model v2, service changes must be submitted by May 1 prior to the start of the fiscal year. Subsequently, if an operator anticipates proposing a service change, it will notify the owner and the Commission as soon as possible. Operators may submit proposed service changes that were not identified prior to the May 1 deadline at any time. (If the operator is also an owner, it will notify operators using its territory and the Commission.) However, in order to be incorporated in model v3, mid-year service changes must be submitted by May 1 of the current fiscal year. An operator may request guidance on the financial impacts of a proposed service change at any time.

6.4.1 Mid-Year Revisions to Operating Cost Obligations

Unanticipated service changes may be brought to the Commission at the election of any owner or operator. Operating cost obligations will be revised mid-year to reflect unanticipated service increases for the duration(s) the service change(s) are in effect, if one of the following thresholds is met:

- An operator's allocated costs, calculated on a cumulative basis for the portion(s) of the year in which the change(s) are in effect, increases by \$500,000 or more
- An operator's total annual scheduled gross ton-miles, calculated on a cumulative basis for the year in which the change(s) are in effect, increases by 5 percent or more

Any mid-year revisions will not include adjustments for service changes that do not meet the above thresholds.

Operating cost obligations will not be revised mid-year due to:

- Seasonal, or ad-hoc schedule adjustments
- Service reductions unrelated to extraordinary events

6.4.2 Mid-Year Revisions to BCCs

The Commission will consider developing procedures for revising BCCs due to unanticipated service changes.

1. Appendices

1.1 Definitions

AAR Index: Refers to Table C: Quarterly Index of Chargeout Prices and Wage Rates, EAST (1997=100): Materials prices, wage rates and supplements combined (excluding fuel).

Backlog: The condition in which an infrastructure asset no longer functions as designed, or is in service beyond its expected useful life. Backlog is composed of both basic infrastructure activities and major projects.

Basic Infrastructure: Means the infrastructure components that require annual renewal to keep the NEC's structures and systems functioning properly and in a state-of-good-repair for safe train operations. It includes rails, ties, ballast, communication systems, electric traction power systems, under-grade bridges and other similar items.

Baseline Capital Charge (BCC): The capital charge assigned to each operator based on factors that reflect asset condition and relative use that is calculated as a percentage of the Normalized Replacement amount.

Commission: Means the body of the Commission, composed of voting members—1 member from each of the States (including the District of Columbia) that constitute the Northeast Corridor as defined in section 24102, designated by, and serving at the pleasure of, the chief executive officer thereof; members representing the Department of Transportation; members representing Amtrak; and any non-voting representatives.

Commuter Authority: Means, as defined in 49 U.S.C. § 24102(2), a State, local, or regional entity established to provide, or make a contract providing for, commuter rail passenger transportation, as defined in 49 U.S.C. § 24102(3). Commuter Authorities on the Northeast Corridor are required to implement the formula developed under 49 U.S.C. § 24905(c) and include the Massachusetts Bay Transportation Authority, the Rhode Island Department of Transportation, Connecticut Department of Transportation, the New York Metropolitan Transportation Authority, Metro-North Railroad, Long Island Railroad, New Jersey Transit Corporation, the Southeastern Pennsylvania Transportation Authority, the Delaware Department of Transportation, the Maryland Department of Transportation, Maryland Transit Administration, Virginia Railway Express, any successor agencies and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service.

Fiscal Year: Refers to the federal fiscal year, beginning on October 1 and ending September 30.

Gross Ton Mile: The movement of a ton of transportation equipment and contents one mile.

Improvement: Project that introduces new assets above and beyond existing NEC infrastructure, facilities, and equipment to improve reliability, increase capacity, reduce travel time, or improve the customer experience.

Incremental/Avoidable Cost: Method to assign costs that presumes a dominant user and assigns to minority user(s) only the costs that could be directly avoided, but for the existence of the minority user.

Major Backlog: Means projects necessary for achieving a state-of-good repair, but are not undertaken on a routine basis, such as rehabilitation or replacement of major bridges and tunnels. These projects include Basic

Infrastructure components and may include improvement elements where in-kind replacement is impossible or undesirable. When replacing a major structure it makes sense to scope all contemplated work into a single project to save both time and money.

Mandated: Capital projects required by law or regulation or to protect public health. These include environmental remediation, right-of-way fencing, infrastructure and station resiliency and security systems, Positive Train Control (PTC), and station access improvements.

New Haven Line: The Metro-North Railroad operated and dispatched Northeast Corridor service territory between New Rochelle, NY and New Haven, CT, owned by the New York Metropolitan Transportation Authority for the segment within the State of New York and owned by the Connecticut Department of Transportation within the State of Connecticut.

Normalized Replacement: Replacement of Basic Infrastructure assets on a regular schedule to maintain NEC infrastructure components and facilities within lifecycle to sustain a state-of-good-repair.

Northeast Corridor: The segment of the continuous railroad line between Boston, Massachusetts, and Washington, District of Columbia, which is part of the national rail transportation system, as defined in 49 U.S.C. § 24102(5)(A) and the branch lines: New Haven, CT to Springfield, MA; New York – Penn Station to New York – Spuyten Duyvil; and Philadelphia, PA to Harrisburg, PA.

Operating Segment: Set forth in Appendix 1.3

Operator: An entity responsible for, or established to provide, commuter or intercity passenger rail transportation, that is subject to the cost-sharing requirements set forth in 49 U.S.C. § 24905(c). This includes Amtrak, the New York Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Delaware Department of Transportation, Maryland Department of Transportation, the Rhode Island Department of Transportation, the Southeastern Pennsylvania Transportation Authority, New Jersey Transit Corporation, the Massachusetts Bay Transportation Authority, Virginia Railway Express, any successor agencies and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter or intercity service.

Owner: Means an infrastructure or station owner of the Northeast Corridor that is also required to implement the formula under 49 U.S.C. § 24905(c). Unless the context indicates otherwise, an owner also means an entity that is responsible for capital project or program delivery.

Passenger On/Off: A combined metric of annual passenger boardings and alightings at a station.

Pre-Existing: Unless the context indicates otherwise, means prior to the date the policy is adopted.

State-of-Good-Repair: The conditions in which existing physical assets, individually and as a system, a) are functioning as designed within their expected useful lives; and b) are sustained through regular maintenance and normalized replacement programs.

Shared/Joint/Common Infrastructure: NEC assets mutually agreed to provide benefit and utility to more than one operator.

Sole-Benefit Infrastructure: NEC assets mutually agreed to provide benefit and utility only to one operator.

Terminal Zones: Those operating segments whose segment length and train speeds are sufficiently low as to suggest that costs are best allocated among the parties by train moves as opposed to other allocators such as gross-ton-miles. These are:

- South Station, Boston
- F/JO/C Interlockings
- Penn Station New York
- A Interlocking-Swift
- C Interlocking-Union Station – Washington, DC

Train Moves: The scheduled movement of a train as a singular unit through a designated geographic location.

Train Moves, Average Daily: Number of scheduled train moves over a one week time period, divided by seven.

Train Stops: Scheduled weekly passenger stops at a shared station. If the same train pulls into a station ending service under one train number and later exits the station beginning service under a second train number, it is counted as two train stops.

Unit Miles: Scheduled number of individual cars, locomotives or MUs multiplied by the number of miles in an operating segment. A consist scheduled with 1 locomotive and 5 cars, travelling through a 10 mile segment is counted as 60 unit miles.

1.2 Statute

49 U.S.C.

United States Code, 2011 Edition

Title 49 - TRANSPORTATION

SUBTITLE V - RAIL PROGRAMS

PART C - PASSENGER TRANSPORTATION

CHAPTER 249 - NORTHEAST CORRIDOR IMPROVEMENT PROGRAM

§ 24905. Northeast Corridor Infrastructure and Operations Advisory Commission; Safety Committee

(a) Northeast Corridor Infrastructure and Operations Advisory Commission.—

(1) Within 180 days after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008, the Secretary of Transportation shall establish a Northeast Corridor Infrastructure and Operations Advisory Commission (referred to in this section as the “Commission”) to promote mutual cooperation and planning pertaining to the rail operations and related activities of the Northeast Corridor. The Commission shall be made up of—

(A) members representing Amtrak;

(B) members representing the Department of Transportation, including the Federal Railroad Administration;

NORTHEAST CORRIDOR INFRASTRUCTURE AND OPERATIONS ADVISORY COMMISSION

(C) 1 member from each of the States (including the District of Columbia) that constitute the Northeast Corridor as defined in section 24102, designated by, and serving at the pleasure of, the chief executive officer thereof; and

(D) non-voting representatives of freight railroad carriers using the Northeast Corridor selected by the Secretary.

(2) The Secretary shall ensure that the membership belonging to any of the groups enumerated under paragraph (1) shall not constitute a majority of the Commission's memberships.

(3) The Commission shall establish a schedule and location for convening meetings, but shall meet no less than four times per fiscal year, and the Commission shall develop rules and procedures to govern the Commission's proceedings.

(4) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

(5) Members shall serve without pay but shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5.

(6) The Chairman of the Commission shall be elected by the members.

(7) The Commission may appoint and fix the pay of such personnel as it considers appropriate.

(8) Upon request of the Commission, the head of any department or agency of the United States may detail, on a reimbursable basis, any of the personnel of that department or agency to the Commission to assist it in carrying out its duties under this section.

(9) Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support services necessary for the Commission to carry out its responsibilities under this section.

(10) The Commission shall consult with other entities as appropriate.

(b) Statement of Goals and Recommendations.—

(1) Statement of goals.—The Commission shall develop a statement of goals concerning the future of Northeast Corridor rail infrastructure and operations based on achieving expanded and improved intercity, commuter, and freight rail services operating with greater safety and reliability, reduced travel times, increased frequencies and enhanced intermodal connections designed to address airport and highway congestion, reduce transportation energy consumption, improve air quality, and increase economic development of the Northeast Corridor region.

(2) Recommendations.—The Commission shall develop recommendations based on the statement developed under this section addressing, as appropriate—

(A) short-term and long-term capital investment needs beyond those specified in the state-of-good-repair plan under section 211 of the Passenger Rail Investment and Improvement Act of 2008;

(B) future funding requirements for capital improvements and maintenance;

(C) operational improvements of intercity passenger rail, commuter rail, and freight rail services;

- (D) opportunities for additional non-rail uses of the Northeast Corridor;
- (E) scheduling and dispatching;
- (F) safety and security enhancements;
- (G) equipment design;
- (H) marketing of rail services;
- (I) future capacity requirements; and
- (J) potential funding and financing mechanisms for projects of corridor-wide significance.

(c) Access Costs.—

(1) Development of formula.—Within 2 years after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008, the Commission shall—

(A) develop a standardized formula for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation, as defined in section 24102 of this title, on the Northeast Corridor main line between Boston, Massachusetts, and Washington, District of Columbia, and the Northeast Corridor branch lines connecting to Harrisburg, Pennsylvania, Springfield, Massachusetts, and Spuyten Duyvil, New York, that use Amtrak facilities or services or that provide such facilities or services to Amtrak that ensures that—

(i) there is no cross-subsidization of commuter rail passenger, intercity rail passenger, or freight rail transportation;

(ii) each service is assigned the costs incurred only for the benefit of that service, and a proportionate share, based upon factors that reasonably reflect relative use, of costs incurred for the common benefit of more than 1 service; and

(iii) all financial contributions made by an operator of a service that benefit an infrastructure owner other than the operator are considered, including but not limited to, any capital infrastructure investments and in-kind services;

(B) develop a proposed timetable for implementing the formula before the end of the 6th year following the date of enactment of that Act;

(C) transmit the proposed timetable to the Surface Transportation Board; and

(D) at the request of a Commission member, petition the Surface Transportation Board to appoint a mediator to assist the Commission members through non-binding mediation to reach an agreement under this section.

(2) Implementation.—Amtrak and public authorities providing commuter rail passenger transportation on the Northeast Corridor shall implement new agreements for usage of facilities or services based on the formula proposed in paragraph (1) in accordance with the timetable established therein. If the entities fail to implement such new agreements in accordance with the timetable, the Commission shall petition the Surface Transportation Board to determine the appropriate compensation amounts for such services in accordance

with section 24904(c) of this title. The Surface Transportation Board shall enforce its determination on the party or parties involved.

(3) Revisions.—The Commission may make necessary revisions to the formula developed under paragraph (1), including revisions based on Amtrak's financial accounting system developed pursuant to section 203 of the Passenger Rail Investment and Improvement Act of 2008.

(d) Transmission of Statement of Goals and Recommendations.—The Commission shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives—

(1) the statement of goals developed under subsection (b) within 1 year after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008; and

(2) the recommendations developed under subsection (b) and the formula and timetable developed under subsection (c)(1) annually.

(e) Authorization of Appropriations.—There are authorized to be appropriated to the Commission such sums as may be necessary for the period encompassing fiscal years 2009 through 2013 to carry out this section.

(f) Northeast Corridor Safety Committee.—

(1) In general.—The Secretary shall establish a Northeast Corridor Safety Committee composed of members appointed by the Secretary. The members shall be representatives of—

(A) the Department of Transportation, including the Federal Railroad Administration;

(B) Amtrak;

(C) freight carriers operating more than 150,000 train miles a year on the main line of the Northeast Corridor;

(D) commuter rail agencies;

(E) rail passengers;

(F) rail labor; and

(G) other individuals and organizations the Secretary decides have a significant interest in rail safety or security.

(2) Function; meetings.—The Secretary shall consult with the Committee about safety and security improvements on the Northeast Corridor main line. The Committee shall meet at least two times per year to consider safety and security matters on the main line.

(3) Report.—At the beginning of the first session of each Congress, the Secretary shall submit a report to the Commission and to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the status of efforts to improve safety and security on the Northeast Corridor main line. The report shall include the safety and security recommendations of the Committee and the comments of the Secretary on those recommendations.

NORTHEAST CORRIDOR INFRASTRUCTURE AND OPERATIONS ADVISORY COMMISSION

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 935; Pub. L. 110–432, div. B, title II, § 212(a), Oct. 16, 2008, 122 Stat. 4921.)

1.3 Operating Segments

Table 7: Operating Segments

Line	Segment ID	Segment Description	Miles	MP Fr	MP To	State
NEC Spine - Amtrak	1	South Station - Tower 1	0.2	228.7	228.5	MA
NEC Spine - Amtrak	2	Tower 1 - Cove	0.5	228.5	228	MA
NEC Spine - Amtrak	3	Cove - Plains	3.7	228	224.3	MA
NEC Spine - Amtrak	4	Plains - Read	4.7	224.3	219.6	MA
NEC Spine - Amtrak	5	Read - Transfer	1.1	219.6	218.5	MA
NEC Spine - Amtrak	6	Transfer - Canton Junction	4.6	218.5	213.9	MA
NEC Spine - Amtrak	7	Canton - Mansfield	9.9	213.9	204	MA
NEC Spine - Amtrak	8	Mansfield - Attleboro	7.1	204	196.9	MA
NEC Spine - Amtrak	9	Attleboro - MA / RI State Line	6.1	196.9	190.8	MA
NEC Spine - Amtrak	10	MA / RI State Line - Orms	5.2	190.8	185.6	RI
NEC Spine - Amtrak	11	Orms - Providence	0.5	185.6	185.1	RI
NEC Spine - Amtrak	12	Providence - Wickford	19.4	185.1	165.7	RI
NEC Spine - Amtrak	13	Wickford - RI / CT State Line	24.6	165.7	141.1	RI
NEC Spine - Amtrak	14	RI / CT State Line - New	18.2	141.1	122.9	CT
NEC Spine - Amtrak	15	New London - Old Saybrook	17.8	122.9	105.1	CT
NEC Spine - Amtrak	16	Old Saybrook - Mill River Jct	31.5	105.1	73.6	CT
Springfield Line	701	Springfield - MA/CT State	6.2	62	55.8	MA
Springfield Line	702	MA/CT State Line - Hartford	19.2	55.8	36.6	CT
Springfield Line	71	Hartford - Mill Riv Jct.	35.1	36.6	1.5	CT
Springfield Line	17	Mill River Jct - Metro North	0.7	73.6	72.9	CT
NEC Spine - Metro-	18	Metro North Div Post - State	0.2	72.9	72.7	CT
NEC Spine - Metro-	19	State Street - New Haven	0.4	72.7	72.3	CT
NEC Spine - Metro-	20	New Haven - CP 261 (Devon)	11.6	72.3	60.7	CT
NEC Spine - Metro-	21	CP 261 (Devon) - CP 257	3.9	60.7	56.8	CT
NEC Spine - Metro-	22	CP 257 (Central) - CP 255	1.5	56.8	55.3	CT
NEC Spine - Metro-	23	CP 255 (Port) - CP 241 (Walk)	14	55.3	41.3	CT
NEC Spine - Metro-	24	CP 241 (Walk) - CP 234	8	41.3	33.3	CT
NEC Spine - Metro-	25	CP 234 - NY / CT State Line	7.2	33.3	26.1	CT
NEC Spine - Metro-	26	NY / CT State Line - CP 223	2.6	26.1	23.5	NY
NEC Spine - Metro-	27	CP 223 - CP 216 (Shell)	7.2	23.5	16.3	NY
NEC Spine - Amtrak	28	CP 216 (Shell) - Harold (Hell)	15.2	18.9	3.7	NY
NEC Spine - Amtrak	29	Harold I/L - F I/L	0.7	3.7	3	NY
NEC Spine - Amtrak	30	F - JO/C Interlockings	2.9	3	0.1	NY
Albany Line	72	Empire Connection - NYP-	10.8		10.8	NY

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Line	Segment ID	Segment Description	Miles	MP Fr	MP To	State
NEC Spine - Amtrak	31	Penn Station New York	0.3	0.1	0.2	NY
NEC Spine - Amtrak	32	A Interlocking - NY/NJ Line	1	0.2	1.2	NY
NEC Spine - Amtrak	33	NY / NJ State Line - Swift	6	1.2	7.2	NJ
NEC Spine - Amtrak	34	Swift - Hudson	1.1	7.2	8.3	NJ
NEC Spine - Amtrak	35	Hudson - Dock	1.3	7.2	8.5	NJ
NEC Spine - Amtrak	36	Penn Station Newark	0.3	8.5	8.8	NJ
NEC Spine - Amtrak	37	Dock - Hunter	1.7	8.8	10.5	NJ
NEC Spine - Amtrak	38	Hunter - Union	9.2	10.5	19.7	NJ
NEC Spine - Amtrak	39	Union - County	13.1	19.7	32.8	NJ
NEC Spine - Amtrak	40	County - Trenton	23.9	32.8	56.7	NJ
NEC Spine - Amtrak	41	Trenton - NJ / PA State Line	1	56.7	57.7	NJ
NEC Spine - Amtrak	42	NJ / PA State Line - Morris	0.6	57.7	58.3	PA
NEC Spine - Amtrak	431	Morris - Holmes	18.9	58.3	77.2	PA
NEC Spine - Amtrak	432	Holmes - Shore	4.9	77.2	82.1	PA
NEC Spine - Amtrak	44	Shore - Lehigh	3	82.1	85.1	PA
NEC Spine - Amtrak	45	Lehigh - Girard	2.6	85.1	87.7	PA
Harrisburg Line	94	Girard - ZOO 34th/Mt.Ver	0.3	87.7	88	PA
NEC Spine - Amtrak	46	Girard - No. Penn	1.1	87.7	0.8	PA
NEC Spine - Amtrak	47	30th Street Lower Level	0.6	0.8	1.4	PA
Harrisburg Line	81	Penn - D1 (36th St. Branch)	0.9	0.9		PA
Harrisburg Line	462	ZOO 34th/Mt.Ver - 36th St.	0.9	0	0.9	PA
Harrisburg Line	82	D1 / JO - Valley	2.1	1.9	4	PA
Harrisburg Line	83	Valley - Bryn Mawr	6.1	4	10.1	PA
Harrisburg Line	84	Bryn Mawr - Paoli	9.8	10.1	19.9	PA
Harrisburg Line	85	Paoli - Frazer	4	19.9	23.9	PA
Harrisburg Line	86	Frazer - Glen	1.4	23.9	25.3	PA
Harrisburg Line	87	Glen - Thorn	9.7	25.3	35	PA
Harrisburg Line	88	Thorn - Thorndale	0.3	35	35.3	PA
Harrisburg Line	89	Thorndale - Park	8.6	35.3	43.9	PA
Harrisburg Line	90	Park - Cork	24.2	43.9	68.1	PA
Harrisburg Line	91	Cork - Roy	26.2	68.1	94.3	PA
Harrisburg Line	92	Roy - State	10.3	94.3	104.6	PA
Harrisburg Line	93	State - Division Post	0.6	104.6	105.2	PA
NEC Spine - Amtrak	48	South Penn - Arsenal	1.3	1.4	2.7	PA
NEC Spine - Amtrak	49	Arsenal - Phil (Sig 18S)	0.9	2.7	3.6	PA
NEC Spine - Amtrak	50	Phil - Chester	9.8	3.6	13.4	PA
NEC Spine - Amtrak	51	Chester - Marcus Hook	3.7	13.4	17.1	PA

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Line	Segment ID	Segment Description	Miles	MP Fr	MP To	State
NEC Spine - Amtrak	52	Marcus Hook - PA / DE State	1.1	17.1	18.2	PA
NEC Spine - Amtrak	53	PA / DE Line - Wilmington	8.6	18.2	26.8	DE
NEC Spine - Amtrak	54	Wilmington - Newark	12.1	26.8	38.9	DE
NEC Spine - Amtrak	55	Newark - DE / MD State Line	2.5	38.9	41.4	DE
NEC Spine - Amtrak	56	DE/MD Line - Bacon	9.6	41.4	51	MD
NEC Spine - Amtrak	57	Bacon - Perryville	8.4	51	59.4	MD
NEC Spine - Amtrak	58	Perryville - Baltimore	36.3	59.4	95.7	MD
NEC Spine - Amtrak	59	Baltimore - MD / DC Line	35.9	95.7	131.6	MD
NEC Spine - Amtrak	60	MD / DC Line - C	3.4	131.6	135	DC
NEC Spine - Amtrak	61	C Interlocking - Union Station	1	135	136	DC
NEC Spine - Amtrak	62	Union Station - CSX Div Post (CP Virginia)	1.1	136	137.1	DC
NEC Spine - Amtrak	3111	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3112	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3121	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3122	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3123	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3130	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3140	Penn Station New York - Zone				NY
NEC Spine - Amtrak	3099	Sunnyside Yard				NY
NEC Spine - Amtrak	3199	Penn Station New York – 3rd				NY

1.4 Operating Cost Calculation and Payment Details

Table 8: Cost Calculation and Payment Details

Inflation Index Period	AAR Index	Annual Moody's Inflation Index	Cost Change	FY 2010 costs	FY 2012 costs	FY 2013 costs	Three-Year Sum of Costs Inflated	Three-Year Costs – Annual Average
2Q10 (3/31/2010)	448.8			\$10,000				
2Q12 (3/31/2012)	485.4		1.08	\$10,816	\$10,500			
2Q13 (3/31/2013)	471.4		0.97	\$10,504	\$10,197	\$10,218		
4Q13 (12/31/2013)	482.6		1.02	\$10,753	\$10,439	\$10,461		
2Q15 (3/31/2015)		1.0257	1.0321	\$11,099	\$10,775	\$10,797	\$32,670	\$10,890

1.4.1 Payment Provisions

The following payment provisions will apply unless an owner and operator agree on an alternative arrangement:

- (1) Each operator with allocable costs will issue an invoice to other operators. In an instance where two owners are invoicing each other, the parties may agree to credit the smaller payment against the larger payment resulting in fewer invoices, provided that all gross transaction amounts are included on the invoices and in their respective general ledgers for record keeping purposes. Invoicing provisions will be in accordance with individual contracts, unless otherwise specified in this policy.
- (2) Payments are due on or prior to the 15th day of each service month.
- (3) Interest may be charged on late payments, in accordance with individual contracts.

1.4.2 Process and Schedule for Allocation and Review

The schedule for developing financial obligations each year is set forth in Table 9.

Any operator submitting costs for allocation and reimbursement must provide the Commission with the following:

Any operator submitting costs for allocation will provide the Commission with the following:

- (1) Chart of Accounts, along with a primer describing the contents of each field
- (2) Supporting information, in a format to be determined
- (3) Cost details at a general ledger line item detail level, or the most detailed documentation available that can be audited. If general ledger line-item detail is not available, the operator submitting costs for allocation will provide a written explanation regarding why general ledger data is not available and

how the applicable costs were determined. All operators to be allocated costs must concur that the alternative detailed documentation is acceptable prior to being allocated such costs.

- (4) Documentation describing the process used to identify the costs proposed for allocation. This description will:
- Explain how cost data was identified and extracted
 - Identify the criteria used to assign costs to each cost category and the criteria used to identify common-benefit costs
 - Identify costs that represent long term, non-cash accruals, together with a rationale for why these accruals are being included for cost allocation purposes.

Costs submitted for allocation will be limited to costs for which an Audited Consolidated Financial Statement has been completed and issued by the agency's independent auditor, beginning with the costs to be allocated for FY2017 payments. Additionally, such cost shall be limited to those for which owners can reasonably assure that payments have been made to the applicable parties at the time of submission, other than the non-cash accruals described above. Owners should submit their allocable costs and supporting documentation within four months of the close of each operator's most recent available fiscal year, but must submit them no later than **January 31**. For agencies on a calendar year fiscal year, costs should be submitted by January 31 of the next year. (For example, an operator with a fiscal year ending December 31 must submit costs incurred between January 1, 2013-December 31, 2013 by January 31, 2015, but should endeavor to submit its costs by April 30, 2014.) Expense data must be submitted in a prescribed format.

The Commission will ensure that each operator provides the cost data at the general ledger line-item level, or acceptable alternative as described in (3), together with the supporting documentation described above, prior to the cost data being included in the spreadsheet model. After receiving the data, the Commission will meet with each operator to discuss the process used for determining allocable costs. The Commission will produce a summary document describing each party's process and make it available for review by all operators by **March 15**.

Owners must submit the most recently available service plans and allocation statistics for all operators using their territory for the upcoming fiscal year by **January 31**. The service plans will be determined in cooperation with each operator during the capital plan development process.

Each operator's Monthly Operating Charge will be calculated for the upcoming fiscal year by **March 15**. Operators will have the opportunity to document any concerns with the calculations until **April 15**. The Commission will adopt the preliminary Monthly Operating Charges by **June 30**.

The Commission will contract for an internal audit, where compliance with the policy is audited, transactions sampled, model calculations including cost allocations are recalculated, index process is recalculated, indirect costs are examined for proper application, and operators' Indirect Cost Allocation Plans are reviewed for compliance with the policy. The scope of the internal audit will be limited to the extent necessary to meet the deadlines established herein. Assuming full cooperation from all operators that have submitted costs, the draft audit will be completed each year by December 31, responses will be due by March 1, and the Commission will complete the audit described above by December 31. A revised audit incorporating operators' responses will be completed by **April 1**. The Commission will determine the most appropriate manner to address each finding.

The Commission will determine any adjustment to the Monthly Operating Charges that may be appropriate as a result of the internal audit. **This policy does not waive any agencies' contractual right to independently audit.**

If the above functions are not performed within the time frame required by the policy, or if the policy expires, then the last year for which fully allocated costs were calculated according to the policy (the 'Previous Allocated Cost') will be used as the basis for calculating the current-year costs for all costs except electric traction propulsion power. The Previous Allocated Cost will be adjusted for inflation using the then-current AAR inflation index rate. Also, adjustments to the Previous Allocated Costs that are needed in order to remain consistent with the policy may be requested by any operator. The other operators must be reasonable in considering such request, and reasonable requests will be incorporated into a formal amendment, resulting in a "Modified Current Year Allocated Cost." For electric traction propulsion power, the reimbursement process will continue as described. This method will be followed for succeeding years, with the Modified Current Allocated Cost becoming the Previous Allocated Cost for the following year, until the Commission resumes its functions relating to cost allocation, the policy is renewed, or a change in law or agreement among the Commission members prescribes a new method.

Table 9: Cost Allocation Model Timeline and Key Dates

Illustrative Years: FY2018 and FY2019	
Draft FY2018 audit report complete	December 31, 2017
Cost data and operating statistics due to the Commission for FY2019 financial obligations	January 31, 2018
FY2018 audit comments due	March 1, 2018
FY2019 financial obligations model v1 released	March 15, 2018
Final FY2018 audit report distributed	April 1, 2018
Comments on FY2019 model v1 due	April 15, 2018
<ul style="list-style-type: none"> • Mid-year revisions to operating statistics for FY2018 financial obligations due • Final operating statistics for FY2019 financial obligations due 	May 1, 2018
Deadline to resolve issues related to FY2019 financial obligations ³⁰	May 15, 2018
FY2018 financial obligations model v3 released, if needed	June 1, 2018
FY2019 financial obligations model v2 released	June 15, 2018
<ul style="list-style-type: none"> • FY2019 financial obligations model v2 adopted • FY2018 financial obligations model v3 adopted (if needed) 	June 30, 2018
Draft FY2019 audit report complete	December 31, 2018

1.4.3 Financial Obligation Adjustments

Unless the Commission decides to make an exception, financial obligations will only be re-approved mid-year due to:

- (1) Issues listed in the FY2016 financial obligation resolution addendum
- (2) Annual cost allocation model internal audit
- (3) Unanticipated service changes³¹

³⁰ For inclusion in model v2. Remaining issues may be addressed per the dispute resolution process in Section 2.7, or resolved among impacted parties as discussed in Section 1.4.3

³¹ Mid-year revisions due to unanticipated service changes are addressed in Section 6.4, in accordance with the schedule set forth in this appendix and Section 6.4.

Any issue may be resolved among impacted parties in accordance with the policy. The Commission must be notified of resulting adjustments to financial obligations and will consider whether adjustments that impact model calculations need to be approved.

The Commission will run the cost allocation model each May, if necessary, to quantify potential mid-year changes to financial obligations.

1.4.4 Reconciliation Schedule Options

Mid-year reconciliations will be made according to, at the payer's option, schedules (1) or (2), unless the parties mutually agree to (3):

- (1) Settle Immediately. No later than the fiscal year's end, pay or credit the difference.
- (2) Settle During the Following Fiscal Year. At the fiscal year's close, add or credit the inflation-adjusted difference (divided by 12) to the Monthly Operating Charges for the following year.
- (3) Settle Over a Longer Period. Repay over a longer period by adding or crediting the difference divided by the number of years in the repayment period to each year's financial obligation calculation, adjusted for inflation, as necessary.

If operators make budget requests before financial obligations are approved by the Commission, the most recently available financial obligation estimates may be used to inform these requests. Operators will inform the Commission and owners of requested budget amounts. If budgeted payments represent an over- or under-payment, operators will agree to a reconciliation schedule.

1.5 Capital Segments

- NEC Main Line (Boston, MA – New Haven, CT; and New Rochelle, NY – Washington, DC), used by MBTA, RIDOT, ConnDOT, LIRR, NJT, SEPTA, DTC, MARC, VRE, and Amtrak
- Springfield Line (Springfield, MA – New Haven, CT), used by Amtrak
- Empire Connection (Spuyten Duyvil, NY – New York Penn Station, NY), used by Amtrak
- Harrisburg Line (Harrisburg, PA – Philadelphia, PA), used by Amtrak and SEPTA.
- New Haven Line-CT (New Haven – State Line), used by Amtrak and CDOT
- New Haven Line-NY (State Line – New Rochelle), used by Amtrak and MNR

1.6 Development of Normalized Replacement Amount Calculation for FY2015

- The following adjustments to the values in the FY2011 SOGR assessment were made:
- An amount of \$28M was applied to the FY2011 Normalized Replacement Amounts to account for the cost of capital investments that support the entire program (e.g. maintenance of way vehicle overhauls, system design investments, etc.). This amount was based on a review of Amtrak's actual costs for these projects for the most recent five years, ending with FY2013.
- Except for G&A, all overheads are already embedded in the source data for Amtrak's Normalized Replacement Amounts. An estimated G&A of 7 percent was applied to all Normalized Replacement Amounts.

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- FY2011 costs from the SOGR assessment were adjusted for inflation to FY2015 values using the same method as for adjusting operating costs.
- Station costs are not included in Normalized Replacement amounts, nor are the replacement costs associated with major overhead bridges and tunnels.

1.7 Exclusions

**MTA Metro-North Railroad & Amtrak
PRIIA Ancillary Costs Review
General & Administrative Overhead Calculation – Exclusions**

I. Excluded Total Responsibility Center Costs from G&A Numerator Costs

- Mail & Ride¹
- Passenger Revenue Operations¹
- Ticket Receivers Office-GCT¹
- Customer Quality Evaluation Unit²
- Group Sales³
- Business Development Facilities and Marketing³
- Fleet Management⁴
- MTA Consolidated Positions⁵
- Marketing / Advertising / Customer Service / Sales Cost Centers⁶
- Office of Inspector General cost centers⁷
- IT Cost Centers related to Marketing and Station Website (Amtrak Only)⁶
- NEC IID Next Generation Integration (Amtrak Only)⁸
- Subsidiary Operating Activity - PSL, WTC, CUS, PRIL, TSL (Amtrak Only)⁹

Comments:

1. MN Passenger Revenue-related Costs
2. MN Sole Costs - dedicated for MN Customers only
3. MN Sole Costs - revenues not shared with other NEC Users
4. MN Sole Cost. VP Operations sub-dept for managing real-time deployment & maintenance of MN equipment
5. 100% Reimbursable from MTA
6. Specific to Amtrak passenger revenue generation
7. OIG expense funded by separate Grant
8. Next generation HSR development
9. Excluded subsidiaries

II. Excluded Specific Ledger Accounts from G&A Numerator Costs

- Advertising^{1,2}
- Bad debts¹
- Fines, penalties and other financial services expense¹
- Interest costs of borrowed capital or governmental unit's own funds¹
- Interest attributed to a fully depreciated assets¹
- Alcoholic beverages and other Commissary Supplies¹
- Contributions or donations rendered¹
- Entertainment costs¹
- Fund raising and investment management costs¹
- Capital expenditures^{1,3}
- Cost of idle facilities¹
- Lobbying¹
- Patent costs¹
- GASB45 - OPEB Accrual (unfunded)¹
- Pension Accrual (unfunded)¹
- Injury Claims^{1,4}
- Damage Claims To Property-Others^{1,4}
- Claims Handling Serv Fee^{1,4}
- Expense Recovery Medical^{1,4}
- Insurance Recovery^{1,4}
- GCT-H/H Lease (Rent Portion)⁵
- Port Jervis Lease⁵

- Depreciation & Amortization⁶
- Amortization of Capital Leases⁶
- Gain/Loss-Equip Disposal⁶
- Grand Central Getaway Costs⁷
- Real Estate Admin.^{7,8}
- Westchester County DOT Subsidy⁹
- Hudson Rail Link Service⁹
- Bus. & Transfer Services⁹
- NJT Subsidy Payments¹⁰
- Tariffs & Timetables¹¹
- TSM Credit Card Fees¹¹
- Web Ticket Credit Card Fees¹¹
- Passenger Tickets^{11,12}
- M&R Credit Card Fees^{11,13}
- Est. Amtrak Exp. Recovery^{14,15}
- Recovery Of Overhead Cost¹⁶
- Equipment Recovery¹⁷
- Exp Recovery-Other Railroad (Freight)¹⁸

Amtrak Only Expenses

- Telephone/Data allocation cost related to reservation system¹⁹
- Passenger Inconvenience Expenses²⁰
- Lease Termination Fees²¹
- RR Sta Armored Car Carrier Fee²²
- RR Sta Bank Deposit Supplies Fees²²
- PEDFA Garage Operating Expense²³
- Land/Air Rights Acquisitions²⁴
- Purchased Insurance²⁵

Comments:

1. A87 Exclusion
2. Advertising, Sales, Merchandising, Commission, Timetables expenses
3. All capital expenditures are excluded
4. Claims and related recoveries
5. Capital Lease -Asset related costs
6. Asset-related costs
7. Related revenue - not shared with NEC users
8. Real Estate - All Real Estate cost center expenses excluded
9. Purchased Transportation / Alternative Service
10. WofH Service - Direct Operation Costs
11. Passenger Revenue-related Costs
12. Ticketing (Amtrak comment)
13. Credit Card and Foreign exchange fees.
14. MN share of incremental NEC cost
15. Reimbursed expenses are not part of the pool.

16. Capital Project related
17. Capital Assets & Projects related
18. Direct MofW reduction-NEC model
19. Excludes telephone allocation repated to Amtrak revenue generation
20. Related to Amtrak passengers
21. Termination of Amtrak leases
22. Amtrak passenger specific item
23. Bond for 30th street parking garage
24. Excluded
25. Parties agree that purchased insurance should be excluded. Parties agree to discuss further pending potential impact from overall liability arrangement discussions.

III.

MN G&A Overhead Base

Total MN Expenses

Less:

- G&A Admin Responsibility Centers (Included & Excluded)
- G&A Denominator Costs

Amtrak G&A Overhead Base

Total Amtrak Expenses

Less:

- Depreciation
- Inventory Write-Off
- Finance - Banking Charges
- Major Equipment Purchases
- G&A Numerator Costs (Overhead Pool)

1.8 Master Schedule

Policy Document Reference	Task	Date to be completed by
2.5	Adopt Policy	December 17, 2014
6.3	Notify the Commission in Writing if Planning to Fund less than the BCC for FY2016 Payments	February 1, 2015
2.5	Submit Indirect Cost Plans, and detailed cost data to be allocated	February 3, 2015
5.8	Determine Interim Approach for Allocating Costs of Environmental Remediation	March 1, 2015
2.5	Consider the FY2016-2020 Capital Plan	May 1, 2015
2.9	Submit Staffing and Resource Plans	June 30, 2015
2.5	Execute agreements (Best effort)	July 1, 2015
5.9	Share a Plan to Collect and Track Freight Data for a Six-Month Period	Beginning July 1, 2015
2.5	Execute Agreements (Final deadline)	October 1, 2015
2.5	Financial Obligations Begin	October 1, 2015
2.5	Interim methods for additional capital projects apply to any new agreements	October 1, 2015
6.1	Develop a Process for Reconciling Unanticipated Service Changes	October 1, 2015
5.5.3	Develop Permanent Allocation Methods for Stations, Mandated, Major Backlog, Improvements Projects	January 1, 2016
5.5.3	Develop Procedures for Obtaining and Exception to the Policy	January 1, 2016
5.8	Adopt Approach for Allocating Costs of Environmental Remediation	January 1, 2016
4.1.1	Establish Cost-Effective NEC Asset Management and Engineering Assessment Best Practices	March 31, 2017
2.2.1	Complete Mid-Term Evaluation	March 31, 2018
4.4	Develop a New Approach to Liability Provisions	March 31, 2018

NORTHEAST CORRIDOR



INFRASTRUCTURE AND OPERATIONS
ADVISORY COMMISSION

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER
CORP., d/b/a AMTRAK, and NORTHEAST
CORRIDOR INFRASTRUCTURE AND
OPERATIONS ADVISORY COMMISSION,

Defendants.

Civil Action No. 16-10120

COMPLAINT

Plaintiff Massachusetts Bay Transit Authority (“MBTA”) brings this complaint for declaratory and injunctive relief against defendants National Railroad Passenger Corp., d/b/a Amtrak (“Amtrak”), and the Northeast Corridor Infrastructure and Operations Advisory Commission (“Commission”). Amtrak has demanded nearly \$30 million per year from the MBTA for *Amtrak’s* use of *MBTA’s* rail lines, based on a “Cost Sharing Policy” (the “Policy”) developed by the Commission pursuant to a federal statute, the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907 (2008). Amtrak’s demand violates an existing agreement between Amtrak and MBTA, and the Commission’s Policy violates the U.S. Constitution’s Appointments and Due Process Clauses, the Constitution’s separation of powers, and the federal Administrative Procedure Act, as described in detail below. MBTA accordingly alleges as follows:

INTRODUCTION

1. Defendant Amtrak, the federal government entity responsible for (*inter alia*) intercity rail passenger service between Boston, MA and Washington, D.C. (the “Northeast Corridor”), obtains access to the rail line between Boston and the Rhode Island border (the “Attleboro Line”) under a contract (the “Attleboro Line Agreement”) with plaintiff MBTA, a Massachusetts government entity and the owner of the Attleboro Line. In exchange for MBTA granting Amtrak access to the Attleboro Line and the right to “dispatch” (*i.e.*, to control) when Amtrak’s high-speed intercity trains and MBTA’s commuter trains are dispatched on the Line, Amtrak agreed to provide MBTA with certain services and maintenance along the Line *without charge*. Now, however, claiming that it is both permitted and required to do so under a pair of federal statutes, Amtrak is demanding that MBTA pay it tens of millions of dollars each year for the very services that Amtrak already is obligated by the Attleboro Line Agreement to provide MBTA without charge, with no recognition of the value of MBTA’s ownership of the Attleboro Line or the value of the dispatch rights.

2. According to Amtrak, MBTA must pay it this money as a result of PRIIA and the Fixing America’s Service Transportation Act (the “FAST Act”), Pub. L. No. 114-94, 129 Stat. 1312 (2015). Under those statutes, as codified at 49 U.S.C. § 24905, Congress set up the Commission, a body consisting of representatives of the federal and state governments, and tasked it with establishing the Cost Sharing Policy to replace the terms of existing contracts between Amtrak and state commuter rail agencies for rail access. After the Commission promulgated the Cost Sharing Policy this October, Amtrak repudiated the Attleboro Line Agreement and demanded that MBTA enter a new contract implementing the Policy. If MBTA

will not agree to do so, then Amtrak is threatening to file an action before the federal Surface Transportation Board (“STB”) to force the Cost Sharing Policy on MBTA.

3. MBTA brings this lawsuit because the federal law that Amtrak is invoking to justify its demand for nearly \$30 million in cost-sharing payments for this year alone is unconstitutional, and because Congress cannot by statute relieve federal agencies, such as Amtrak, from their contractual obligations without putting those agencies into breach of contract. Whether or not Amtrak should have more money for its maintenance responsibilities along the Northeast Corridor, the answer is not to simply take that money from Massachusetts and a few other states in violation of the constitution and their contractual rights. Resolution of the issues raised in this complaint is urgent, as the allocation of costs between MBTA and Amtrak has significant implications for Massachusetts commuters, Massachusetts taxpayers, and MBTA’s relations with its vendors. MBTA’s specific claims are as follows:

4. *First*, because § 24905 vests executive power in the Commission—the power to determine the substantive standard that must be implemented by Amtrak and state commuter rail agencies in new contracts and that must be applied by the STB in adjudicating disputes between Amtrak and state commuter rail agencies—it violates the Appointments Clause of the Constitution. *See* U.S. Const., art. II, § 2, cl. 2. Only “Officers” of the federal government may exercise such executive authority, and at least half of the members of the Commission are not appointed consistent with the Appointments Clause.

5. *Second*, and related, § 24905 violates the Constitution’s separation of powers because it vests federal executive authority in Commission members who are not removable by, and thus are not accountable to, the President or any other member of the Executive Branch, but instead are answerable only to state officials. By delegating federal regulatory authority to

officials who are ultimately accountable to persons other than the President of the United States, the FAST Act violates the separation of powers. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010).

6. *Third*, § 24905 violates the Due Process Clause of the Constitution, which requires that regulators be neutral and disinterested. Under § 24905 members of the Commission represent the entities that appointed them, all of which have a direct financial interest in the Cost Sharing Policy's allocation of fiscal responsibility for work on the Northeast Corridor. The Cost Sharing Policy, unfairly determined by a vote of the regulated entities themselves, shifts tens of millions of dollars from a handful of states—including Massachusetts—to Amtrak (a net winner overall), while rewarding a majority of other States with millions in cost savings on their contracts with Amtrak. This is an obvious violation of Due Process.

7. *Fourth*, the Commission's Policy must be set aside as unlawful under the federal Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2). The APA requires any substantive rule adopted by an agency, such as the Cost Sharing Policy, to be promulgated through notice and comment rulemaking, 5 U.S.C. § 553, and the Commission indisputably did not follow those procedures in adopting the Policy. Thus, even if the Commission could adopt the Cost Sharing Policy consistent with the Constitution—and it cannot—the Policy would still need to be remanded for the APA's important procedural requirements to be fulfilled.

8. *Fifth*, claiming the right to do so under PRIIA and the FAST Act, Amtrak has repudiated the Attleboro Line Agreement. MBTA does not accept Amtrak's repudiation of the Agreement, which remains a valid, binding, contract. As a matter of Supreme Court precedent, PRIIA and the FAST Act cannot excuse Amtrak's breach of contract. *United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996). MBTA is entitled to a declaration that Amtrak is contractually

obligated to continue performing under the Attleboro Line Agreement so long as that Agreement remains in force pursuant to its own terms, and an injunction requiring it to do so.

9. *Sixth*, Amtrak has breached the implied covenant of good faith and fair dealing in the Attleboro Line Agreement by threatening to go to the STB unless MBTA agrees to pay Amtrak millions of dollars per year for services that Amtrak already is obligated by contract to provide without charge.

10. Wherefore, MBTA asks this Court to declare that Section 212 of PRIIA, as amended by Section 11305 of the FAST Act, 49 U.S.C. § 24905, violates the Appointments Clause, the separation of powers, and the Due Process Clause; to declare the Cost Sharing Policy invalid and to set it aside; to find Amtrak in breach of the Attleboro Line Agreement and the implied covenant of good faith and fair dealing in that Agreement; and to enter an injunction requiring Amtrak to continue acting in conformance with the Attleboro Line Agreement.

THE PARTIES

11. Plaintiff MBTA was established by Massachusetts law to provide, *inter alia*, commuter rail transportation within the Commonwealth. It is a public entity, designated a “body politic and corporate, and a political subdivision of the commonwealth.” Mass. Gen. Laws ch. 161A, § 2. MBTA has its principal office and principal place of business in Boston, Massachusetts, and is a citizen of Massachusetts.

12. Defendant Amtrak was established by Congress in the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970), to provide intercity rail passenger transportation in the United States. All of Amtrak’s preferred shares are owned by the U.S. Department of Transportation and, for purposes of the United States Constitution, Amtrak is deemed a federal government, not a private, entity. *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135

S. Ct. 1225, 1233 (2015). Amtrak has its principal office and principal place of business in the District of Columbia. 49 U.S.C. § 24301(b). “Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.” *Id.*

13. Defendant the Commission was established by PRIIA and is responsible for establishing the Cost Sharing Policy. The Commission is administratively hosted by Amtrak. The Commission consists of nine voting members appointed by the governors of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Delaware, and by the mayor of Washington, D.C., together with four voting members from Amtrak and five voting members from the U.S. Department of Transportation. Non-voting members from various other States and entities also participate on the Commission.

JURISDICTION AND VENUE

14. This case raises federal questions arising under the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, the Constitution’s separation of powers, and the Due Process Clause of the Fifth Amendment. *See, e.g., Free Enter. Fund*, 561 U.S. at 491 n.2. It also raises questions arising under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

15. This Court has subject matter jurisdiction over the claims brought in this action pursuant to 28 U.S.C. §§ 1331 and 1367. The Court may issue declaratory relief under 28 U.S.C. § 2201.

16. Jurisdiction and venue are proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and (e)(1)(B) because a substantial part of the events or omissions giving rise to these claims occurred in Massachusetts, and a substantial part of the property (the Attleboro Line) that is the subject of this controversy is located in Massachusetts. The Attleboro Line

Agreement contains a forum selection clause designating this district for purposes of claims arising under the Agreement. Agreement § 25.2.

FACTS RELATING TO THIS DISPUTE

A. The Relationship Between Amtrak And State Commuter Rail Agencies, Such As MBTA

17. State commuter rail systems are a crucial component of the transportation network in States such as Massachusetts that contain densely populated, heavily urbanized areas (*e.g.*, the Boston metropolitan area). Within the States making up the Northeast Corridor, state commuter rail agencies provide “short haul” rail service to hundreds of thousands of passengers every business day.

18. MBTA’s commuter rail trains provide transportation to an average of more than 125,000 passengers each business day. MBTA has contracted with a private corporation, Keolis Commuter Services, to operate the commuter rail under a fixed-price contract. Revenue from commuter rail passengers and other sources does not cover all of MBTA’s costs of running the commuter rail service, however, and MBTA receives subsidies from the Massachusetts state government to make up the difference.

19. Amtrak provides long-distance passenger service between major metropolitan areas, including the high speed “Acela” service connecting cities such as Boston, New York, Philadelphia, and Washington, D.C. Amtrak carries approximately 40,000 passengers each business day in the Northeast Corridor and, on information and belief, earns hundreds of millions of dollars each year in profits on its Northeast Corridor trains. Indeed, Amtrak’s share of the combined market for travel by air and rail between New York and Boston has increased from 20% to 54% since the introduction of Amtrak’s Acela service in 2000.

20. Often, Amtrak and the state commuter rail agencies run some or all of their trains on the same rail lines. Within Massachusetts, MBTA and Amtrak each run trains along the Attleboro Line, which since 1973 has been owned by MBTA. (MBTA also runs trains along numerous other lines it owns that are not normally used by Amtrak, such as the “Fitchburg Line”).

21. MBTA’s ownership of its rail lines is an extremely valuable asset, representing a considerable historical and ongoing investment by Massachusetts. MBTA originally purchased the Attleboro Line from the Penn Central Transportation Company in 1973 for \$19,500,000, and has invested many millions of dollars in the Line and related property rights since that time.

22. MBTA’s ownership of the Attleboro Line also includes the right to allocate station slots and to decide when to dispatch trains on the line—or the right to bargain away its dispatch rights to Amtrak for other services. Given the importance of high-speed rail service to Amtrak’s profitable Northeast Corridor business, the ability to determine which trains have priority on the Attleboro Line is a highly valuable right.

23. In most other States on the Northeast Corridor, it is Amtrak that owns the rail line and provides state commuter rail agencies with access to it. Within the Northeast Corridor, only Massachusetts, Connecticut, and New York own any of the rail line that Amtrak uses. In New York and Connecticut, but *not* in Massachusetts, Amtrak also owns much of the line along which its trains run *and* provides the state commuter rail agency access to such track for commuter rail service. By contrast, in Massachusetts, Amtrak does not own any track that MBTA uses.

24. Historically, Amtrak and state commuter rail agencies have negotiated bilateral agreements governing topics such as access to each other’s rail assets, maintenance performed on rail lines, and station operations.

25. In the absence of such agreements, federal law requires Amtrak to provide access to track it owns to state commuter rail agencies, 49 U.S.C. § 24904 (renumbered § 24903 under the FAST Act), and likewise requires state commuter rail agencies to provide access to rail lines they own to Amtrak, *id.* § 24308. In both instances, if Amtrak and the relevant state commuter rail agency cannot agree on the compensation to be provided for such access and related services, then the STB would decide the amount of compensation to be paid *to the rail owner* by the party obtaining rail access based on criteria specified in the relevant statutory provision. *See id.* § 24308(a)(2)(A); *id.* § 24904(c)(2). Neither of these provisions provides for the STB to enter a net award of costs *against the rail owner* with respect to services provided by the accessing carrier; the allocation of such costs is purely a question of contract.

B. The Attleboro Line Agreement

26. On July 1, 2003, MBTA and Amtrak entered the Attleboro Line Agreement, which has since been amended a number of times. The Agreement has a term of thirty years and (except for specified causes) is terminable by either party only on provision of 12 months' notice. Agreement §§ 10, 23.2. The Agreement is governed by Massachusetts law. *Id.* § 28.1.

27. Under the Attleboro Line Agreement, MBTA provides Amtrak the right to use the Attleboro Line (and, as necessary for support, certain other MBTA-owned rail lines) for the operation of a specified number of trains per hour. Agreement § 2.1.

28. The Attleboro Line Agreement notes that “both the MBTA and Amtrak value highly the right to dispatch trains running over the Attleboro Line, and the MBTA agrees to allow Amtrak to dispatch such trains in exchange for other services.” Attleboro Line Agreement at 1.

29. In exchange for access to the Attleboro Line and dispatching rights, Amtrak provides MBTA with specified dispatch and maintenance services on the Attleboro Line.

Agreement §§ 2.2, 4.1. Amtrak is “responsible for the costs of materials, equipment, management, services, and other expenses required for the performance” of such maintenance. *Id.* § 4.4. Amtrak also provides MBTA with access to Amtrak-owned rail line between the Massachusetts-Rhode Island border and Providence, Rhode Island. *Id.* § 2.1(g).

30. Except as specified in the Agreement, neither party to the Attleboro Line Agreement is obligated to pay the other any fiscal compensation in exchange for the rail access and services exchanged under the Agreement: “Amtrak shall perform the Dispatching Services and Maintenance Services as detailed in Sections 2.2 and 4.1 herein, as well as all other obligations detailed in this Agreement (with the exception of Force Account Work, which shall be compensated as detailed below) in exchange for the operating rights detailed in Section 2.1 above and the right to perform Dispatching Services, as detailed in Section 2.2.” Agreement § 3.1; *see also id.* § 3.3 (“Neither Party shall charge the other Party any fees for access to stations on the Attleboro Line, other MBTA lines, or the Amtrak Rail Line.”).

31. In the Attleboro Line Agreement, Amtrak specifically agreed to relieve MBTA from any obligation to maintain the Attleboro Line for purposes of Amtrak’s provision of intercity passenger rail service: “The MBTA shall not *in any way* be obligated to provide maintenance necessary or incidental to Amtrak’s intercity rail passenger service on the Attleboro Line.” Agreement § 4.2 (emphasis added). The Agreement further specifies that “Amtrak shall have the right to improve, *at its sole expense*, the track and facilities it uses or may use on the Attleboro Line in intercity rail passenger service,” and “Amtrak shall be *solely responsible* for any and all costs associated with the operation and maintenance of such improvements.” *Id.* § 4.6(a), (b) (emphases added). The Attleboro Line Agreement has no provision under which

Amtrak can require MBTA to pay for capital improvements, of Amtrak's choosing, on the Attleboro Line.

32. The Attleboro Line Agreement contemplates the possibility that Amtrak's maintenance obligations on the Attleboro Line could increase due to changes in MBTA operations or modifications to the Attleboro Line undertaken on behalf of MBTA, and provides a specific procedure and standard for determining the compensation—if any—that must be paid to Amtrak to account for such increased maintenance. Agreement § 3.7. Thus, Amtrak is not without remedy under the existing Agreement if MBTA causes maintenance needs on the Attleboro Line to increase.

33. The Attleboro Line Agreement also contains a provision under which Amtrak may propose "recapitalization projects." MBTA, however, is not required to fund such projects. If MBTA concludes "in its sole discretion" that certain projects proposed by Amtrak are not worth undertaking, then it can choose not to fund the projects. Agreement § 4.9.

34. The parties selected a "federal court in Massachusetts" as the forum for any dispute concerning "the interpretation, application or enforcement" of the Attleboro Line Agreement. Agreement § 25.2.

C. Congress Enacts PRIIA and the FAST Act

35. On October 16, 2008, PRIIA was signed into law. One purpose of PRIIA was to provide additional money to Amtrak for its maintenance and capital improvement needs on the Northeast Corridor. Historically, the federal government failed to provide Amtrak with consistent policy or financial commitments to support the mission it has prescribed for the company, or to support intercity passenger rail in general. This hampered Amtrak's ability to both set and achieve goals, including the improvement of the Northeast Corridor.

36. Most relevant to this case is Section 212 of PRIIA, which established the Commission and provided for the Commission’s adoption of a Cost Sharing Policy. 49 U.S.C. § 24905.

37. PRIIA directed the Secretary of Transportation to establish the Commission. 49 U.S.C. § 24905(a)(1). The Secretary, however, does not appoint all of the Commission’s members. The chief executive officers of the States and the District of Columbia in the Northeast Corridor each appoint one member to the Commission; that member is “designated by, and serving at the pleasure of” the state chief executive officer. *Id.* § 24905(a)(1)(C). Nine members of the Commission—half of the 18 voting members—have been appointed in such a fashion. Four more Commission members represent Amtrak.

38. The Commission functions as part of the Federal government. It can request that a federal department or agency “detail, on a reimbursable basis, any personnel of that department or agency to the Commission to assist in in carrying out its duties,” and similarly request “administrative support services” from the Administrator of General Services. 49 U.S.C. § 24905(a)(8), (9).

39. As reflected in its name (the “Northeast Corridor Infrastructure and Operations *Advisory* Commission”), the Commission’s role is partly advisory in nature. One purpose of the Commission is “to promote cooperation and planning pertaining to the rail operations and related activities of the Northeast Corridor.” 49 U.S.C. § 24905(a)(1). To that end, the Commission is tasked with “develop[ing] a statement of goals concerning the future of the Northeast Corridor rail infrastructure and operations,” and “develop[ing] recommendations based on the statement.” *Id.* § 24905(b)(1), (2).

40. As most relevant here, the Commission is further directed to “develop a standardized formula for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation . . . on the Northeast Corridor main line between Boston, Massachusetts, and Washington, District of Columbia,” and certain branch lines. 49 U.S.C. § 24905(c)(1)(A).

41. The Cost Sharing Policy developed by the Commission is required to “ensure” that three statutory objectives are met: “(i) there is no cross-subsidization of commuter rail passenger, intercity rail passenger, or freight rail transportation; (ii) each service is assigned the costs incurred only for the benefit of that service, and a proportionate share, based upon factors that reasonably reflect relative use, of costs incurred for the common benefit of more than 1 service; and (iii) all financial contributions made by an operator of a service that benefit an infrastructure owner other than the operator are considered, including but not limited to, any capital infrastructure investments and in-kind services.” 49 U.S.C. § 24905(c)(1)(A).

42. Once the Cost Sharing Policy is finalized, PRIIA *requires* Amtrak and the state commuter rail agencies to repudiate their existing agreements and to “implement *new* agreements for usage or services based on the formula” contained in the Policy. 49 U.S.C. § 24905(c)(2) (emphasis added).

43. PRIIA initially set up a procedure whereby, if the parties failed to enter new agreements, “the Commission shall petition the Surface Transportation Board to determine the appropriate compensation amounts for such services in accordance with Section 24904(c) [now § 24903(c)] of this title. The Surface Transportation Board shall enforce its determination on the party or parties involved.” 49 U.S.C. § 24905(c)(2). Those compensation amounts would not be determined pursuant to the Cost Sharing Policy, but rather the statutory criteria in § 24903(c).

44. PRIIA's process for situations in which a state commuter rail agency declines to enter a new contract was amended on December 4, 2015, when the President signed the FAST Act into law. The FAST Act modified Section 24905(c)(2) such that the STB is no longer instructed to determine compensation amounts by applying the statutory criteria in what is now § 24903. In place of those statutory criteria, the FAST Act instructs the STB to determine compensation by "taking into consideration the policy developed [by the Commission], as applicable." Congress limited the STB to looking at § 24903 only for "procedures" and a "procedural schedule."

45. Because Congress has instructed the STB to consider the Cost Sharing Policy in determining compensation, STB must do so; it cannot choose to disregard the Policy in setting compensation. Moreover, and importantly, *no other intelligible principle* is provided to guide the agency's compensation decisions. The STB cannot revise or alter the policy; only the Commission may make changes to the Policy. 49 U.S.C. § 24905(c)(3). If the STB decides compensation based on some factor not identified in the Policy, it will be in violation of Congress's mandate.

46. The FAST Act contains a carrot and stick designed to convince state commuter rail agencies to sign new agreements with Amtrak implementing the Cost Sharing Policy. Section 11302 of the FAST Act introduces 49 U.S.C. § 24911, "Federal-State partnership for state of good repair." Under § 24911, Congress provided for a system of federal grants, administered by the Secretary of Transportation, for railway capital projects.

47. With respect to the Northeast Corridor, however, § 24911 provides that "[g]rant funds may not be provided under this section to an eligible recipient for an eligible project located on the Northeast Corridor unless Amtrak and the public authorities providing commuter

rail passenger transportation on the Northeast Corridor are in compliance with section 24905(c)(2).” 49 U.S.C. § 24911(e)(1). Section 24905(c)(2), again, directs Amtrak and the state commuter rail agencies to enter new agreements implementing the Cost Sharing Policy.

48. Thus, state commuter rail agencies are penalized if they do not enter new agreements with Amtrak. Until they do (and seemingly until they all do), otherwise available Federal funds will not be provided for § 29411 projects within the Northeast Corridor.

D. The Commission Develops The Cost Sharing Policy

49. The Commission spent three years developing the standardized formula as required by PRIIA, establishing a Cost Allocation Committee to lead this effort.

50. The Commission finally adopted an interim policy in December 2014. The Commission did not publish notice in the Federal Register with respect to the draft Cost Sharing Policy and call for public comments. This varied from the approach taken by the Federal Railroad Administration (“FRA”) and Amtrak in developing “metrics and standards,” applicable to its contractual relationships with freight railroads pursuant to Section 207(a) of PRIIA.

51. On September 17, 2015, the Commission adopted the final Cost Sharing Policy. The Policy was adopted by a 15 to 2 vote, with 1 abstention. The Commission members appointed by Massachusetts and New York voted against the Policy, and the member appointed by New Jersey abstained. The Policy was promulgated on October 2, 2015. On December 7, 2015, the Commission voted to reissue the Policy with various amendments.

52. The Cost Sharing Policy acknowledges the existing contracts between Amtrak and state commuter rail agencies such as MBTA, but only to disparage them. According to the Policy, the negotiation of these agreements, entered between agencies of the Federal and state governments, “has often resulted up to this point in serving short-term, parochial interests” Policy at 17.

53. The Policy, determined by majority vote of representatives of the very entities it regulates, results in clear winners and losers when applied against the variety of existing contracts between Amtrak and state commuter rail agencies and the varied degrees of track ownership by state commuter rail agencies. Using the cost sharing formula in the Commission's Policy rather than the existing contracts between Amtrak and state commuter rail agencies, it has been estimated that Amtrak will save about \$56 million this fiscal year, Connecticut will save about \$20 million, and New York will save about \$16 million in comparison to their previous levels of spending. All told, Amtrak and five of the nine state commuter rail agencies will save money under the Cost Sharing Policy.

54. The gains for Amtrak and those states are losses for other States. In particular, Amtrak has asserted that MBTA must make \$28.8 million in cost sharing payments not called for under the Attleboro Line Agreement. Amtrak also is demanding nearly \$90 million from New Jersey, nearly \$14 million from Pennsylvania, and about \$1 million from Maryland. However, whereas MBTA owns the rail line that Amtrak uses, the commuter rail agencies in New Jersey, Pennsylvania, and Maryland do not.

55. Generally speaking, the Cost Sharing Policy reaches these allocations by distinguishing between "sole-benefit costs" and "common-benefit costs." It provides that "sole-benefit costs" will be incurred by the rail operator incurring them, while "common-benefit costs" will be shared between operators based on a variety of metrics (*e.g.*, train moves, train miles, gross ton miles) aimed to determining operators' respective proportional benefit from the expenditure.

56. The Cost Sharing Policy describes itself as "establish[ing] the *required* cost-sharing methods" for agreements between Amtrak and state commuter rail agencies, together

with “national and regional policy *recommendations* to support them.” Policy at 6 (emphases added). It likewise states that “[t]he *requirements* set forth in this policy *will be* incorporated into existing or new individual agreements between Amtrak and Commuter Authorities.” Policy § 2.3 (emphases added).

57. The Cost Sharing Policy expressly contradicts the Attleboro Line Agreement in material aspects. Under the Attleboro Line Agreement, for example, Amtrak does not charge MBTA for dispatching services—Amtrak performs dispatching in partial exchange for the right to control dispatching, which otherwise belongs to MBTA as to the rail line owner. Under the Policy, however, Amtrak’s dispatching costs on the Attleboro Line must be allocated as common-benefit costs, and Amtrak is demanding millions of dollars per year for them.

58. The Cost Sharing Policy states that “parties *may* (1) [i]mplement compensation agreements for assets and services not addressed within the policy,” and “(2) [a]gree to terms that exceed compensation amounts due under the policy, provided such agreements do not result in cross-subsidization of commuter rail passenger, intercity rail passenger, or freight rail transportation.” Policy at 34 (emphasis added). Nothing in the Policy, however, *requires* compensation for “assets and services not addressed within the policy.” And to the extent § 24905(c) eliminates existing agreements setting compensation for such other assets and services, and then determines the compensation due for assets and services that *are* covered by the Policy (whether in a new voluntary agreement or following an action before the STB), it fundamentally alters the negotiating posture of the parties should they attempt to reach some new agreement with respect to non-covered assets and services.

59. For example, the Cost Sharing Policy assigns no value to the dispatching rights that, in the Attleboro Line Agreement, both MBTA and Amtrak agreed that they “value highly.”

In theory, MBTA and Amtrak could attempt to negotiate compensation for such rights, and the parties have attempted to do so. Amtrak, however, has taken the position that it need not pay compensation for such rights in light of the Policy, and nothing in the Policy allows the STB to order compensation with respect to rights that they are not covered by the Policy.

60. The Cost Sharing Policy holds out the possibility of penalties if a state commuter rail agency does not provide Amtrak compensation required under the Policy. Specifically, the Policy provides that the subject of a party's "fail[ure] to meet its required financial commitments under the policy . . . will be addressed specifically within the individual agreements and may include remedies such as: [f]inancial penalties, including appropriate interest charges for late payments[; r]eimbursement of costs and fees associated with the termination or restoration of service[; or o]ther arrangements consistent with the policy's overall intent." Policy § 2.6.

E. Amtrak Demands Payment from MBTA

61. In July of 2015, after the Commission adopted the interim Policy but before the Commission voted on the final Policy, Amtrak proposed that the Attleboro Line Agreement be "amended" to incorporate the Cost Sharing Policy. The proposed "amendments" would have gutted the Attleboro Line Agreement of the careful balance reached by the parties in 2003, and instead would have required all cost allocation to be determined pursuant to the Policy.

62. Following adoption of the final Cost Sharing Policy, Amtrak approached MBTA and demanded that MBTA pay the cost allocations calculated by the Policy—\$28.8 million for federal fiscal year 2016. The amount requested consisted of \$16.6 million for operating expenses, principally maintenance, and \$12.2 million for capital projects. Under the Attleboro Line Agreement, MBTA has no obligation to pay those sums to Amtrak.

63. Amtrak's demand simply shifts to MBTA costs that Amtrak already is obliged to bear under the Attleboro Line Agreement. Amtrak's demand is based on Amtrak's actual gross

costs, with no consideration of whether those expenses are reasonable or necessary and with no consideration of the revenue that Amtrak receives as a result of its use of MBTA's property. Under the Policy, MBTA would have no final say over how Amtrak will spend the \$12.2 million that Amtrak is asking MBTA to pay this year for capital projects, even though MBTA is the actual owner of the Attleboro Line.

64. Amtrak has threatened to take its demand for a new contract with new compensation terms to the STB if MBTA will not voluntarily enter a new contract to replace the existing Attleboro Line Agreement. The parties engaged in extensive discussions to resolve this dispute short of litigation, but those negotiations failed to result in a negotiated resolution.

CLAIMS FOR RELIEF

COUNT ONE: VIOLATION OF THE APPOINTMENTS CLAUSE

65. MBTA realleges the allegations of Paragraphs 1-64 as if set forth fully herein.

66. Only an "Officer" of the United States may exercise federal rulemaking authority. *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). Under the Appointments Clause, only the President can appoint an Officer, except that Congress may by law permit "inferior Officers" to be appointed by the head of an Executive Department or a court of law. U.S. Const., art. II, § 2, cl. 2. In no instance may an Officer of the United States be appointed by the chief executive of a State or the mayor of the District of Columbia.

67. The Commission exercises executive authority. It is the final decisionmaker that establishes the Cost Sharing Policy; the Policy is not subject to review or revision by the STB, the Secretary of Transportation, or any other federal official. PRIIA requires Amtrak and state commuter rail agencies to implement the Cost Sharing Policy in new contracts. If they fail to do so, the FAST Act withholds federal grants otherwise available under 49 U.S.C. § 24911. The

Policy also is the only criterion that the STB is directed to consider in adjudicating compensation disputes between Amtrak and state commuter rail agencies in the Northeast Corridor, such as MBTA. 49 U.S.C. § 24905(c)(2). Indeed, but for the directive to apply the Policy, the statute would not provide the STB with any intelligible principle to make compensation decisions; the STB is told to look at § 24903 only for “procedures and [the] procedural schedule,” not any substantive rule.

68. Although they exercise executive authority, the members of the Commission are not appointed consistent with the Appointments Clause. Nine members of the Commission are appointed not by the President (or even the head of a federal department), but instead by the chief executives of the States and the District of Columbia within the Northeast Corridor. Four more members represent Amtrak.

69. 49 U.S.C. § 24905(c)(2) violates the Appointments Clause by vesting the Commission with executive authority.

70. The Cost Sharing Policy adopted by the improperly appointed Commission is void *ab initio*. MBTA need not enter a new contract implementing the Policy and the STB may not enforce the Policy against MBTA.

71. MBTA is entitled to a declaration that the composition of the Commission violates the Appointments Clause and that the Cost Sharing Policy adopted by the improperly constituted Commission is void.

COUNT TWO: VIOLATION OF THE SEPARATION OF POWERS

72. MBTA realleges the allegations of Paragraphs 1-71 as if set forth fully herein.

73. 49 U.S.C. § 24905 provides the Commission with executive authority. Yet the nine Members of the Commission who are appointed by the chief executives of the States and

the District of Columbia are not accountable to the President because they are not removable by the President or any other member of the federal Executive Branch, whether for good cause or otherwise. Instead, they serve “at the pleasure” of the chief executive who appointed them to the Commission. 49 U.S.C. § 24905(a)(1)(C).

74. By conferring Commission members with executive authority while insulating them from any accountability to the Executive Branch, the FAST Act violates the Constitution’s separation of powers. *See Free Enter. Fund*, 561 U.S. at 496-97.

75. The Cost Sharing Policy adopted in violation of the separation of powers is void *ab initio*. MBTA need not enter a new contract implementing the Policy and the STB may not enforce the Policy against MBTA.

76. MBTA is entitled to a declaration that the composition of the Commission violates the Constitution’s separation of powers and that the Cost Sharing Policy adopted by the Commission is void.

COUNT THREE: VIOLATION OF THE DUE PROCESS CLAUSE

77. MBTA realleges the allegations of Paragraphs 1-76 as if set forth fully herein.

78. A key component of due process is that substantive rules be determined by regulators who are neutral and disinterested. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

79. The voting membership of the Commission is anything but disinterested in the subject matter that the Commission regulates. The Cost Sharing Policy and its “standardized formula” will determine how tens of millions of dollars will flow in new agreements between—or STB orders enforced against—the federal and state agencies represented by the members of the Commission. Amtrak and a majority of state commuter rail agencies represented on the

Commission save money under the Policy; their savings are at the expense of a minority of states, including Massachusetts.

80. By giving the self-interested members of the Commission authority to set the terms of the Cost Sharing Policy, 49 U.S.C. § 24905(c)(2) violates the Due Process Clause of the Fifth Amendment.

81. The Cost Sharing Policy adopted in violation of due process is void *ab initio*. MBTA need not enter a new contract implementing the Policy and the STB may not enforce the Policy against MBTA.

82. MBTA is entitled to a declaration that § 24905 violates the Due Process Clause and that the Cost Sharing Policy adopted by the Commission is void.

COUNT FOUR: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

83. MBTA realleges the allegations of Paragraphs 1-82 as if set forth fully herein.

84. The Commission is an agency of the federal government within the meaning of the APA, 5 U.S.C. § 551.

85. Amtrak and state commuter rail agencies must comply with the Cost Sharing Policy by entering new contracts implementing the Policy; if they do not there are immediate legal consequences, such as ineligibility for grants otherwise available under § 24911. The STB also must apply the Policy as its rule of decision in any adjudication under § 24905(c). The Policy therefore constitutes a rule within the meaning of the APA. With limited exceptions not applicable here, the APA requires all rules to be adopted through notice and comment rulemaking. 5 U.S.C. § 553.

86. The Commission did not follow the APA's notice and comment requirements in adopting the Cost Sharing Policy. The Policy was therefore adopted in violation of the APA.

87. Because the Cost Sharing Policy was adopted “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), the Cost Sharing Policy must be set aside and it may not be enforced against MBTA.

COUNT FIVE: BREACH OF CONTACT

88. MBTA realleges the allegations of Paragraphs 1-87 as if set forth fully herein.

89. The Attleboro Line Agreement is an existing, valid contract between MBTA and Amtrak.

90. The Attleboro Line Agreement obligates Amtrak to provide MBTA with certain maintenance and dispatching services, and access to the Amtrak-owned rail line between Attleboro and Providence, without monetary compensation.

91. The Attleboro Line Agreement specifically relieves MBTA of any obligation to provide maintenance to the Attleboro Line necessary or incidental to Amtrak’s intercity rail passenger service.

92. Amtrak claims that, pursuant § 24905, it need not comply with the Attleboro Line Agreement and instead MBTA must enter a new contract concerning the same subject matter.

93. Amtrak insists that the new contract must depart from the terms of the existing Attleboro Line Agreement. For example, while MBTA is not obligated to pay Amtrak for specified maintenance on the Attleboro Line under the Attleboro Line Agreement, Amtrak insists that under the new agreement MBTA must pay it many millions of dollars each year for such maintenance.

94. Amtrak has repudiated the Attleboro Line Agreement. MBTA does not accept that repudiation.

95. MBTA is entitled to a declaration that Amtrak is in breach of the Attleboro Line Agreement. MBTA also is entitled to an injunction requiring Amtrak to fulfill its obligations under that Agreement because an action for damages would provide an inadequate remedy for breach. Amtrak's demand for significant, unanticipated payments could have adverse effects on the cost and/or quality of the services that MBTA provides its customers, resulting in a loss of goodwill among MBTA's customers and political constituents that cannot readily be calculated.

COUNT SIX: VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

96. MBTA realleges the allegations of Paragraphs 1-95 as if set forth fully herein.

97. Amtrak is obligated by the implied covenant of good faith and fair dealing not to execute its obligations under the Attleboro Line Agreement in a manner that denies MBTA its fruits of the Agreement, and Amtrak cannot leverage a threat of non-performance to negotiate a better deal for itself.

98. Amtrak is insisting that MBTA enter a new contract in which MBTA pays Amtrak millions of dollars each year for services that Amtrak already is obligated by the Attleboro Line Agreement to provide without charge. Amtrak also is threatening to go to the STB for a compensation order, on terms that under the Cost Sharing Policy will differ from those in the Attleboro Line Agreement, if MBTA does not agree to enter such a new contract.

99. Amtrak's efforts to extract payments from MBTA for services that Amtrak already is contractually obliged to provide without charge violates the implied covenant of good faith and fair dealing in the Attleboro Line Agreement. MBTA is entitled to a declaration that Amtrak is acting in breach of the implied covenant. MBTA also is entitled to an injunction requiring Amtrak to fulfill its obligations under that Agreement pursuant to its terms because an action for damages would provide an inadequate remedy for breach.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

- a) A declaratory judgment holding that 49 U.S.C. § 24905(c) violates the Appointments Clause, the Separation of Powers, and the Due Process Clause, and that the Cost Sharing Policy adopted by the Commission is therefore void;
- b) A declaratory judgment that the Cost Sharing Policy was adopted in violation of 5 U.S.C. § 553, and a judgment setting aside the Policy for that reason;
- c) A declaratory judgment that Amtrak has breached the Attleboro Line Agreement, and the implied covenant of Good Faith and Fair Dealing in that Agreement, and an order enjoining Amtrak to comply with the Attleboro Line Agreement; and
- d) Such other and further relief that this Court deems just and proper.

Respectfully submitted,

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY

By its attorneys,

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