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September 21, 2016

VIA ELECTRONIC FILINGMs. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20006**Re: Docket No. FD 36048
Petition by National Railroad Passenger Corporation for Relief
Pursuant to 49 U.S.C. § 24905**

Dear Ms. Brown:

On August 2, 2016, the Massachusetts Bay Transportation Authority (“MBTA”) requested that the Surface Transportation Board (the “Board”) hold the above-referenced proceeding in abeyance pending resolution of the previously filed District Court Litigation.¹ The National Railroad Passenger Corporation (“Amtrak”) opposed MBTA’s abeyance request. On August 29, 2016, Amtrak expressed continued opposition to MBTA’s abeyance request, and attached as an exhibit an August 23, 2016 motion of the Northeast Corridor Commission (“NECC”) to dismiss MBTA’s complaint in the District Court Litigation for lack of jurisdiction (the “Motion to Dismiss”).

On September 20, 2016, MBTA filed its response in opposition to NECC’s Motion to Dismiss (“Opposition”). In light of Amtrak’s prior submission to the Board of NECC’s Motion to Dismiss, MBTA is providing the Opposition here to provide the Board with a complete record concerning the District Court Litigation.

The NECC had argued in its Motion to Dismiss that § 24905 strips the District Court of jurisdiction to hear MBTA’s constitutional and Administrative Procedure Act challenges to the NECC and its Cost Allocation Policy. In its Opposition, MBTA explains that the NECC’s jurisdiction-stripping argument is inconsistent with controlling Supreme Court precedent and that

¹ *Massachusetts Bay Transportation Authority v. National Railroad Passenger Corp.*, No. 16-10120 (D. Mass.) (the “District Court Litigation”).

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the litigation therefore should go forward. Accordingly, and contrary to Amtrak's August 29 filing, NECC's Motion to Dismiss provides no basis for the Board to deny MBTA's petition for abeyance.

Respectfully submitted,



Kevin P. Martin
Attorney for Massachusetts Bay
Transportation Authority

Attachment

cc: all parties of record

UNITED STATES DISTRICT COURT
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,

and

NATIONAL RAILROAD PASSENGER
CORP. d/b/a AMTRAK

Counterclaim-Plaintiff,

v.

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,

Counterclaim-Defendant.

Civil Action No. 16-10120-MLW

Oral Argument Requested

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY'S MEMORANDUM
IN OPPOSITION TO THE NORTHEAST CORRIDOR COMMISSION'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY**

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INTRODUCTION

This case involves an unconstitutional statutory scheme that Congress enacted in 2008 in order to take money from certain States and give it to a federal agency, defendant National Railroad Passenger Corporation (“Amtrak”). The current motion concerns defendant the Northeast Corridor Commission’s (the “NECC” or the “Commission”) argument that this Court cannot even exercise its ordinary federal question jurisdiction in order to hear plaintiff Massachusetts Bay Transportation Authority’s (“MBTA”) constitutional challenge to that scheme. NECC’s argument, based on a strained reading of the relevant statutory text and a misapplication of the relevant precedent, is meritless and should be denied.

The background is not disputable: In 2008, Congress decided that Amtrak had done a poor job negotiating bilateral agreements with state commuter rail agencies within the Northeast Corridor, some of which had entered deals with Amtrak to obtain access to Amtrak-owned rail lines, and others of which – most notably, MBTA, which owns all of the relevant rail line in Massachusetts – had entered contracts granting Amtrak access to state-owned rail lines. In the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. No. 110-432, Div. B., 122 Stat. 4848, 4907-70 (2008), as amended by the Fixing America’s Surface Transportation Act (the “FAST Act”), Pub. L. No. 114-94, 129 Stat. 1312 (2015), Congress created the NECC and decreed that the state agencies must “implement new agreements” with Amtrak based on a formula (the “Cost Sharing Policy” or “Policy”) that NECC would develop. *See* 49 U.S.C. § 24905(c)(2). Resistance to Congress’s mandate would be futile, for in the absence of new agreements PRIIA authorized Amtrak and the state agencies to petition the federal Surface Transportation Board (“STB”) for an order enforcing the Policy. *Id.* § 24905(c)(2).

MBTA’s Complaint alleges that this statutory scheme is unconstitutional on its face, and

nowhere in NECC's motion to dismiss does the federal government express any confidence in its ultimate position on the merits. Indeed, the D.C. Circuit recently struck down a similar provision in PRIIA, involving Amtrak's contractual relations with the freight railroads, on much the same constitutional grounds that MBTA raises in Counts One, Two, and Three of its Complaint. *See Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* ("AAR"), 821 F.3d 19 (D.C. Cir. 2016). NECC's motion also does not deny that it adopted the Cost Sharing Policy in violation of the federal Administrative Procedure Act ("APA"), as alleged in Count Four of the Complaint.

NECC makes only one argument in support of its motion to dismiss: That, when it comes to § 24905 and the Cost Sharing Policy, Congress stripped district courts of their ordinary federal question jurisdiction, intending that any constitutional challenges to the statute and any APA challenges to the Policy be heard only in a federal court of appeals following an adjudicatory proceeding at the STB. According to NECC, Congress's provision that STB "shall" determine compensation amounts based on the Policy (if Amtrak and a state commuter rail agency do not themselves enter an agreement implementing the Policy) counts as an "explicit" indication that district courts have been stripped of their jurisdiction over constitutional and APA claims. NECC reassures that depriving district courts of their jurisdiction is not a problem, because any arguments against § 24905 or the Policy can be heard by a court of appeals if and when it ever reviews an STB compensation order.

This argument is meritless and should be rejected. *First*, § 24905 does not come remotely close to supporting NECC's argument that Congress "explicitly" stripped this court of its jurisdiction. There is a presumption that Congress does not intend to alter district courts' ordinary federal question jurisdiction, and the simple statement of what STB "shall" do if a matter happens to come before it is insufficient to overcome that presumption. The Supreme

Court previously has considered a statute replete with provisions governing what an agency “shall” do in a proceeding before it, and yet rejected a claim that the statute stripped district courts of their jurisdiction over constitutional challenges to the underlying statute. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490-91 (2010).

Second, Congress also did not implicitly strip the district courts of their ordinary jurisdiction to hear constitutional and APA challenges to § 24905 and the Policy. Courts do not find that district court jurisdiction over constitutional challenges to substantive law has been stripped if the statute or regulation has legal consequences for plaintiff separate and apart from any agency proceedings, and the Supreme Court repeatedly has held that parties are not expected to violate legal commands for the opportunity to trigger constitutional review of statutes. That is the case here: whether or not the STB ever became involved, PRIIA placed an immediate legal duty on MBTA to negotiate a new agreement with Amtrak implementing the Policy, and imposed financial consequences if MBTA failed to do so (and the Policy itself imposes more). As in cases like *Free Enterprise Fund*, MBTA did not need to wait to see if the STB would become involved before challenging the legal duty to negotiate imposed by PRIIA. No case has found that district courts were stripped of their jurisdiction on similar facts.

Third, unlike those cases in which courts have found that Congress implicitly intended to strip district courts of their federal question jurisdiction, the STB has no expertise bearing on MBTA’s constitutional and APA claims. Indeed, STB will not even hear those claims.

Fourth, this Court’s exercise of its jurisdiction to consider MBTA’s constitutional and APA claims will promote efficiency by allowing the parties to resolve threshold challenges to the NECC and the Cost Sharing Policy before resources are wasted on a fact-intensive administrative proceeding at the STB. This is not a case, involving an administrative

adjudicatory system of broad applicability (*e.g.*, employment claims by federal employees), in which allowing district court challenges would eliminate efficiencies Congress hoped to achieve.

Finally, it is noteworthy that no party or judge has expressed concerns with the district court's exercise of jurisdiction over plaintiffs' constitutional claims in the AAR litigation. That is so even though PRIIA's provision addressing Amtrak's contracts with the freight railroads, like its provision addressing Amtrak's contacts with state commuter rail agencies, provides for possible proceedings before the STB and provided what STB "shall" do in such a proceeding.

For these reasons, the Court should reject NECC's claim that Congress stripped the Court of its ordinary federal question jurisdiction over MBTA's claims. The Court also should reject NECC's alternative argument to stay this proceeding in deference to the STB. The threshold issues MBTA raises here should be resolved before resources are wasted in agency proceedings.

BACKGROUND

I. THE ATTLEBORO LINE AGREEMENT

MBTA owns the rail line between Boston and the Rhode Island border (the "Attleboro Line") and, pursuant to the "Attleboro Line Agreement," makes that line available to Amtrak. Compl. ¶¶ 1, 20. Under the Agreement, MBTA also provides Amtrak the right to determine the priority of train dispatching, a right that the parties agreed is "highly" valuable. *Id.* ¶ 28. In exchange, Amtrak agreed to provide MBTA with no-charge dispatch and maintenance services on the Attleboro Line and with access to an Amtrak-owned line in Rhode Island. *Id.* ¶¶ 26-31.

II. PRIAA AND THE CREATION OF THE NECC

Congress enacted PRIAA in 2008 in order to, *inter alia*, improve the finances of Amtrak, a for-profit rail carrier that is an agency of the federal government. Compl. ¶ 35; *U.S. Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1231-33 (2015). The Act pursued this goal through several novel – and unconstitutional – provisions. For example, PRIAA § 207 allowed

Amtrak to participate in the establishment of performance metrics and standards intended to enforce Amtrak's priority over freight trains. Under the statute, Amtrak and freight rail carriers were directed to incorporate the metrics and standards into their agreements "to the extent practicable," *AAR*, 821 F.3d at 33, with Amtrak able to petition the STB for an award of damages if a freight carrier is responsible for Amtrak's failure to meet the performance standards. Earlier this year, the D.C. Circuit held that § 207 was unconstitutional under the Due Process Clause and the Appointments Clause. *Id.* at 23.

This case involves a constitutional challenge to a closely analogous provision, PRIIA § 212, as codified at 49 U.S.C. § 24905 and amended by the FAST Act. Section 212 created the NECC, a body consisting of members from Amtrak, the Department of Transportation, and the Northeast Corridor States. 49 U.S.C. § 24905. Nine members are "designated by, and serv[e] at the pleasure of" the chief executive officers of the States (including the District of Columbia) in the Northeast Corridor. *Id.* § 24905(a)(1)(C). In addition, four NECC members represent Amtrak, and five represent the U.S. Department of Transportation. *See id.* § 24905(a)(1)(A)-(B); <http://www.nec-commission.com/the-commission/members/>.

NECC is charged with several duties by PRIAA, including to "develop a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation." *Id.* § 24905(c)(1)(A). Congress's direction to develop this policy represented a significant break from the status quo. Amtrak and state commuter rail agencies have traditionally entered bilateral agreements governing compensation for track access, maintenance, and station operations. Compl. ¶ 24. In most states along the Corridor, Amtrak owns the rail lines and provides state commuter rail agencies with access for their local operations. *Id.* ¶ 23. By contrast, in Massachusetts (and in certain parts of Connecticut and New

York), the track is owned by the State and Amtrak must negotiate for access. *Id.* ¶¶ 20, 23.

Congress intended the Cost Sharing Policy to upend this structure. The statute provides that, retroactive to October 1, 2015, existing financial arrangements are abrogated and Amtrak and state commuter rail agencies “shall implement new agreements for usage of facilities or services based on the [Cost Sharing Policy].” 49 U.S.C. § 24905(c)(2). This dictate, which predetermines contractual terms, represents a clear exercise of “regulatory power.” *AAR*, 821 F.3d at 32-33. In addition, until state commuter rail agencies enter new agreements that implement the Cost Sharing Policy, they are ineligible to receive certain federal grants for capital projects. *See* 49 U.S.C. § 24911(e)(1).

The mandate to “implement new agreements,” and the consequences of failing to do so, do not require any action by the STB. If Amtrak and the state commuter rail agencies fail to implement new agreements, however, the statute provides for an adjudication by the STB to determine “appropriate compensation.” 49 U.S.C. § 24905(c)(2). The substantive rule of decision is provided by the Cost Sharing Policy, as the STB is told to “determine the appropriate compensation” for usage of facilities and services “after taking into consideration the [Cost Sharing Policy], as applicable,” and then to “enforce its determination on the party or parties involved.” *Id.* The statute provides no criteria for the STB to determine “appropriate compensation” other than by applying NECC’s Cost Sharing Policy. *Id.*

The STB cannot rule on challenges to § 24905 or to the Policy. Compl. ¶ 45. Indeed, the STB will not review a statute’s constitutionality. *See, e.g., Amtrak – Conveyance of B&M in Conn. River Line in VT & NH*, 4 I.C.C. 2d 761, 771 (1988) (“*Amtrak/B&M*”) (explaining that constitutional challenges to a statute should be filed “in an appropriate district court”). Only NECC, not the STB, can revise the Cost Sharing Policy. *See* 49 U.S.C. § 24905(c)(3).

III. CREATION OF THE COST SHARING POLICY AND THIS LITIGATION

NECC spent three years developing the Cost Sharing Policy before adopting an interim policy in December 2014. Compl. ¶¶ 49, 50. NECC did not publish notice in the Federal Register with respect to the draft Policy or call for public comments. *Id.* ¶ 50. On September 17, 2015, NECC adopted the final Policy. *Id.* ¶ 51. The Policy produces an enormous windfall for Amtrak and five of the nine state commuter rail agencies at the expense of other state agencies like MBTA, which are expected to transfer millions of dollars to Amtrak. *Id.* ¶¶ 53, 54. Indeed, Amtrak is estimated to save about \$56 million in the first fiscal year under the Policy, while MBTA is expected to pay an additional \$28.8 million. *Id.* The Policy arrives at these figures by gutting the terms of existing bilateral agreements like the Attleboro Line Agreement. For example, while the Attleboro Line Agreement is a barter arrangement, Amtrak now claims that the Policy requires MBTA to pay it millions of dollars for the maintenance and dispatch services it provides, while at the same time the Policy does not address whether Amtrak must pay MBTA compensation for its access and dispatch rights under the Agreement. *Id.* ¶¶ 57-59.

The Cost Sharing Policy indicates that parties' "financial obligations ... commence on October 1, 2015" (§ 2.5), and provides for possible "financial penalties" against state commuter rail agencies that do not come to heel and enter new agreements as of that effective date, including potential interest charges and additional cost reimbursements (§ 2.6; *see* Compl. ¶ 60).

Amtrak has taken the position that MBTA is legally required to amend the Agreement (or enter a new agreement) to implement the Policy. Compl. ¶ 61. After the interim Cost Sharing Policy was finalized on September 17, 2015, Amtrak asserted that MBTA would owe Amtrak \$28.8 million in cost-sharing payments. *Id.* ¶ 62. MBTA refused Amtrak's demands because they are inconsistent with the Attleboro Line Agreement and because MBTA believes that § 24905 is unconstitutional and the Cost-Sharing Policy is invalid. *Id.* ¶ 64.

MBTA filed suit in this Court, bringing claims alleging the unconstitutionality of § 24905, the invalidity of NECC's Cost Sharing Policy, and Amtrak's breach of the Attleboro Agreement. As relevant here, MBTA alleges (¶¶ 65-76, Counts One and Two) that NECC's composition violates the U.S. Constitution's Appointments Clause and basic separation-of-powers principles, because NECC exercises federal executive authority even though half of its members were not appointed by, and are not removable by, the President or any other member of the Executive Branch. In addition, the Complaint alleges (¶¶ 77-82, Count Three) that § 24905 violates due process because NECC is not a neutral arbiter for allocating costs and revenues, but instead is controlled by representatives (from Amtrak and the Northeast Corridor States) that have "skin in the game." *AAR*, 821 F.3d at 23 (holding that PRIIA § 207 violates due process for this reason). Finally, the Complaint alleges (¶¶ 83-87, Count Four) that the Cost Sharing Policy was issued in violation of the APA, 5 U.S.C. § 553, because NECC failed to provide notice and allow for public comment before issuing its final rule.

MBTA agreed to delay service of the Complaint while the parties tried to negotiate a resolution. *See* Dkt. No. 12 at 2-3. Because the parties did not settle, MBTA served the Complaint on June 24, 2016. That same day Amtrak filed an action in the STB, petitioning the Board to determine the compensation owed by MBTA "in accordance with" the Cost Sharing Policy. *See* NECC Br. Ex. A at 1. MBTA has petitioned the STB to hold the proceeding in abeyance pending this litigation. The STB has not yet ruled on that petition.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER MBTA'S CLAIMS

Federal district courts ordinarily have subject-matter jurisdiction to review constitutional challenges to federal statutes and claims that final agency action violated the APA. *See* 28 U.S.C. § 1331. In rare instances, however, typically involving either widely-applicable statutory

rights of action (*e.g.*, employment claims by federal employees) or widely-applicable administrative enforcement proceedings (*e.g.*, Securities & Exchange Commission (“SEC”) enforcement actions), Congress strips district courts of that jurisdiction and instead channels all litigation through federal agencies and then to courts of appeals. To determine whether Congress has divested the district courts of power to hear claims otherwise within their jurisdiction, courts examine the underlying statute’s “text, structure, and purpose,” *Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126, 2133 (2012), and “presume that Congress does not intend to limit jurisdiction,” *Free Enter. Fund*, 561 U.S. at 489.

A. NECC’s Argument That There Is Explicit Preclusion Of District Court Jurisdiction Has No Support In The Statutory Text

NECC begins its argument by asserting that “[i]t is fairly discernable that Congress intended challenges to the cost allocation policy to be handled by the STB and courts of appeal” – indeed, that there is “explicit language of preclusion” of district court jurisdiction in § 24905 – because Congress provided that “the STB *shall* determine the appropriate compensation” for new bilateral agreements “after taking into consideration the [Cost Sharing Policy], as applicable.” NECC Br. 9 (quoting § 24905(c); emphasis in NECC Brief).

NECC’s brief repeats the word “shall” like a mantra, but that single word, in context, cannot bear the weight that NECC places on it. The statute does not say that constitutional or APA challenges to § 24905 or the Cost Sharing Policy shall be brought before the STB or shall be heard only by a court of appeals following STB proceedings. That matters – when Congress intends to explicitly strip district courts of their federal question jurisdiction and channel matters to agencies and the courts of appeals, it knows how to do so. *E.g.*, *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (Medicare Act provides that “[n]o action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section

1331 or 1346 of title 28 to recover on any claim arising under this subchapter,” thereby limiting beneficiaries to an administrative scheme (emphasis omitted)). All that § 24905(c) says is what the STB “shall” do under § 24905(c), which is “determine the appropriate compensation” in a new rail usage agreement after “taking into consideration” the Cost Sharing Policy. There is no language in § 24905(c) that remotely authorizes the STB to consider MBTA’s constitutional and APA challenges to § 24905 and another agency’s adoption of the Cost Sharing Policy; in fact, STB will not hear those claims. *See Amtrak/B&M*, 4 I.C.C. 2d at 771 (STB will not hear constitutional claims); 5 U.S.C. § 706(2)(D) (APA review of an agency rulemaking is in the courts, not another agency). Thus, the STB cannot ignore the Cost Sharing Policy or void it; it cannot, as NECC says, consider “challenges to the cost allocation policy” at all. All that STB can do is take the Policy into consideration and set compensation.

The Supreme Court’s decision in *Free Enterprise Fund* is dispositive of NECC’s reliance on the single word “shall.” In that case, an accounting firm filed an action in district court alleging (much as MBTA alleges here) that Congress’s conferral of regulatory authority on the newly-created Public Company Accounting Oversight Board violated the Appointments Clause and separation-of-powers principles because Board members were appointed by the SEC and were insulated from Presidential oversight. The government argued that the district court lacked jurisdiction because the Sarbanes-Oxley Act empowers the SEC to review the Board’s rules and sanctions, and then channels appeals of SEC orders directly to a court of appeals. 561 U.S. at 489. It relied on 15 U.S.C. § 7217, which provides (emphases added) that the SEC “*shall* have oversight and enforcement authority over the Board,” “[n]o rule of the Board *shall* become effective without prior approval of the Commission,” that “[t]he Commission *shall* approve a proposed rule” under specified circumstances, and that another statute “*shall* govern the review

by the Commission of final disciplinary sanctions imposed by the Board,” and on 15 U.S.C. § 78y, which directs appeals of SEC orders (not Board orders) to the courts of appeals.

Rejecting the government’s jurisdictional argument, the Supreme Court explained that this statutory text, notwithstanding its reiteration of the word “shall,” “does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly.” *Free Enter. Fund*, 561 U.S. at 489 (citation omitted). The Court went on to hold that the accounting firm’s challenge to the Board’s very “existence” need not wait upon any “[SEC] orders or rules from which review might be sought.” *Id.* at 490. The Court acknowledged that it was theoretically possible that the firm might be able to raise its claims by appealing an SEC order. But the Court concluded that Congress did not *mandate* that parties follow the paths to review proposed by the government. *Id.* at 490-91. So too here; that MBTA *may* be able to challenge § 24905 and NECC’s APA failings in a challenge to an STB order (which is far from clear)¹ does not mean that it *must* await an STB order to do so. In the absence of evidence that Congress intended to preclude district court jurisdiction – and there is no evidence, “explicit” or otherwise, of such intent – MBTA can challenge § 24905 and the Policy in district court.

While this case is much like *Free Enterprise Fund*, it is nothing like *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the lead case on which NECC relies in its brief. There, petitioner filed a lawsuit to challenge an agency regional enforcement office’s “interpretation” of the substantive statute it administered and its integration with supposedly competing dictates in another law; it did not challenge the constitutionality of the underlying substantive law. *Id.* at

¹ It is not obvious that appellate review of all of MBTA’s claims would be available. NECC relies on case law providing that “[a] party seeking judicial review of an administrative action may ordinarily draw into question the constitutionality of the statute under which the agency acted.” NECC Br. 13. But MBTA is challenging the authority of NECC (not the STB), and NECC would not even be a party in an appeal of the STB’s final order. NECC Br. 14 n.2. Moreover, MBTA’s Complaint not only raises a constitutional challenge to § 24905, but also alleges that NECC violated the APA. *See* Compl. ¶¶ 83-87. NECC cites no authority for a court of appeals to review for APA compliance the actions of an agency not actually before it.

213-14. In those circumstances the Supreme Court held that the regional office's interpretation of the laws should be tested first within the administrative review scheme (which might result in rejection of the regional office's interpretation) and not in district court, noting the extensive legislative history (not present here) establishing the need for streamlined enforcement procedures. *Id.* at 211-12. This case, however, does not involve arguments over actual application of the Cost Sharing Policy to the Attleboro Line. Here, MBTA is challenging the Policy's very existence, including the constitutionality of the law establishing the agency that created the Policy and the procedure by which the Policy was adopted. *Thunder Basin Coal*, unlike *Free Enterprise Fund*, is not directed to this type of case.

Overall, NECC's brief assumes that if plaintiff may challenge a statute or agency rule after an agency proceeding, then plaintiff must do so. NECC Br. 11-14. That argument is contrary to the case law and the presumption that district courts retain their jurisdiction to rule on constitutional challenges to federal government actions. The cases clearly demonstrate that even assuming a court of appeals has jurisdiction to review challenges to § 24905 and NECC's Cost Sharing Policy following a detour through the STB, that does not mean that Congress intended to foreclose district court review too. As in *Free Enterprise Fund*, MBTA may bring its constitutional and APA challenge to § 24905 and to the Cost Sharing Policy in district court.

B. This Court Possesses Jurisdiction In Light Of Section 24905's Immediate And Ongoing Legal Mandate

District court jurisdiction over federal question claims is implicitly restricted in deference to agency proceedings only as to "claims [that] are of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin Coal*, 510 U.S. at 212. A district court's jurisdiction has not been stripped in deference to agency review "if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review

provisions’; and if the claims are ‘outside the agency’s expertise.’” *Free Enter. Fund*, 561 U.S. at 489 (citation omitted).

Most importantly, courts do not find that district court jurisdiction to hear challenges to a statute or rule has been stripped if the law has legal consequences for the plaintiff separate and apart from the agency proceedings. In such cases, plaintiff can bring its challenge in district court and need not wait to see whether, or how, the agency procedure unfolds. That is because parties burdened by a law are not typically required to violate the law – compounding their potential liability – thereby daring the government to pursue an administrative enforcement action. Rather, they are entitled to bring a challenge to the rule – or to the statute authorizing the rule – immediately, in district court. *See, e.g., Sackett v. EPA*, 132 S. Ct. 1367, 1372-74 (2012) (holding that the petitioner could bring an immediate challenge to an agency’s compliance order and rejecting the government’s argument under *Thunder Basin Coal* that pre-enforcement judicial review was precluded). This principle bears even greater force when plaintiff wants to challenge a rule that was enacted by one agency but will be enforced by a second agency. *See id.* at 1372 (explaining that later review of a second agency’s action “does not ordinarily provide an ‘adequate remedy’ for action already taken by another agency”); *see also U.S. Army Corps of Eng’rs v. Hawkes*, 136 S. Ct. 1807, 1815 (2016) (holding that the respondent could bring an immediate challenge to the U.S. Army Corps of Engineers’ determination that it was required to obtain a discharge permit, rather than wait to defend against an EPA enforcement action).

As set forth *supra*, p. 6, under § 24905 NECC’s Cost Sharing Policy resulted in legal consequences for MBTA and other state commuter rail agencies as soon as it was finalized by NECC – consequences that did not depend on any action by the STB. The state commuter rail agencies now have an ongoing duty to “implement new agreements” with Amtrak. 49 U.S.C.

§ 24905(c)(2). As with the similar duty under § 207 that was at issue in *AAR*, this “legal duty” is immediately challengeable. *See AAR*, 821 F.3d at 33. MBTA’s Complaint specifically challenges the constitutionality of that legal duty: Counts One through Four allege that “[t]he Commission exercises executive authority” in violation of the constitution because, *inter alia*, “PRIIA requires Amtrak and state commuter rail agencies to implement the Cost Sharing Policy in new contracts,” and further allege that because the “Policy ... is void *ab initio*, MBTA need not enter a new contract implementing the Policy.” Compl. ¶¶ 67, 70, 75, 81, 85. Moreover, the mandate to implement the Cost Sharing Policy has real practical bite, whether or not the STB takes any action: If state commuter rail agencies are not “in compliance with section 24905(c)(2),” the statute states they are ineligible for grants for capital projects under the FAST Act’s Federal-State partnership program. 49 U.S.C. § 24911(e)(1); *e.g.*, Compl. ¶ 67. In addition, under the Cost Sharing Policy, state commuter rail agencies risk accruing additional costs if they do not implement new agreements by the Policy’s October 1, 2015 effective date. *See Cost Sharing Policy* § 2.6; Compl. ¶ 60. NECC ignores these legal consequences from adoption of the Cost Sharing Policy, never addressing them in its argument.

This type of ongoing legal duty is not seen in the cases on which NECC relies; instead, these cases involved administrative proceedings to address the consequences of past conduct. For example, in *Elgin*, federal employees wanted to challenge the constitutionality of the Military Selective Service Act, under which their employment had been terminated based on their past conduct (willful failure to register for the draft); the Supreme Court held that the employees were required to exhaust their administrative appeals before raising their constitutional claim in a court of appeals. *See* 132 S. Ct. at 2130. Similarly, the decisions that NECC cites involving challenges to administrative enforcement actions by the SEC all involve

the same fact pattern: the SEC alleges that the plaintiff's past conduct violated the securities laws, and the plaintiff tries to enjoin the SEC from imposing sanctions in an administrative forum. *See, e.g., Tilton v. SEC*, 824 F.3d 276, 280 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 766 (7th Cir. 2015). These cases do not involve challenges to the validity of a statute or an agency rule requiring *prospective* compliance with a legal duty, and as a result courts in these cases have not called on plaintiffs to violate the law in order to obtain review. By contrast, in *Free Enterprise Fund*, where the plaintiff would have had to violate the law to pursue review through an agency-first path, the Court held that it could instead bring a declaratory judgment claim in district court. *See* 561 U.S. at 491.

At the end of the day, the STB cannot provide MBTA with all of the relief it seeks in this action, such as freedom from the ongoing statutory duty to “implement [a] new agreement[.]” with Amtrak “based on the [Cost Sharing Policy].” *Compare Elgin*, 132 S. Ct. at 2136-40 (noting that the relief sought – reinstatement of federal employment – was of a kind that the Merit Systems Protection Board “routinely affords”). In the words of *Free Enterprise Fund*, requiring state commuter rail agencies to implement new agreements embodying a policy adopted by one agency in violation of the APA under a law that is unconstitutional, before litigating application of the policy before a second agency that cannot entertain challenges to the policy or the statute underlying it, would be “an odd procedure for Congress to choose” as the exclusive means to challenge the statute and policy. 561 U.S. at 490. For this reason, the Court should conclude that Congress did not strip it of jurisdiction over MBTA's claims.

C. The STB Has No Relevant Expertise Bearing On MBTA's Claims

NECC argues (at 10, 16-17) that the STB can somehow bring its “expertise” “to bear” on MBTA's claims. That makes no sense, because the STB has no “expertise” in resolving constitutional challenges to statutes (indeed, it will not even entertain such challenges) or APA

challenges to another agency's rulemaking. *See Free Enter. Fund*, 561 U.S. at 491 (“Petitioners’ constitutional claims are also outside the [SEC’s] competence and expertise.”).

The STB does even not have particular “expertise” in application of the Cost Sharing Policy, which is not only new, but a defined formula with specific inputs. *See Amtrak Mot. Ex. A § 5*. Indeed, the Cost Sharing Policy bears no resemblance to the two statutory cost-allocation provisions that the STB does have experience and expertise administering, which direct STB to determine compensation to be paid by an *accessing carrier* to the owner of a rail segment in exchange for access. *See* 49 U.S.C. § 24308(a)(2); *id.* § 24903(c)(2). Indeed, only two years ago Amtrak argued and the STB held that cost-allocation agreements entered pursuant to PRIIA are “not relevant” to traditional compensation disputes under § 24308.² Under neither § 24308 nor § 24903 is the STB charged with determining compensation that a *track owner* should be forced to pay to an accessing carrier, when the owner has decided – simply as a matter of business convenience – to have the accessing carrier provide certain services (*i.e.*, maintenance) rather than perform them itself (or have some third party provide them). The STB’s experience administering those rail-access statutes thus provides the STB no expertise in determining how much MBTA, as the rail owner, should be required to pay Amtrak for services that MBTA always has the alternative of either performing itself or sourcing elsewhere.

In making its “expertise” argument, NECC suggests (at 17) that the STB could moot MBTA’s claims by deciding that MBTA does not owe Amtrak *any* compensation pursuant to § 24905(c), for example if competing claims by MBTA fully offset Amtrak’s demands. That suggestion is based on a simplistic and incorrect understanding of how § 24905 works. Even if the STB determines compensation in an amount that equals zero for the *current* fiscal year (a

² *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(A) – Canadian Nat’l Ry. Co.*, Docket No. FD 35743, 2014 WL 1492310, at *3, *5 (STB Apr. 15, 2014).

result that NECC has not shown is remotely likely), there is no guarantee that application of the Policy and valuation of MBTA's offsets would result in a favorable result for MBTA in future fiscal years.³ A favorable outcome at the STB for this fiscal year would not, moreover, relieve MBTA of its ongoing statutory obligation to "implement [a] new agreement[]" with Amtrak "based on the [Policy]," an obligation that is unconstitutional for the reasons alleged in the Complaint. Thus, in contrast to a case like *Elgin*, where the agency could decide the plaintiffs' employment claims in a way that could moot their constitutional arguments, *see* 132 S. Ct. at 2140, here the STB cannot resolve any proceeding in a manner that would moot MBTA's claims.

D. This Court's Exercise Of Jurisdiction Will Promote Efficiency

Finally, MBTA's claims are substantially different from those raised in the cases that NECC invokes, because immediate judicial review will promote rather than hinder efficiency. In *Elgin*, for example, the Supreme Court explained that Congress had created a separate review process for federal employee claims in order to replace a "wasteful and irrational" process in which hundreds of thousands of federal employees could file "actions in district courts across the country," leading to "wide variations" in decisions "issued on the same or similar matters." 132 S. Ct. at 2135 (quoting *United States v. Fausto*, 484 U.S. 439, 444-45 (1988)). The Court reasoned that channeling all employee actions to the MSPB (regardless of the employee's specific legal theory) was necessary to protect Congress's integrated scheme of review. *Id.* at 2135. Similarly, in the SEC cases, allowing every defendant in the country accused of violating the securities laws to side-step administrative review would undermine Congress's decision to authorize the SEC to bring actions in an administrative forum. *See, e.g., Tilton*, 824 F.3d at 291.

³ NECC denies that the STB is bound by the Cost Sharing Policy, stating that while the STB must take the Policy "into consideration" it need not follow it. NECC Mem. 18 n.3. The statute, however, does not provide the STB with *any other factors* to take "into consideration" aside from the Policy. Given this omission, it is clear that the STB must implement the Policy, with STB's discretion limited to resolving disputes over application of the Policy in particular cases; otherwise, § 24905 is unconstitutional for its failure to provide the STB with an intelligible principle for resolving disputes before it. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

There is no comparable purpose served by diverting MBTA's facial challenges through the STB. Section 24905(c) applies to just ten entities that could file suit (Amtrak and nine state commuter rail agencies), not to the entire federal workforce or to anyone who trades securities. Adjudicating MBTA's challenge to NECC's regulatory authority and its Cost Sharing Policy in district court will not open the floodgates to future litigation. To the contrary, resolving MBTA's threshold challenges to § 24905(c) will promote efficiency. If MBTA prevails, then this action will save substantial federal and state resources by avoiding a wasteful process in which the parties would need to spend time and money negotiating new agreements implementing the unconstitutional Policy and fighting over its application at the STB.

E. This Action Closely Resembles The Successful Challenge To Section 207 Of PRIIA, Which Began In Federal District Court

This Court would be sticking to a path already blazed by others in exercising jurisdiction over MBTA's claims. NECC's brief never mentions the freight railroads' challenge to the constitutionality of PRIIA § 207, which culminated in the D.C. Circuit's *AAR* decision. NECC therefore never mentions that *AAR* began, like this case, in a district court. *See Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 865 F. Supp. 2d 22 (D.D.C. 2012). Having not mentioned that fact, NECC necessarily never attempts to explain why the freight railroads' constitutional challenge to § 207 was allowed to proceed in district court but MBTA's challenge to § 212 should not be, an effort that would be fruitless in any event.

As noted above, p. 5, *supra*, the freight railroads' challenge to § 207 is similar to MBTA's challenge to PRIIA § 212. PRIIA § 207 directed Amtrak and the Federal Railroad Administration to develop performance metrics and standards that Amtrak and freight-rail operators were then required to incorporate into their track usage agreements "[t]o the extent practicable." *AAR*, 821 F.3d at 33. Whether or not the parties incorporated agreements, PRIIA

§ 213 further provided that “upon the filing of a complaint by Amtrak” or others, the STB was to “initiate an investigation” to determine whether a freight-rail operator was responsible for material deviations by Amtrak from the performance standards, and to “award damages against the [freight] host railroad” and in favor of Amtrak if the former was found responsible for Amtrak’s delays. PRIIA § 213(a); *see AAR*, 821 F.3d at 33. Thus, just as PRIIA § 212 provides for the development of the Cost Sharing Policy, requires that Amtrak and state commuter rail agencies enter new agreements implementing the Policy, and provides for the STB to adjudicate a compensation amount based on the Policy in the event new agreements are not reached, PRIIA §§ 207 and 213 provides for development of performance metrics and standards, requires Amtrak and the freight railroads to try to incorporate the standards into their contracts, and provides for proceedings at the STB in the event the performance standards are violated.

The freight railroads challenged § 207 as unconstitutional under, *inter alia*, the Due Process Clause and the Appointments Clause. *AAR*, 821 F.3d at 23. Consistent with NECC’s theory in this case, the potential for an STB adjudicatory proceeding under PRIIA § 213 should have precluded a district court challenge to § 207; after all, the freight railroads always could challenge the statute on a petition to a court of appeals after an unfavorable STB decision. *See* 28 U.S.C. §§ 2321, 2342(5). But that is not how the action unfolded. Rather, a trade association for the freight railroads filed suit in district court to challenge the constitutionality of § 207, and its case proceeded to the D.C. Circuit, the Supreme Court, and back to the D.C. Circuit on remand. *See AAR*, 821 F.3d at 24. At no point did the government or the courts question jurisdiction – despite the courts’ independent duty to confirm their own jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

In the wake of *AAR*, the government has become more aggressive about challenging

jurisdiction. But for the reasons given above, its arguments in this case lack merit for reasons that would have applied equally to the freight railroads' claims in *AAR*.

II. THE COURT SHOULD DENY NECC'S STAY REQUEST

This Court should deny NECC's alternative request for a stay pending resolution of Amtrak's STB petition, which was filed months after MBTA's Complaint. "[S]tays cannot be cavalierly dispensed: there must be good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and balanced." *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1155 (1st Cir. 1992). When the delay from a stay could prejudice the opposing party, "[t]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward." *Steele v. Bongiovi*, 784 F. Supp. 2d 94, 97 (D. Mass. 2011) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936)). Moreover, "[a]s a general rule" when two related actions have been filed, "the suit filed first should have priority." *Quality One Wireless, LLC v. Goldie Grp., LLC*, 37 F. Supp. 3d 536, 540-41 (D. Mass. 2014).

Here, the most efficient course is to allow this first-filed case to go forward. This action raises a threshold challenge to the Cost Sharing Policy, which, if successful, would eliminate the basis for the second-filed STB proceeding and would spare the parties and the Board the time and expense of resolving disputes over application of the Policy to the Attleboro Line. Moreover, the STB proceeding is only at the initial pleading stage, and it will certainly take well over a year before the full process (including judicial review) is complete. During that time, MBTA will continue to suffer adverse consequences from the Policy. *See pp. 6, 13-14, supra.*

CONCLUSION

The Court should deny NECC's motion to dismiss and its request to stay the litigation.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), MBTA respectfully requests oral argument.

Dated: September 20, 2016

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CERTIFICATE OF SERVICE

I, Kevin P. Martin, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 20, 2016.

/s/ Kevin P. Martin