

**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION**

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In the Matter of:)	
)	
COMPETITIVE PASSENGER RAIL)	PUBLIC HEARING
SERVICE PILOT PROGRAM)	
)	

U.S. Department of Transportation
1200 New Jersey Avenue, SE
Conference Center
Washington, DC 20590

Wednesday
September 7, 2016

The above-entitled matter came on for
hearing, pursuant to notice.

BEFORE: PAUL NISSENBAUM, Hearing Officer
Associate Administrator for Railroad
Policy and Development

A P P E A R A N C E S

FRA TECHNICAL PANEL:

BETH NACHREINER, Division Chief, Rail Policy
and Development

BRANDON WHITE, Long Distance Passenger Train
Oversight Manager

ZEB SCHORR, Deputy Assistant Chief Counsel

COMMENTATORS:

RAY CHAMBERS, President of the Association
of Independent Passenger Rail Operators

ED ELLIS, President of Iowa Pacific

JIM COSTON, Chairman of Corridor Capital
of Chicago

LONNIE BLAYDES, Herzog Transit Services

ROSS CAPON, American Association of Private
Railroad Car Owners

PHILLIP BELL, Erie Lackawanna Railroad

RICHARD EDELMAN, BMWED, BRS and SMART

JOHN RISCH, Legislative Director for SMART
Transportation Division

LARRY WILLIS, Secretary-Treasurer,
Transportation Trades Department, AFL-CIO

RICHARD SLATTERY, Amtrak

MALCOLM KENTON, National Association of
Railroad Passengers

JOHN HEFFNER, Attorney for Iowa and Pacific

ALSO PRESENT:

ERIC FORBES, AIPRO
JARED ROBERTS, Amtrak
CHARLIE HOGUE, BMWED
GREGG BAXTER, First Rail
BOB VANDERCLUTE, First Rail
GREG HYNES, SMART
MIKE SHERLOCK, Trans Dev
COLE SCANDAGLIA, TTD
BRENDAN DANAHER, TWU
JENNIFER MACDONALD, AAR
SARAH BELL, Steptoe & Johnson
LAUREN GARDNER, Politico
BOB SCHWARTZ, First Rail
MICHAEL ALLEN, W.R. Allen Associates
DOUG GASCON
ALYCIA WILLIAMS

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P R O C E E D I N G S

(1:45 p.m.)

1
2
3 HEARING OFFICER NISSENBAUM: Okay. Well
4 good morning everyone or good afternoon, I guess.
5 Still on West Coast time. Thank you for attending this
6 Public Hearing on Federal Railroad Administration's
7 proposed rule to implement the Competitive Passenger
8 Rail Service Pilot Program, which is mandated by
9 Section 11307 of the FAST Act.

10 My name is Paul Nissenbaum. I'm Associate
11 Administrator for Rail Policy and Development here at
12 FRA, and I'll be the Hearing Officer for today's
13 proceeding.

14 For the record, we are in the Conference
15 Center of the U.S. Department of Transportation
16 Headquarters, 1200 New Jersey Avenue, Southeast,
17 Washington, DC.

18 And we're going to begin with a safety
19 briefing provided by Brandon White.

20 MR. WHITE: Hi, all. So good afternoon. We
21 are as Paul said, in the Conference Center, Room 6 of
22 DOT Headquarters. If an alarm were to sound, we would
23 listen to the PA announcement for further instructions.
24 If this is a shelter in place situation, we would stay

1 here. If emergency requires an evacuation, we would
2 exit this room. We would go out to the main atrium,
3 and we would turn either left or right, preferably
4 right, it's a little faster, go out the doors to ground
5 level and walk straight towards the water, which is
6 about southeast of here. FRA folks all meet up by the
7 light footbridge that crosses a little swimming pool
8 for kids. It's just about a block and a half that way.
9 We will take roll there. So please get there as
10 quickly as possible. In the event of medical
11 emergency, we will contact security at 60333 or call
12 911 for medical service. Until respondents arrive, we
13 need to assist and stabilize anyone that is in need.

14 Please raise your hand if you are first aid
15 or CPR trained and are willing to help.

16 Okay. An AED is available. The closest one
17 is immediately across the atrium through the doors by
18 the Docket Center. Says Dockets right on the door.
19 Pretty easy to find.

20 Restrooms, as I mentioned already, are
21 located right outside this door. Turn right. It's
22 about 40 feet down that way.

23 And at this point if you could place your
24 cell phones on vibrate, turn them off.

25 Last thing, I'm looking around the room for

1 tripping hazards. There aren't any, so I think it
2 should be pretty easy to egress should we need to.

3 Any questions? Okay.

4 HEARING OFFICER NISSENBAUM: All right.

5 MR. WHITE: So I'll try to speak up. We'll
6 all try to speak up. The room does not have mics
7 equipped. There will be mics for the speakers. So
8 everything that's going to be transcribed will be heard
9 just fine at the podium and up here, but we'll try to
10 be loud for those in the back.

11 Okay. Sorry, Paul.

12 HEARING OFFICER NISSENBAUM: Here's fine.
13 All right, thanks, Brandon.

14 There's a sign-up sheet here, and everyone
15 should sign and indicate if you'd like to speak at
16 today's hearing. If you've not already done so, please
17 sign in so that we do have an accurate attendance
18 record for today's hearing, and again indicate if you
19 wish to speak.

20 In the hearing notice for this proceeding,
21 FRA asked that any person wishing to participate in the
22 public hearing should, as a courtesy, notify FRA at
23 least five working days prior to the date of the
24 hearing and submit the oral statement that he or she
25 intends to make, and to provide certain identifying

1 information. We have subsequently received requests
2 from representatives from a number of entities, and I'm
3 going to kind of read through them, and I think we're
4 going to take testimony in this order: First from
5 AIPRO, the Association of American Independent
6 Passenger Operators; Iowa Pacific; Corridor Capital;
7 Herzog; the American Association of Private Railroad
8 Car Owners; the Erie and Lackawanna Railroad
9 Corporation; Mooney, Green representing the BMW, BRS
10 and SMART; SMART TTD; and Amtrak.

11 And I thank you and those other interested
12 parties who took the time to be here today for this
13 hearing. Again, if others would like to testify,
14 please indicate that on the sign-in sheet so that we
15 can make sure we get you into the program.

16 Purpose of today's hearing is to provide
17 interested parties the opportunity to offer comments
18 regarding the notice of proposed rulemaking for the
19 Competitive Passenger Rail Service Pilot Program
20 required by the FAST Act. On June 22, 2016, FRA
21 published the proposed rule to implement a Pilot
22 Program for competitive selection of eligible
23 petitioners in lieu of Amtrak to operate not more than
24 three long distance routes operated by Amtrak.

25 FRA received one request to hold today's

1 hearing, and to date has received 10 written comments
2 about the proposed rule.

3 FRA extended the comment period to October 7,
4 2016, one month from today, in order to accommodate
5 this hearing and afford interested parties the chance
6 to submit comments in response to the views or
7 information that's provided today.

8 We look forward to reviewing and considering
9 all of the comments as we develop the final rule for
10 this program. We appreciate the time, effort and
11 resources that you've put in to helping us form the
12 final rule.

13 Before we open the hearing for comments, I
14 want to introduce the FRA representatives that are
15 serving as the Technical Panel today. To my right is
16 Beth Nachreiner, who is the Division Chief for
17 Passenger Rail Policy in my office, Rail Policy and
18 Development. Brandon White at the end is our Long
19 Distance Passenger Train Oversight Manager. And then
20 Zeb Schorr is our Deputy Assistant Chief Counsel in our
21 Office of Chief Counsel.

22 All right, Zeb.

23 MR. SCHORR: Today's hearing will be
24 conducted in accordance with the *Rules of Practice* of
25 the Federal Railroad Administration published in Title

1 49 of the Code of Federal Regulations at Part 211.
2 Today's hearing will be informal. It is not an
3 adversarial proceeding. Rules of evidence do not
4 apply, and cross-examination of witnesses will not be
5 permitted. This Public Hearing addresses that notice
6 of proposed rulemaking on the Competitive Passenger
7 Rail Service Pilot Program Rulemaking contained in
8 Docket Number FRA-2016-0023 and published in the
9 *Federal Register* on June 22, 2016.

10 The purpose of this hearing is fact-finding.
11 It is not meant to be a forum for a debate on the NPRM
12 now before us. Rather, it is an opportunity for you to
13 provide relevant information to FRA and a mechanism to
14 place your views on the record for later review and
15 consideration.

16 In order to permit each of you an equal
17 opportunity to express your views and comments, the
18 following procedure will be used. Each person who
19 wishes to do so will be permitted to make an oral
20 statement. At the beginning of your oral statement,
21 please identify yourself, spell your name for the court
22 reporter, and indicate whether you are appearing as an
23 individual or in a representative capacity. If
24 appearing in a representative capacity, please also
25 identify the individual or organization you represent.

1 At the conclusion of a witness' statement,
2 the Hearing Officer or Technical Panel may question the
3 witness to clarify the witness' testimony.

4 At the conclusion of all statements provided
5 by today's witnesses, we will move on to questions from
6 members of the public for purposes of clarifying any
7 witnesses' testimony.

8 FRA does not permit cross-examination of
9 witnesses about the justification for their comments or
10 the validity of their reasoning. However, FRA does
11 permit questions for the purpose of resolving
12 ambiguities, defining terms, and otherwise clarifying
13 the substance of any testimony. And if a document you
14 will be referring to today has not yet been furnished
15 to FRA, please submit a copy to the Hearing Officer and
16 to the court reporter so that it may be marked for
17 identification and made a part of the public docket.

18 A transcript of today's proceeding is being
19 taken. We will not go off the record in this hearing
20 unless so stated by the Hearing Officer. The
21 transcript is being prepared by a private,
22 nongovernmental reporting service under contract with
23 FRA. The transcript of this proceeding and all filed
24 comments will be available for viewing and downloading
25 on the Internet at www.regulations.gov, under Docket

1 Number FRA-2016-0023.

2 Thank you.

3 HEARING OFFICER NISSENBAUM: Okay. So I'm
4 going to call you to the front to speak in the order
5 that I mentioned. Again, if you are still interested
6 in speaking and have not already signed up to do so,
7 we'll leave the attendance sheet open for that purpose.
8 Once you're called to the front, please state your name
9 and organization so the transcript will be correct and
10 complete.

11 And with that, we are going to start with Ray
12 Chambers.

13 MR. CHAMBERS: Okay. I am Ray Chambers,
14 R-a-y C-h-a-m-b-e-r-s. And I'm the President of the
15 Association of Independent Passenger Rail Operators and
16 am presenting this testimony on their behalf. I will
17 be followed, I believe, by a couple of our members, who
18 are going to speak very briefly to a couple of the
19 points and a little bit about their organizations and
20 their interest in this program.

21 On December 10, 2014, I testified before the
22 Senate Commerce Committee on behalf of AIPRO, and we
23 called for a streamlined Pilot Program. And I'm happy
24 to say that the Congress was responsive. We've worked
25 through the legislative process, of course wasn't

1 exactly what we proposed, but little less than one year
2 later, on December 4, 2015, President Obama signed the
3 FAST Act, the Rail Title, which essentially contained
4 that program.

5 As far as we're concerned as an organization
6 it presents a major opportunity to demonstrate high
7 performance passenger rail service in the United
8 States. We believe that in the implementation of this
9 program that our four members have a great deal to
10 offer. Today our members transport a quarter of a
11 million passenger trains in America. Internationally
12 we carry more than a million passengers in every kind
13 of rail operation. Our companies are substantial. We
14 bring a strong safety culture, innovation, and we think
15 we will bring reliability to intercity passenger rail
16 operations.

17 I guess a point that I want to emphasize as
18 much as anything else the FRA's flexibility. This new
19 Pilot Program is unprecedented. There are important
20 stakeholders, many of whom are in this room, including
21 of course, the host railroads, rail labor. These
22 people as well as Amtrak and others have got to be our
23 partners in making this thing work. There are major
24 issues that have got to be resolved that have never
25 been addressed before in the context of intercity

1 passenger service that's been a de facto monopoly for
2 almost 50 years. Those issues include negotiated
3 traffic fees, liability coverage. There's no question
4 about it that this is going to be a complicated program
5 to administer, and it could fail if the implementation
6 is not done right. In the AIPRO's view if it is made a
7 success it can really become a shining example as
8 moving passenger rail service in a new direction to
9 benefit everybody in this country we would submit,
10 including Amtrak.

11 Our members know that we face a great deal of
12 difficulty in making this program a reality. So AIPRO
13 asked for this oral hearing because we believe --
14 because there are so many complex issues that at this
15 early stage we initiate a candid dialog with you and
16 with our partners, a dialog with all of the interested
17 parties and the agencies so that we can lead to the
18 creation of a vital program that will give us positive
19 results.

20 So with that said, I would like to say that I
21 am very grateful. We are all very grateful to the
22 Federal Railroad Administration for scheduling this
23 hearing, and we look forward to both the testimony and
24 to any discussion both now and afterwards that come out
25 of it. There are many, many complex issues that have

1 got to be worked through with FRA. We have four major
2 recommendations which were in our testimony that we
3 filed on August 22, and I'm going to touch on those
4 right now.

5 First and importantly the rule calls for a
6 60-day deadline for filing all applications. We don't
7 like that deadline. We think it's harmful. As some
8 excellent testimony -- I think you're going to hear
9 later. You going to speak later? Some excellent
10 testimony on behalf of the National Association of
11 Railroad Passengers states we feel that deadline is
12 insufficient. There is not enough time for negotiating
13 the complexities of planning such a service. The Pilot
14 Program has got to be crafted to provide significant
15 breathing room necessary to negotiate and to create
16 solid corridor service agreements. AIPRO argues that
17 this deadline is insufficient, and we think that it's
18 unnecessary. It's not in the statute. We believe that
19 the intent of the statute, of course you could check
20 that back on the -- wherever, but the intent of the
21 statute was that the program should be evergreen with
22 applicants allowed to file at any point during the
23 statutory life. Because of the complexity of these
24 deals coming off these applications a mere two months
25 after the rule would likely smother the program in its

1 cradle. So, therefore, we ask that the 60-day deadline
2 be removed. The additional deadline stipulated in the
3 rule of the statute seemed to us to be reasonable.

4 The second thing is the long distance route
5 must have a subsidy assigned to it prior to the
6 promulgation of the rule. Subsidy has got to be clear.
7 It's got to be precise. It can't be subject to any
8 last-minute manipulation. Once the subsidy is granted,
9 the pilot route should be treated exactly the same as
10 Amtrak long distance routes for purposes of the
11 distribution of intercity passenger rail grant, the
12 Amtrak grant distributed through the FRA. Unless the
13 subsidy is plainly addressed, it's going to be
14 impossible for the applicant to put forward a bid in
15 good confidence.

16 I must say I just read the Amtrak testimony
17 just before coming here. They make some similar points
18 that I felt were helpful. While I didn't understand
19 all of the nuances of what they were saying, I felt
20 that generally stating they made some similar points
21 that were helpful to determine the need to identify the
22 subsidy.

23 Third, FRA must determine and make available
24 Amtrak's level of service on each route. We
25 particularly endorse the NARP recommendation that was

1 filed earlier that a detailed and specific definition
2 of the same level of service is going to be necessary.
3 Amtrak's fully allocated cost, level of service,
4 metrics on each quarter and so forth. The Secretary
5 should provide the applicant with detailed and specific
6 definitions of the level of service. Enhanced levels
7 of service by the applicant should be encouraged. I
8 think that you will find that at least our members and
9 some other people in this room have some very creative
10 ideas on enhanced levels of service.

11 Fourth, the FRA, this is something that
12 should go without saying, but the FRA has got to
13 administer this program in an even-handed manner
14 treating pilot applicants and Amtrak exactly the same.
15 Like I said, this should go without saying. But
16 through no fault of its own Amtrak has -- FRA has
17 conflicting roles on Amtrak ward, provides a grant, so
18 forth and so on. These are the cards we were all dealt
19 by the Congress. These are the cards we've got. These
20 are the laws that we've got to work with. So all we're
21 asking is that FRA with all its obligations adhere to a
22 fully neutral policy.

23 So with that summary, the FRA has got to move
24 forward with some solid planning, with determination,
25 and, again, I think we're going to need dialog. And we

1 look forward to flexibility in developing this program
2 because we're not absolutely sure we've got it right in
3 the first legislation, that Congress got it right, but
4 we think that it is an opportunity to create a success
5 here that can ultimately achieve the lofty goals
6 intended. In the end, we believe it can make a major
7 contribution to bringing higher performance passenger
8 rail operations to America's intercity passenger rail
9 network.

10 Thank you for this.

11 HEARING OFFICER NISSENBAUM: Thank you, Ray.
12 Appreciate those comments and appreciate your
13 participation.

14 Next up is Ed Ellis.

15 MR. ELLIS: My name is Ed Ellis,
16 E-d E-l-l-i-s, and I am President of Iowa Pacific. And
17 let me begin by saying thanks to the FRA for holding
18 this hearing. It gave those of us at Iowa Pacific an
19 opportunity to think about the comments that were made
20 in the first comment period. There were a lot of good
21 comments made I think by a lot of folks. In
22 particular, I spent some time reviewing the comments of
23 Amtrak submitted by Richard Slattery, who is here,
24 undoubtedly Amtrak's executive most qualified to lead
25 its response to this rulemaking. A good man who

1 understands long distance trains well, and has also
2 been an Iowa Pacific customer, to which we're grateful.
3 Mr. Slattery was quite thoughtful in developing more
4 than one Trojan horse designed to further Amtrak's
5 ability to veto implementation of Section 11307 without
6 appearing to do so. Of course, one of the key elements
7 of Iowa Pacific's analysis and written comments was a
8 review of Amtrak's overt resistance to Iowa Pacific's
9 efforts to participate in the operation of private
10 services including Iowa Pacific's Pullman subsidiary
11 and the Indiana Department of Transportation, Hoosier
12 State. But in Mr. Slattery's comments on behalf of
13 Amtrak the veto power is hidden exquisitely behind the
14 phrase rail carrier that owns or controls any
15 infrastructure. Mr. Slattery proposes that any
16 petitioner that is not the sole owner of a necessary
17 infrastructure, that is any third-party operator, must
18 submit an agreement with the infrastructure owner with
19 its petition. But, of course, Amtrak is a rail carrier
20 that owns or controls any infrastructure along almost
21 all of the 15 long distance routes. Eight of the 15
22 routes touch Chicago. And Amtrak is the sole owner of
23 Chicago Union Station Company, which is the rail
24 carrier that owns all the infrastructure from Canal
25 Street north of the station at 21st Street south of the

1 station. So Amtrak can just direct Chicago Union
2 Station Company to say no to any private use of the
3 station, if you have the language the way Mr. Slattery
4 wrote it.

5 Amtrak also owns or controls most of the
6 infrastructure on the northeast corridor, not including
7 trains that use Chicago Union Station. Four long
8 distance trains use the NEC. And Amtrak also owns the
9 infrastructure into the stations that serve the Auto
10 Train network in Virginia and central Florida. So out
11 of 15 long distance routes that only leaves two: the
12 Sunset Limited and the Coast Starlight. The Sunset
13 Limited runs out of New Orleans. And while the station
14 track -- to New Orleans Union Passenger Terminal is
15 owned by the City, it's leased and controlled by
16 Amtrak. Only on the Coast Starlight route were we able
17 to find -- unable to find any Amtrak owned or
18 controlled infrastructure with the exception of non-
19 mainline infrastructure in the code charts.
20 Obviously, it wasn't the intent of Congress to give
21 Amtrak the ability to veto privatizing long distance
22 train routes. So we're suggesting that you reject
23 Mr. Slattery's proposed change to that part of the
24 document. But in analyzing Amtrak's intent to subvert
25 the intent of Congress we went further in looking at

1 Section 11307 and how this rulemaking might actually
2 make it easier for a private company, either Iowa
3 Pacific or another qualified company to actually
4 operate a long distance route. Specifically, we looked
5 at the requirement to have agreements with
6 infrastructure owners excluding Amtrak, which is
7 mandated to make an agreement with a petitioner awarded
8 a route by FRA. Section 11307(b)(3)(A) says an
9 eligible petitioner is a rail carrier that has a
10 written agreement with a rail carrier or rail carriers
11 that own such infrastructure. Nowhere in that
12 provision does Congress specify the nature of the
13 agreement with the owner of the infrastructure. And
14 also in 11307(g)(1)(A), the Surface Transportation
15 Board is designated to resolve any disputes between
16 Amtrak and a successful petitioner regarding, quote,
17 whether access to Amtrak's facility or equipment or the
18 provision of services by Amtrak is necessary, close
19 quote. Which is a clear indication that Congress
20 expects Amtrak to provide whatever is needed to support
21 the privatization of three routes. The definition of
22 what STB can require is broad and inclusive. In fact,
23 this definition is broad enough to include two things
24 that Amtrak provides in the Hoosier State model:
25 Amtrak's freight railroad access agreements and the

1 services of Amtrak train crews. Couple that to
2 petitioner access to the equipment, the rolling stock
3 that Amtrak uses on the long distance train surfaces,
4 and a petitioner can effectively step into Amtrak's
5 shoes with substantially fewer hurdles.

6 This is a substantial departure from the 2008
7 PRIIA Act. Under the privatization provisions of that
8 Act only the host railroad could petition to upgrade a
9 route. Iowa Pacific discussed partnering with various
10 such railroads, but there was no interest.

11 At a meeting in Washington, Congressman Bill
12 Shuster asked me about this, and I explained what I saw
13 as the flaws in the 2008 law. He suggested I meet with
14 congressional staff and express my concerns and
15 interest, which I did. I have provided a copy, and
16 it's on the website. I sent this in earlier, of the
17 testimony that I provided to the House Transportation
18 Infrastructure Staff. And of particular interest is
19 the discussion of the fact that Amtrak has previously
20 provided freight access and train crews for a private
21 third-party operator of a train. So there's no
22 question that they can do so. The train was the Texas
23 Limited, which was the brainchild of Houstonian
24 Franklin Denson. The Texas Limited operated from
25 Houston to Galveston using rolling stock provided by

1 Mr. Denson, but using Amtrak's train crews and track
2 access. Given that a petitioner can request the
3 Indiana Hoosier State model with or without rolling
4 stock, what is the nature of the agreement with a non-
5 Amtrak host railroad. I envision an agreement that
6 lays out the expected responsibilities of all three
7 parties; the petitioner, the host railroad and Amtrak.

8 In effect, the petitioner and the host railroad can
9 simply agree that petitioner will contract with Amtrak
10 for track access and train crews, and will provide its
11 own liability insurance in addition to insurance
12 carried by Amtrak and the host railroad, and that
13 petitioner will meet all FRA and other regulations. I
14 expect that some host railroads will prefer this to a
15 direct agreement, although perhaps not all. And I
16 expect that Amtrak will highly oppose this pathway to
17 privatization. But I submit that what Congress clearly
18 intends as a result of including privatization language
19 in the 2008 law and by approving it in the 2015 FAST
20 Act is to make it eminently feasible for qualified
21 companies such as Iowa Pacific to take over operation
22 of a long distance route in order to see what the
23 effect of privatization is over a four to eight-year
24 period specific in the Act. FRA should reject Amtrak's
25 proposed modifications to the rule as they are designed

1 to delay and restrict Congress' intent. This includes
2 rejection of the proposed modification of Section
3 269.15 of the rule in which Amtrak effectively proposes
4 removal of the terms equipment and provision of
5 services, which are in the law and should not be
6 removed.

7 We also know that Amtrak proposed changing
8 Section 269(b)(4), consent from -- funding states to
9 require the bidder, I think they mean petitioner, to
10 provide written documentation that the states providing
11 funding concur with the bidder's petition to provide
12 service on a route. That's not what the law says. The
13 FAST Act in 11307(b)(1)(D) requires the Secretary to
14 have the concurrence of the state or states. It does
15 not state that the petitioner is to obtain that
16 concurrence.

17 Having been through this exact situation
18 before where Amtrak did everything they could to
19 dissuade the State of Indiana from dealing with private
20 operators, we believe that having the Secretary through
21 the FRA meet with any involved states and provide to
22 those states FRA's assessment of the petitioner and the
23 petition, and that's necessary to hold Amtrak in check.
24 So please reject Amtrak's proposed addition to the
25 rules. Amtrak's comments also suggest that any claimed

1 increase in Amtrak's costs or claimed deterioration in
2 Amtrak's financial performance should be part of FRA's
3 evaluation of a petitioner's proposal. That plainly
4 contradicts 11307(e)(2), which states in part, any
5 amount provided by the Secretary to Amtrak under this
6 paragraph shall not be deducted from them or have any
7 effect on the operating subsidy to petitioner described
8 in Section (b)(1)(E)(iii). Congress wisely recognized
9 that Amtrak might have some legitimate impairment, but
10 also recognized that it should not be included in
11 evaluating the funding of petitioner's operation.

12 The burden is on Amtrak to effectively manage
13 the change so that the federal subsidy of intercity
14 passenger rail does not increase, and this should be
15 Amtrak's responsibility, not the petitioner's
16 responsibility.

17 Mr. Slattery raised an interesting question
18 in the discussion of what is an operating subsidy.
19 Mr. Chambers touched on that briefly too. He proposes
20 to exclude -- Mr. Slattery proposes to exclude
21 depreciation and interest from the calculation of
22 operating losses from each route, which serves to
23 reduce the subsidy available and then make it less
24 attractive to a private operator. But depreciation
25 actually is an operating cost. It presents the usage

1 of a piece of equipment which is said to depreciate
2 with mileage and time. Certainly the equipment is not
3 free. If a petitioner asks Amtrak to provide, for
4 example, a locomotive to haul a train, Amtrak would
5 rightly want to recover the cost of maintenance of the
6 locomotive in addition to rent for the time the
7 locomotive was made available to petitioner. Thus, it
8 is only fair that those rental charges for the rolling
9 stock facilities and any other assets be included in
10 the operating losses of each route. While normal
11 companies use depreciation to represent that expense
12 for assets they own, another methodology is for Amtrak
13 to develop usage charges for each asset and charge
14 themselves exactly the same amount as they would expect
15 to recover from a third party, so it's a level playing
16 field.

17 Interest is also an operating expense. Usage
18 -- because usage of long distance trains is seasonal,
19 it's reasonable to expect that Amtrak has to borrow
20 money during the off season and recover it during the
21 peak season. That interest charge to borrow money is
22 just part of Amtrak's operating cost and should be
23 included in the calculation of subsidy.

24 Another attempt by Amtrak to make this more
25 difficult is contained in Mr. Slattery's proposal that

1 the rules should require the bidder to comply with all
2 statutory and other legal requirements that apply to
3 Amtrak's use of funds appropriated under that section
4 or any subsequent appropriation.

5 That's exactly what Congress is trying to
6 change. If there is a specific requirement that the
7 petitioner needs to meet, it's spelled out in 11307.
8 Iowa Pacific has extensive experience with Amtrak
9 imposing requirements that are different from FRA's
10 requirements and claiming they are statutory or legal
11 requirements. Please don't give Amtrak the latitude to
12 keep doing this.

13 Overall, I'm grateful to Mr. Slattery for his
14 comments because they stimulated a lot of thought on
15 the nuances of the statute's language and ways to make
16 sure the potential Amtrak resistance is neutralized.
17 One area that is of great concern is Amtrak's
18 calculation of cost. As you know, Iowa Pacific
19 participates in the operation of the Hoosier State.
20 It's actually the only intercity route that is semi-
21 privately operated in the country. INDOT has published
22 its contracts with both Amtrak and Iowa Pacific on its
23 website. In the publicly available Amtrak INDOT
24 contract is Appendix 6, which has a breakdown of what
25 Amtrak is charging INDOT for Amtrak's role in operating

1 the train. One of those costs is shared stations in
2 the amount of \$264,917 for the year just completed.
3 Hoosier State uses six stations: Indianapolis,
4 Crawfordsville, Lafayette, Renselaer, Dyer, and Chicago
5 Union Station. The Hoosier State was scheduled for 416
6 total trains. So the cost per train for using those
7 stations was \$636.81. That's for all six. Obviously,
8 Chicago Union Station is some portion of that cost;
9 perhaps close to half, \$300 per use. Contrast this to
10 what Amtrak charged Metra, Chicago's commuter service
11 operator for Iowa Pacific trains using Chicago Union
12 Station at the beginning of end of trips from Chicago
13 to Madison, Wisconsin in October 2014. Metra has
14 billed and rebilled to Iowa Pacific, 16,500 for the
15 usage of Chicago Union Station for three departures,
16 three arrivals or \$2,750 for each use of Chicago Union
17 Station. Almost 10 times as much as the APT calculated
18 cost for the Hoosier State. It's our concern that
19 Amtrak, unless regulated by FRA and STB will invent
20 unfair charges such as these in an effort to prevent
21 private operators from successfully operating a long
22 distance route. The language in this rulemaking needs
23 to be stiffened to ensure that Amtrak provides the cost
24 in advance of a petition and, and that those costs are
25 completely consistent with APT costs as directed under

1 Section 209 of PRIIA. Iowa Pacific tried to convince
2 Amtrak to moderate its charges at Chicago Union Station
3 so that we could continue to run trains to Madison, a
4 popular destination that has no other rail service, but
5 Amtrak refused. In fact, a recent excursion run by
6 another private group was charged \$10,000 for just one
7 arrival and one departure at Chicago Union Station or
8 \$5,000 each way, a substantial increase over what we
9 were charged.

10 I recognize that FRA has extended the comment
11 period beyond this hearing, and based on other comments
12 today we expect to propose further revisions to the
13 rule designed to help FRA administer the transition of
14 three long distance routes to private operation as
15 Congress directed in 11307. What's really unfortunate
16 about Amtrak's response to this rulemaking is that
17 private operators such as Iowa Pacific and others in
18 the room can function as an addition to the resources
19 devoted to intercity passenger rail service in this
20 country. Every piece of rolling stock we bring to the
21 show, every additional route or train, every point in
22 improved customer satisfaction scores or an on time
23 performance improves access to rail transportation.
24 It's regrettable that Amtrak sees this as competition
25 when it should be treated as a helpful public-private

1 partnership. I am hopeful that new leadership at
2 Amtrak will adjust that viewpoint.

3 I've also reviewed comments filed by the
4 Transportation Trades Department, AFL-CIO and its
5 counsel on behalf of Amtrak's unionized employees'
6 labor. The thrust of labor's concerns is twofold: to
7 assure that Amtrak employees who have worked on a train
8 that is subject of a pilot passenger proposal enjoy the
9 normal benefits of railroads under federal law and
10 receive hiring preference; and, two, that employees
11 affected by implementation of the Pilot Program enjoy
12 protections equivalent to those enacted in Section 405
13 of the 4R Act. Let me state at the outset that Iowa
14 Pacific values its workforce and that treating
15 employees properly strengthens the company and the
16 services it offers. I also believe that Amtrak
17 employees hired by a private carrier should be subject
18 to federal railroads laws. Current IPH personnel enjoy
19 those rights. Any personnel that IPH hires under this
20 program would as well. But I believe that what labor
21 seeks represents an overreach inconsistent with
22 Congressional goals for the program. Labor correctly
23 points out that FRA's regulations leave some latitude
24 for interpretation. I believe this is intentional and
25 appropriate. What labor seems to be striving for is

1 that FRA condition the grant of a pilot application on
2 the winning bidder's agreement to accept labor
3 conditions similar to those imposed at the creation of
4 Conrail or under the STB New York Dock decision. Labor
5 states that any bidder shall be subject to sections
6 that relate to that. Labor's position would
7 effectively derail this program, and it could bring
8 about the discontinuance of Amtrak's poor performing
9 trains, a result contrary to what all parties have in
10 mind. Section 405 of New York Dock are provisions
11 crafted for a totally different situation from that
12 represented by this pilot passenger program. As we
13 understand those measures, employees who are displaced
14 or adversely affected would be paid the difference
15 between their salary and benefits under their former
16 employer and what they would receive under a new
17 employer. To the extent that employees were laid off,
18 they would receive up to six years compensation for now
19 work at all. To the extent that this represented a
20 grand bargain with rail labor to allow the
21 reorganization of the massive Eastern Rail Network
22 operated by seven bankrupt carriers into Conrail was a
23 one-time thing. New York Dock is a statutory mandated
24 form of labor protection STB imposes in certain
25 railroads merger control and line sale cases generally

1 between large carriers. Again, it represents a one-
2 time buyout for a transaction where the parties to the
3 transaction can well afford to pay that price.

4 The second element of both provisions is the
5 requirement that there be an implementing agreement in
6 place before the transaction can be consummated
7 effectively, giving rail labor a veto over a
8 transaction or certainly a delay. Absent some
9 clarification by FRA, it's conceivable that union
10 negotiations and arbitration could take months or years
11 out of an initial four-year term.

12 Finally, I should note that any transition
13 costs, and I would regard the cost of displaced
14 employees to be a transition cost, should be treated as
15 a transition cost under 24711(e)(2) and funded
16 accordingly.

17 Thank you very much for your time today.

18 HEARING OFFICER NISSENBAUM: Thank you,
19 Mr. Ellis, appreciate it, your comments.

20 MR. ELLIS: Thank you.

21 HEARING OFFICER NISSENBAUM: Next we're going
22 to go to Jim Coston.

23 MR. COSTON: Thank you. Good afternoon. My
24 name is Jim Coston, C-o-s-t-o-n. I'm Chairman of
25 Corridor Capital of Chicago, and speaking on behalf of

1 Corridor today. I was going to keep my comments fairly
2 brief because we have the benefit of being able to have
3 our comments entered into the record, plus Ed's a very
4 tough act to follow. So what I wanted to do is simply
5 highlight the five points we made. There are others
6 that could be brought up, but I simply wanted to
7 highlight them. They have all been mentioned in some
8 fashion by the previous comments filed. I suspect that
9 more of them will be treated both this afternoon, and
10 the comments will be made between now and October.

11 First, with regard to the use of equipment.
12 Long distance trains require very specific expensive,
13 not necessarily complex, but unique equipment. The
14 undertaking of a long distance train, particularly one
15 that has a two night travel path requires anywhere from
16 four to six complete equipment sets, uniform equipment.
17 That puts almost any potential private carrier at a
18 disadvantage because of the unavailability of equipment
19 such as that in the general circulation, and the
20 unavailability of North American based rail
21 manufacturers actually producing long distance
22 passenger cars at this time. So we believe that there
23 needs to be a great deal more clarity with regard to
24 whether Amtrak is going to make its fleet available;
25 whether it is going to be compulsory or permissive.

1 And ahead of time the rates, conditions, et cetera that
2 will be imposed upon the private contractor to utilize
3 Amtrak equipment, whether it would be required to
4 utilize either Amtrak maintenance forces to maintain
5 the equipment or a particular maintenance regimen. For
6 an outside contractor, again, all just very critical
7 elements because equipment is such a central part of
8 our takeover a long, particularly a long distance route
9 in order to facilitate preparation of a bid.

10 To Ed's point made with regard to labor, again,
11 just needs to be more clarity with regard to the
12 existing Collective Bargaining Agreements; whether it
13 is expected, required, or how negotiated a private
14 contractor coming in for whatever -- where there's a
15 full-service takeover and just elements of the service
16 to be taken over like Hoosier State. Whether or not
17 they would -- these agreements would have to be either
18 negotiated or written exactly the way the national
19 agreements are with rail labor now or whether they can
20 be individually negotiated.

21 The third point and, you know, everyone is
22 going to talk about this, is 60 days just isn't long
23 enough. And, again, it's not called for within the
24 federal legislation. This is a very ambitious and very
25 noble undertaking. There are a great many parties

1 involved and so many moving parts when it comes to the
2 takeover of an operation of an intercity passenger
3 train, particularly a long distance passenger train.
4 Simply the initial negotiation and coming to an
5 agreement with host railroads, with Amtrak, with the
6 unions, others, et cetera, would blow any meaningful
7 bid well past that 60-day recommendation made in the
8 rulemaking. It needs to be either extended or as Ray
9 suggested needs to be done away with and the other time
10 requirements within the law adhered to.

11 Again, with regard to the operating subsidy,
12 there needs to be specificity here. We've got sort of,
13 I guess, anecdotal information from Amtrak as to how
14 they characterize the use of federal subsidy for
15 operating support for trains. It seems like it's about
16 a 50/50 split on the long distance trains. If a train
17 takes in \$50 million in revenue, it seems to usually
18 take 45 or \$50 million of federal subsidy in order to
19 operate that train. Again, with so many variables and
20 so many potential changes in the operation of a train,
21 if a private operator comes in and takes over either in
22 whole or in significant part of a long distance
23 passenger train service, it needs to be defined up
24 front. The methodology needs to be defined, and there
25 needs to be a specific dollar figure up front in order

1 to put forth a bid that actually makes sense.

2 And, finally, with regard to the
3 recommendation for the initial contract, around the
4 world when franchises, route awards, et cetera, are
5 made, they tend to be made over an 8-year, 10-year, 12-
6 year period. Renewable periods that tend to mimic at
7 least the useful life of new equipment that needs to be
8 procured in order to initiate the service. Four years
9 even with a four-year renewal is very tough in order to
10 put in the capital costs required not only for the
11 service startup. Again, the service startup even the
12 FRA has said it's going to take \$150,000 just to
13 facilitate the preparation of a bid. But when you go
14 beyond that, you get into far greater numbers, and, you
15 know, with the cost of railroad cars being anywhere
16 from two to three million dollars and the need to
17 actually bring in either new manufacturers or existing
18 manufacturers who are not currently manufacturing long
19 distance passenger cars, absent the ability to use
20 Amtrak equipment on a way that would continue to allow
21 a bid to operate a new route on a cost effective basis
22 there needs to be a far longer period in order to
23 recover these capital costs. They're not limited to
24 equipment, but they certainly, you know, would be in
25 great part dictated by the cost of equipment to invest

1 in a new service. Obviously, it's the Congress' intent
2 here, and I think everybody's intent here as an
3 experiment to provide better service, to carry more
4 passengers, take in more revenue, create operating
5 efficiencies that Amtrak has not been able to
6 facilitate, and a four-year period to get this done, if
7 you just look at the four corners of that simply isn't
8 long enough. We would suggest a longer more flexible
9 period. And, again, just generally, again, to echo
10 what Ray Chambers said, some more flexibility here in
11 how this is viewed and how we promote rather than
12 inhibit the interest and participation of the private
13 sector in every aspect of passenger trains, whether
14 it's financing, operation, providing of equipment,
15 providing ancillary services and marketing, et cetera.

16 And with that, I'm very pleased to close, and
17 thank you very much for the opportunity.

18 HEARING OFFICER NISSENBAUM: Okay. Thank
19 you, Mr. Coston, appreciate that.

20 And now Lonnie Blaydes.

21 MR. BLAYDES: Thank you. I submitted some
22 written comments, but here's copies also, so you don't
23 have to -- ignore what I say and just read these.

24 Good afternoon. My name is Lonnie Blaydes,
25 L-o-n-n-i-e B-l-a-y-d-e-s. And I'm here speaking on

1 behalf of Herzog Transit Services. Herzog is H-e-r-z-
2 o-g. I'm going to be very brief, but do not mistake the
3 brevity for Herzog's level of interest. Herzog has
4 been pushing this issue longer than anybody else.
5 Herzog is a founding member of AIPRO, and they're the
6 ones that really pushed hard to get legislation like
7 this passed. So Herzog has a long history and a
8 continuing interest and competition in the intercity
9 passenger rail service.

10 I'm just going to highlight a couple of
11 points. We've already talked about the 60-day rule.
12 Ditto, ditto, ditto, ditto. It ain't enough time.
13 I've negotiated many, many agreements with railroads,
14 and sometimes you're lucky to get a meeting in 60 days,
15 much less some sort of agreement. So 60 days, way too
16 short.

17 The subsidy level, you can imagine as the
18 private carriers are trying to look at routes to bid
19 on, not having a somewhat of an idea, maybe even a firm
20 idea of how much that number is, we're just shooting in
21 the dark unless we have sort of pretty good idea of
22 what the subsidy number we have to hit. Because we
23 know on our side we're going to have to really be very,
24 very cost efficient to be able to come in, frankly,
25 under that number or close to that number -- on the 90

1 percent subsidy level.

2 One thing -- couple things I'd like to really
3 highlight more orally. Ray brought it up tangentially;
4 Ed certainly highlighted it very well. The Amtrak
5 can't be in a position of vetoing everything. That
6 would defeat the purpose of the legislation if Amtrak
7 can just say no. And not that we think Amtrak would
8 always say no, but, you know, that would just be not in
9 keeping with the intent of the legislation.

10 When Herzog thinks of host railroads they
11 don't put Amtrak in the same category as the BNSFs, the
12 CSXs, the UPs, et cetera. For us, a host railroad
13 really is a host freight railroad carrier. They are
14 the ones that can, frankly, for good reason or bad
15 reason or no reason at all we know they can just say
16 no. That's the world that we live in right now. You
17 know, BNSF says nobody but Amtrak; we can live with
18 that answer. We don't agree with it, but we certainly
19 can live with it. For Amtrak to be able to say no
20 because we have a little slice or maybe a bigger slice
21 of the railroad as the owner, again, I don't think of
22 it as the host, as the owner, is just not -- as my
23 grandkids and kids used to say not fair, daddy. That
24 would not be in keeping with the legislation.

25 Again, I'm going to keep this very brief

1 because I think Ray highlighted also we really would
2 like to be able to get in some dialog with you guys and
3 other people in the room about exactly how we can move
4 forward with this because competition, and I
5 highlighted this I think in the written comments, the
6 only way we're going to get better is through
7 competition. I know competition with our competitors
8 in AIPRO makes Herzog a lot better. And competition
9 will make Amtrak a lot better. Frankly, even if
10 nothing really even changes, as long as we can have
11 some meaningful competition in this, we'll all be able
12 to operate better, more efficient and more effective
13 service.

14 So thanks a lot for the time.

15 HEARING OFFICER NISSENBAUM: Okay. Thank
16 you, Mr. Blaydes.

17 Next is Ross Capon.

18 MR. CAPON: Thanks for this opportunity. I'm
19 Washington representative for American Association of
20 Private Railroad Car Owners. Our mission is to promote
21 the operation, ownership and enjoyment of the private
22 passenger rail car. We have about 600 members,
23 including about 75 owners of Amtrak-qualified cars.
24 Some owners have more than one car. So in all there
25 are about 200 such cars that comply with the stringent

1 FRA and Amtrak safety requirements.

2 Most moves involve one or a few cars on
3 scheduled Amtrak trains, but there are one or two all
4 private car special trains each year. Later this month
5 such a special will run from Denver to Spokane for
6 AARPCO's 39th Annual Convention. Amtrak profits from
7 the individual moves cars make to Denver, the Denver-
8 Spokane train, and the individual moves from Spokane to
9 the cars home locations. The cars in general, and
10 special trains in particular, provide valuable economic
11 boost to the communities they visit. These cars are
12 separate from and should not be confused with business
13 cars operated by all the major and some smaller private
14 railroads. AARPCO as an organization and our car-
15 owning members have worked well with Amtrak over many
16 years. Amtrak earns considerable revenue for handling
17 these cars, and the net impact of their operation is to
18 improve Amtrak's bottom line.

19 With consideration given to having alternate
20 operators for some Amtrak routes, we obviously place
21 great importance on maintaining the ability of our
22 members to continue to run private cars on such routes.
23 That's consistent with the spirit of FAST Act, Section
24 11307, which requires the alternate operator to accept
25 a federal grant that does not exceed 90 percent of the

1 level, blah, blah, blah, quoting from the law there.
2 Everyone here is keenfully aware of that. And permits
3 only inflation adjustments in the remaining three
4 years. Since private cars improve the bottom line for
5 trains they use, it is appropriate for any
6 privatization process to require non-Amtrak operators
7 to deal with private car owners in a positive manner.
8 We strongly believe in the value of the long distance
9 trains. Any move towards changing operators should be
10 handled very carefully, respecting the transcendent
11 importance of maintaining, improving and not
12 jeopardizing the service. Again, this is consistent
13 with the law. If there is a cessation of service or
14 failure to fulfill a contractual obligation, the
15 Surface Transportation Board, as you know, is required,
16 quote, to take any necessary action consistent with
17 this title to enforce the contract and ensure the
18 continued provision of service, unquote.

19 Thank you for your time and for considering
20 our views.

21 HEARING OFFICER NISSENBAUM: Great. Thank
22 you, Mr. Capon.

23 Next is Phil Bell.

24 MR. BELL: Give me a second here. Some
25 school group not exactly give you a ton of space to put

1 your coat on like a passenger car does. I'll get set
2 so I look like I belong here.

3 Anyway, as I like to say, thank you so much
4 for having me here. We'd only like to talk about three
5 critical issues.

6 Number one, as I'm sure a lot of folks here
7 have considered participating in this program, we hope
8 that in the final rulemaking bidders will be allowed to
9 decide the routes that they'd like to bid on as opposed
10 to the FRA or Amtrak designating one or two that could
11 be competed for. And we say this because there are a
12 lot of different organizations here that have worked
13 and studied a large number of markets. Ed Ellis, for
14 example, he operates a wide variety across the country.
15 Our organization we've studied a fair amount as well.
16 If you allow the bidders to decide what routes they bid
17 on and judge the process from there, that means you'll
18 get better form fits that are better able to connect
19 into areas that will ultimately serve.

20 Second, I ask that you don't restrict the
21 bidders in terms of what their prior track record was.

22 Although we do have a lot of folks here that have been
23 from the rail industry, the industry itself has
24 generally eschewed operating passenger rail service
25 since the 1960s. Of course we're all painfully aware

1 of what happened. We had a lot of trains, then we got
2 fewer, then we had Amtrak. So more outside influence
3 that we can get in, whether it be someone like
4 Marriott, whether it be someone like a non-operator,
5 along with someone like an Iowa Pacific or a Corridor
6 Capital, that would be a big benefit to moving the
7 process forward and also getting new ideas that will
8 ultimately benefit passenger rail as a whole.

9 And, finally, we ask that you allow for
10 bidding on inactive routes. Over the years Amtrak has
11 discontinued for a wide variety of reasons a number of
12 passenger trains. Couple of examples, the Texas Chief
13 from Chicago to Houston or the Old Montreal, from
14 Montreal to Washington. This could be a tremendous
15 opportunity for Amtrak to expand their route structure
16 if any of the bidders do choose to engage in operating
17 inactive routes.

18 That's all we have. We're definitely
19 thankful that the process is here, and we look forward
20 to continuing.

21 HEARING OFFICER NISSENBAUM: Okay, thank you,
22 Mr. Bell.

23 Next we have Richard Edelman.

24 MR. EDELMAN: Good afternoon. Thank you.
25 I'm Richard Edelman with the law firm of Mooney, Green,

1 Saindon, Murphy and Welch. I represent the Brotherhood
2 of Maintenance Way Employees Division of Teamsters,
3 Brotherhood of the Railroad Signalmen and the
4 International Association of Sheet Metal Air, Rail and
5 Transportation Workers, Mechanical Division. As with
6 my written comments, I'm going to focus primarily on
7 the Section 24711 requirement that winning bidders
8 under the Pilot Program be subject to grant conditions
9 under 49 U.S. Code, Section 24405.

10 Now, just to be clear, this is a statutory
11 requirement. Section 24711 adopts the requirements of
12 Section 24405, which is mandatory. Those are mandatory
13 employee protections. Iowa Pacific they don't have to
14 like it, but Congress attached the conditions to this
15 program. Iowa Pacific criticizes Amtrak for allegedly
16 departing from the statute. But that's what Iowa
17 Pacific advocates with respect to rail workers when it
18 suggests you not impose the requirements of 24405. Now
19 among the -- well, the NPRM notes that the winning
20 bidder will be subject to the 24405 conditions,
21 appropriately so. But it doesn't explain how they will
22 be applied. It doesn't say what compliance that
23 applies. Among the conditions in 24405 that are
24 incorporated into 24711, again, a statutory mandate,
25 the requirement of Section, Subsection (c) that a grant

1 applicant must accept employee protected conditions,
2 and those protected conditions are those established
3 under Section 504 of the Railroad Revitalization
4 Regulatory Reform Act known as the 4R Act. As
5 explained in our written comments, the 4R Act
6 protections are similar to those under 49 U.S. Code
7 11326, the Interstate Commerce Act, and those under 49
8 U.S. Code Section 533(b) of the Federal Transit Act.
9 All of them are derived from the same source
10 protections, the Washington Job Protection Agreement.
11 Here we're talking about 4R Act protections that were
12 the equivalent to the -- the statute says the
13 equivalent of the 4R Act protections should be imposed
14 as a condition of a grant. But now 24405(c) is being
15 incorporated into 24711, which is a competitive bid
16 program for long distance routes.

17 Each of these statutory arrangements were
18 tailored by a government agency to fit the statute to
19 which they apply. In each case, there are standard
20 protections that attach whenever a covered event
21 occurs. The protections are not created from the
22 ground up each time they're applied. There are
23 standard arrangements that are devised and imposed, but
24 their application in specific situations is handled
25 through implementing agreements that are expressly

1 required by the statutorily mandated conditions. The
2 FTA protections goes to the Federal Transit Act grants.
3 The implementing agreement and employee protection
4 benefits obligations are applied to the recipient state
5 and local government entities as well as their
6 successor's operators. The STB employee protections,
7 they're applied to the rail carrier or rail carriers
8 involved in the transaction. The 4R Act protections
9 were established as conditions on federal capital
10 grants to railroads. The protections therefore apply
11 the conditions to railroads. They impose obligations
12 to negotiate an implementing agreement, and to provide
13 employee protection benefits on the railroad that
14 receives the grant. They protect employees affected by
15 a grant to the railroad, and they require implementing
16 agreement negotiations with the railroad.

17 Now, again, Iowa Pacific's comments that the
18 4R Act protections came in some different circumstances
19 than that and shouldn't be imposed in this situation,
20 let's all remember that all happened after the Penn
21 Central bankruptcy. After there were all these
22 concerns about happening in the northeast, Congress
23 imposed those protections. And in any event, Congress
24 mandated them too. Now implementing agreement
25 negotiations and arbitration under them concern how the

1 standard protections are applied in the specific
2 situation. This runs the gamut from the relatively
3 mechanical such as how claims are filed, with whom,
4 dispute resolution mechanisms, to the more substantive
5 such as selection of forces and assignment of
6 employees, among affected employees when there's going
7 to be a displacement or a dismissal of employees or a
8 rearrangement of forces. And, by the way, employee
9 protections are not about people sitting home
10 collecting money not doing anything. They are about
11 people being able to follow their jobs to the work in a
12 fair, equitable and non-arbitrary manner. We don't
13 advocate people getting employee protections to stay
14 home and do nothing. We advocate employees being able
15 to follow their work where they work, particularly when
16 it's facilitated through a federal program to be able
17 to do it to a fair and negotiated manner. Now, so
18 that's a major piece of it.

19 Section 2, in the conditions mandated by
20 Congress, preservation of employee rights, privileges
21 and benefits under existing agreements until changed by
22 collective bargaining or by law. And let's also
23 recognize nobody has cadre of skilled and properly
24 certified railroad workers hanging around doing
25 nothing. They're going to need to hire people. And a

1 functional, negotiated arrangement will facilitate
2 making sure that qualified employees do the work, and
3 that it's done through a process that is fair and not
4 arbitrary, and that there is a consistent matter,
5 negotiated matter for people to move from one place to
6 another. That is always a key part of the employee
7 protection back to the Washington Job Agreement. And
8 it doesn't take months or years as Mr. Ellis has
9 suggested. There's a 60-day time period in the 4R Act
10 protections. It is a very expedited process, and it
11 concludes with final and binding arbitration. And
12 this also goes to the comments of the gentleman from
13 the Corridor Capital. It provides the certainty for
14 what will be applied.

15 So now we know that we have the 4R Act
16 protections. The statute says those equivalent to the
17 4R Act protections now as a result of an amendment in
18 the FAST Act it no longer says the 4R Act protections.
19 It says protections equivalent to those under the --
20 imposed under the 4R Act, which it's the job of the
21 agency to make equivalent protections adapted to this
22 program. The protections need to be adapted to be
23 applied to the winning bidder. The covered activity
24 has to be adapted and applied to a change in the
25 provider of rail services. And the definition of

1 affected employee has to be adapted and applied to
2 employees affected by a change in the provider of the
3 rail services.

4 Section 24711(b)(3) defines a petitioner to
5 include potential joint ventures or arrangements made
6 by multiple carriers, states and entities with rail
7 carriers that own the lines involved, states and state
8 entities with rail carriers that have agreements with a
9 rail carrier that owns the line. Section (c)(3)
10 applies the protections to the petitioner that is the
11 winning bidder. The protections for the Section 24711
12 program should therefore apply to winning bidders, not
13 just railroads. And since 24711 petitioners may
14 include multiple entities, FRA should make it clear
15 that the protective obligations apply to all petitioner
16 entities and their successors that are or are part of
17 the winning bidder by defining the winning bidder as
18 including all the petitioner entities and the
19 successors and assigns as well as the contract
20 operators and rail service providers just as is done by
21 the Department of Labor in the Federal Transit Act.
22 This will ensure that the protections are operative and
23 effective; that the protections are not diminished or
24 negated by gaps in obligations or conflicting
25 agreements. And I've been there when there are

1 multiple entities involved and it's your obligation,
2 no, it's your obligation, no, it's their obligation,
3 and we're trying to sue to enforce it and everybody
4 goes you can't sue me. I'm not a party. You can't sue
5 me. I'm not named in these conditions. So that's why
6 the DOL does it that way, and it should be fixed this
7 way. There should not be a situation where the
8 protections are inoperative or can't be enforced
9 because nobody's sure whose obligation is what.

10 Now that doesn't mean that petitioners cannot
11 apportion among themselves initial responsibility.
12 That happens in FTA grants, and that's fine. If they
13 want to sit there and say state is part of this, and as
14 initial obligations, it is the obligation of the
15 operator, fine and good, as long as there is the
16 backstop that we know whoever is responsible will have
17 ultimate responsibility for it. Everybody is. And
18 this is important because you could have instances
19 where one or more petitioning entity is unable or
20 refuses to be -- comply with the protections. When a
21 successor agency is created, we have this FTA
22 situation, you get this creation of joint powers boards
23 or multiple agency things and entities change their
24 names or an operator is being replaced or brings in a
25 partner or subcontractor. Again, just to make the

1 mandated conditions effective. And so it means that --
2 it also means that entities involved will have an
3 incentive to be clear among themselves about their
4 employee protective obligations, and that the statutory
5 mandate will not fail because they can't be enforced
6 because one or more entities doesn't comply.

7 In our written comments we identified various
8 provisions of the 4R Act protections that will need to
9 be modified to comport with the 24711 program to
10 provide an equivalent level of protections. I won't
11 repeat them, but I respectfully refer you to those
12 comments.

13 The 24711(c)(3) also calls for a hiring
14 preference for Amtrak employees. The protection should
15 incorporate that. Another 24405 condition is Subsection
16 (d), which establishes procedures for negotiations and
17 arbitration when an entity providing intercity
18 passenger rail service replaces Amtrak or a subsequent
19 provider replaces them. The FRA should comply with
20 those requirements by incorporating them into the
21 overall protections. Again, it is about moving the
22 employees from one to the other in a fair, negotiated
23 non-arbitrary, non-dictated scenario.

24 I want to address a couple of points made by
25 two of the commentators or commenter, I guess. We

1 generally join TTD's comments, but I want to emphasize
2 the comment that the rule should incorporate the
3 statutory requirement the new entity providing rail
4 service be a rail carrier under the Interstate Commerce
5 Act, and that they be subject to the Federal Railroad
6 Employment Law such as the Railway Labor Act and Rail
7 Retirement Act. Not only is this a statutory
8 requirement, but it's necessary for true competition.
9 If other entities are going to compete with Amtrak,
10 fair competition requires the competitors be subject to
11 the same legal regime as Amtrak. And that's so for all
12 aspects of the rail services provided.

13 For example, if a competitor is going to
14 replace Amtrak at a facility or have access to part of
15 the facilities such as engine shop or car shop, the
16 employees there should be covered by the same laws. It
17 should be a level playing field for true competition.
18 In that same vein we support Amtrak's comment that
19 there should be an explicit requirement that a
20 competitor be covered by the Interstate Commerce Act.

21 One final point. Since the FRA is setting
22 rules for competitive bids, it should address the
23 procurement process and make it clear that low bid will
24 not drive the decision; that quality of the bid counts.
25 Now in some states low bid is controlling. Bidders in

1 other states bidders are vetted for minimum quality
2 threshold but then low bid controls. I've been
3 involved in disputes in both of those situations.
4 Approaches like that should be rejected by the FRA, and
5 that should be clearly stated in the rules. The FRA
6 should state that quality of the bid will be given
7 equal weight to price, and that factors such as
8 experience and expertise of the bidders, existence of a
9 management team capable of overseeing safe and
10 effective service -- and, sorry, I didn't catch
11 Mr. Bell's client, but entities should not get to learn
12 on the job on providing long distance intercity rail
13 service. There are if we're talking competition there
14 are a number of entities here, a number of whom with
15 whom we've had contracts that do that, and their
16 experience ought to matter.

17 So and we've been in situations, you know, is
18 there an actual management team: You know, people bid
19 for the job and they're going to hire the management
20 afterward. That's not a recipe for success.

21 And, finally, part of the assessment of the
22 quality of a bid should include a viable plan to
23 recruit a qualified workforce, and that will be a key
24 element of assessing the bid. And, again, having the
25 employee protections in place will help that.

1 So that's the end of my prepared remarks, and
2 I appreciate your holding a hearing on this, and I'd be
3 glad to answer any questions that you may have.

4 HEARING OFFICER NISSENBAUM: I think we're
5 good for now. We may have some clarifying questions
6 after we've heard from everyone. But thank you,
7 Mr. Edelman.

8 MR. EDELMAN: Thank you.

9 HEARING OFFICER NISSENBAUM: John Risch.

10 MR. RISCH: My name is John Risch, and I'm
11 the Legislative Director for the SMART Transportation
12 Division, formerly the United Transportation Union.
13 We're the largest of the rail unions.

14 I appreciate the opportunity to appear here
15 today. We represent conductors, brakemen, engineers,
16 switchmen, and yardmasters on railroads across America
17 In fact, the vast majority of our members work for
18 private entities, not public. But we represent folks
19 on Amtrak, many of the passenger railroads across the
20 country. Specifically on Amtrak we represent the
21 conductors, the assistant conductors, and the
22 yardmasters. And that's why I'm here today.

23 We're strong supporters of Amtrak continuing
24 the service on all the lines that they operate today.
25 We were not in favor of this particular provision

1 because of the uncertainties that would occur when it
2 goes out for public bids of anyone. Operating a
3 railroad is complex. Amtrak knows how to operate a
4 passenger railroad, and they employ certified
5 conductors and certified, federally certified,
6 engineers that know how to operate passenger trains.
7 We're not opposed again specifically to private
8 enterprise. In fact, many of our members do work on
9 private passenger operations. The BNSF operates
10 passenger operations at Seattle, Minneapolis and
11 Chicago, Union Pacific in Chicago, and Keolis right
12 here in Washington, DC on the Virginia Rail Express.
13 And we represent workers on all those rail lines. So
14 we're not opposed to private enterprise.

15 Our main concern is that opening up this
16 bidding process to any potential operator. And as Rich
17 so ably pointed out, allowing the low bidder simply to
18 get it. This process -- and I'll second everything
19 that Rich said. We support all the things that he
20 said, and what Larry Willis will say after us. Our
21 main concern is that when you open it up to a private
22 for-profit company, it costs more. It costs more
23 because they have to have a margin. They have to
24 deliver some investment, some profit to their
25 shareholders. Several years ago, I appeared in a

1 transportation infrastructure field hearing in New York
2 City. Then Chairman John Mica had a panel, and I was
3 on the panel with several others, and they had one of
4 the Wall Street investors there. And one of the Wall
5 Street investors openly said, well, you know, if we're
6 going to invest in any of this, we expect a return, you
7 know, we expect a return of 10 percent or more or we're
8 not going to get -- or we're not interested in it.

9 So if you take a situation where you have a
10 money losing passenger route, interject this magical
11 competition that's going to do something, plus you need
12 a 10 percent or more return on investment, I just
13 simply think that's a pretty tall order and pretty
14 tough to meet. But there are those who claim that
15 there's some mystical, mystical private entity that can
16 make -- take a money losing passenger rail enterprise
17 and with brilliant management skills make it profitable
18 with a rate of return and better service, and I think
19 that's pretty much folly.

20 We just witnessed this last week where the
21 federal government decided to end all their
22 relationships with private prisons across this country.
23 It was all the rage that we have private prisons and
24 we'd save money and do a better job of taking care of
25 inmates. Well, after expose on public radio, and I

1 listened to it two Saturdays in a row, they found that
2 these private prisons, how did they operate? How did
3 they compete? They paid lower wages. They didn't
4 provide adequate food to the inmates. They had
5 deplorable conditions. They were far less safe because
6 they had far fewer guards at the prisons. And the
7 federal government looked at that and said, wait a
8 minute, this is not the way we want to proceed, and
9 they're now ending all their private prison
10 participation by the federal government.

11 The one thing that the private prisons did do
12 is they paid their CEO of the largest entity that
13 conducts private prisons or owns private prisons
14 several million dollars a year, which was more than 100
15 times more than the head of the federal prisons here in
16 the United States.

17 There's no silver bullet. There's no trick
18 out there to make rail passenger service profitable.
19 Just like every rail passenger system in the world,
20 rail passenger service will require public subsidies
21 just like our transit and highway users do.

22 But can management of Amtrak improve? Yeah.
23 We believe so. Amtrak just hired a new CEO that they
24 determine to make Amtrak better and more efficient and
25 more effective and provide better service. We support

1 him, and we look forward to working with him to make
2 Amtrak a better operator in the future.

3 Our Union is a member of TTD. Larry Willis
4 will follow me. We support part of the comments filed
5 by TTD on the NPRM. We focus on the FAST Act's
6 requirements that any entity that takes over Amtrak
7 passenger line must play by the same rules as Amtrak.
8 And Rich went into great detail about that. Complying
9 with the federal railway laws like the Railroad
10 Retirement Act, Railroad Unemployment, the Federal
11 Employers Liability Act, and other laws that apply to
12 all railroads or should apply to all railroads.

13 At the very least, there needs to be a
14 process where the workers transition into these new
15 jobs if a bid is accepted with an implementing
16 agreement or honoring the existing agreement.
17 Operating passenger trains takes a skilled workforce.
18 If you want a skilled workforce, you're going to have
19 to compete with the freight railroads and existing
20 passenger lines on the basis of wages and working
21 conditions, and implementing agreements will help
22 facilitate that. You can't just take a hat that says
23 conductor on it, put it on a guy's head and he is a
24 conductor. They need to be federally certified
25 conductors and federally certified engineers to operate

1 these trains.

2 So anyway we just ask that you do careful,
3 careful research. Don't award the bid to the lowest
4 bidder based on some way of clipping employment cost or
5 some way degrading the rules in which these workers
6 operate under. It costs a lot of money to run a
7 railroad. And I didn't just make that line up. So all
8 of that.

9 HEARING OFFICER NISSENBAUM: Thank you,
10 Mr. Risch.

11 Larry Willis.

12 MR. WILLIS: Good afternoon. Larry Willis,
13 W-i-l-l-i-s. I'm the Secretary-Treasurer of the
14 Transportation Trades Department, TTD, AFL-CIO. TTD,
15 we represent 32 unions in all sectors of
16 transportation, including 12 unions that make up our
17 Rail Labor Division. And I'm here representing both
18 entities.

19 You know, at the outset I want to restate our
20 position, and I think it's been touched on by both John
21 Risch and Rich Edelman, and obviously in our comments,
22 that we think that Amtrak and its employees are really
23 in the best position to provide intercity passenger
24 rail in this country, including the long distance
25 routes that are the subject of this Pilot Program.

1 Amtrak has obviously a well-trained and seasoned
2 workforce. They've had decades of experience providing
3 passenger rail across the country. It has a national
4 reservation station network in place. It has mature
5 relationships with the freight railroads that obviously
6 own the right-of-way that is necessary to provide long
7 distance service currently and under this program.

8 If our goal, and as it should be, is to
9 enhance exhibits passenger service, proving Amtrak our
10 nation's national carrier with the resources it needs
11 to improve its rolling stock and related infrastructure
12 we think would be a good place to start. The idea that
13 a private entity can just come in and provide more
14 efficient and economical service than Amtrak simply
15 because it is a private entity is a myth that we simply
16 reject. Our experience is that private sector business
17 models too often in the passenger rail sector
18 contemplate downgrading service, undercutting
19 collective bargaining agreements, circumventing rail
20 statutes including rail retirement, and avoiding labor
21 related standards and protections.

22 The FRA must ensure that the Pilot Program
23 directed by Congress does not follow this model, and
24 guards against private entities that simply wish to
25 turn a profit at the expense of workers and reliable

1 passenger service. When Congress created this program
2 as part of the FAST Act, it was TTD and our rail unions
3 that pushed back against more expansive privatization
4 efforts. In the end, the final measure agreed to in
5 those conditions and requirements that we insisted on
6 to make sure that service was maintained or improved,
7 and obviously that the rights of workers were
8 protected. At the center of that was the requirement
9 that the grant conditions under 24405 apply to this
10 Pilot Program. It has been described earlier that this
11 was an overreach. I disagree strongly with that
12 characterization. But it is relevant because it is
13 what the statute says. Congress was very clear about
14 that, and the requirements of 24405 should apply to
15 this program.

16 Now we are pleased that the FRA noted that in
17 its proposed rule. We do think there needs to be more
18 fleshing out both in the formal regulations and in
19 guidance to make sure that all stakeholders understand
20 what those protections are and requirements are in
21 24405 and in the underlying statutes. And so that when
22 bidders offer proposals. Those costs are accounted
23 for, and that FRA can fully evaluate the applications.

24 Rich spent fair amount of time on the 4R Act
25 protections. I'm not going to go into too much more

1 detail on that other than to say that we agree that
2 they are an essential part of this Pilot Program.
3 Again, we talked about that in our comments.

4 There is a hiring preference that is in
5 proposed Section 269.15(c) that comes out of the
6 underlying statute, which we agree with. But, again,
7 there are hiring procedures and preferences in 24405(d)
8 that need to be applied and are required to be applied
9 to this program. And we would suggest amending 269.15
10 to incorporate those additional hiring preferences that
11 are in the statute.

12 In the underlying statute itself, there is a
13 requirement that employees of the winning bidder are
14 subject to the applicable laws and regulations
15 governing similar crafts or classes of employees of
16 Amtrak. That was an important provision for us.
17 Again, it's captured by the NPRM. But I think there
18 needs to be a little bit more explanation of how that's
19 actually going to work. And this is crucial, and Rich
20 touched on this. If you're going to have an entity
21 that comes in that for example tries to provide some
22 type of service under this Pilot Program that avoids
23 coverage under the Railroad Retirement Act, well, of
24 course they're going to be able to provide service
25 cheaper than, you know, the current provider, which is

1 Amtrak. But, again, that's not contemplated by the
2 statute, and FRA must ensure that doesn't happen. It's
3 great to hear that, you know, individual companies come
4 to this podium and state comments stating that it's
5 their intent to be covered by these rail statutes, but,
6 obviously, there needs to be a clear statement from
7 FRA.

8 I'd also note that in 24405 there are other
9 protections and statutes to touch on. There is Davis-
10 Bacon prevailing wage for any type of construction work
11 that may be done under this program. I would note that
12 this is the same Davis-Bacon statute that applies to
13 Amtrak and has been in the competitive rail section of
14 the Amtrak code for several years. There's Buy America
15 rules that are also in 24405(a) that should be
16 specifically applied to this program as well. This
17 administration led by Secretary Foxx and FRA
18 Administrator Feinberg have been tremendous leaders in
19 making sure that Buy America applies across the board
20 on transportation and on rail issues specifically. So,
21 again, we think the Agency needs to specify that Buy
22 America applies here as well.

23 Separate from the 24405 protections we also
24 support provisions both in the statute and picked off
25 of the proposed regulations to maintain the current

1 level of service. Obviously, for us that means part of
2 that is to make sure that any winning bidder provides
3 the same type, or better, food and beverage service
4 that is currently onboard Amtrak trains. Again,
5 Congress mandated that performance standards be
6 maintained. We think that food and beverage is an
7 essential component of the long distance train
8 experience. An entity shouldn't be able to come in and
9 diminish these types of critical services that
10 passengers have come to expect, again simply to save
11 money and to somehow turn a profit on this Pilot
12 Program.

13 We also support the FRA's proposal in this
14 case that petitions be filed 60 days after the final
15 rule is issued. We know that there's been some
16 pushback from this podium and in the docket to that,
17 but, you know, I think that is fully consistent with
18 Congress' intent here to make this a Pilot Program.
19 And given, quite frankly, the limited resources that
20 FRA has to do a lot of things that Congress has
21 mandated, you know, to leave this Pilot Program open
22 indefinitely and allowing people to come in and submit
23 bids as they see fit, we don't think that's a good use
24 of resources by FRA, and it goes sort of the concept.
25 There should be a limited sort of contained Pilot

1 Program. So we support 90 -- excuse me, the 60 days,
2 and are strongly opposed to efforts to simply remove it
3 completely.

4 We also agree with the proposal by the FRA
5 that the operating subsidy should be limited to what is
6 actually authorized and appropriated by Congress. We
7 would further suggest that if Amtrak itself receives a
8 cut of funding from its authorized levels under the
9 FAST Act that any operating subsidy that is provided
10 under the Pilot Program should likewise be cut.

11 So, and again, thank you for holding this
12 hearing and we're happy to answer any questions.

13 HEARING OFFICER NISSENBAUM: Okay. Thank
14 you, Mr. Willis.

15 Rich Slattery.

16 MR. SLATTERY: Good afternoon. I'm Richard
17 Slattery, S-l-a-t-t-e-r-y, and I'm appearing here on
18 behalf of Amtrak. Amtrak welcomes the opportunity the
19 FRA has provided to highlight some of the written
20 comments we've previously submitted, and to briefly
21 address some of the comments made by other parties.
22 With regard to the comments made by other parties,
23 while there are many that we agree with, there a few to
24 which we take strong exception, and I just wanted to
25 briefly address some of them before getting into the

1 substance of our comments.

2 I think it's important to start by noting
3 that for many years, and long before any statutory
4 requirement to do so existed, Amtrak worked
5 cooperatively with state partners that fund our state
6 supported services, who wanted to use third-party
7 contractors for food service, maintenance, station
8 services and the other services that we also provide.
9 And I think it's also important to clarify the status
10 of the state supported Hoosier State train between
11 Indianapolis and Chicago that has been referenced in
12 some of the comments.

13 Amtrak and its train and engine crews
14 continue to operate that train. We are responsible for
15 ensuring a safe operation and for communications with
16 the host railroad dispatchers and officials regarding
17 the operating and contractual issues. Iowa Pacific is
18 a contractor for the State of Indiana that for the past
19 year has provided marketing and food services and the
20 equipment that the train uses. As Iowa Pacific stated
21 in its comments regarding the Hoosier State, bringing
22 its equipment into compliance with FRA safety
23 regulations and Amtrak safety requirements was, quote,
24 quite a learning experience for IPH, end quote. In
25 working with FRA and the State of Indiana to ensure

1 that the equipment Iowa Pacific would be providing for
2 operation on our train complies with all applicable
3 safety requirements. Amtrak's overriding concern has
4 been the safety of our passengers and employees.

5 Operating intercity passenger trains in the
6 United States is a very challenging business. Although
7 Amtrak constantly strives for improvement, we do not
8 believe that anyone is better at it than we and our
9 21,000 dedicated employees.

10 In the 12 months since Iowa Pacific became
11 responsible for the Hoosier State's marketing equipment
12 and food service, ridership has decreased 11 percent
13 compared to the previous 12-month period. The
14 ridership on our other state supported routes has been
15 virtually unchanged during the same period,
16 notwithstanding the low gas prices. And delays due to
17 equipment malfunctions with the Iowa-Pacific-provided
18 Hoosier State equipment have increased by 35 percent
19 versus when Amtrak provided the equipment.

20 Despite these increased equipment related
21 delays, the Hoosier State's on-time performance has
22 improved over the past 12 months. Rather oddly, Iowa
23 Pacific, whose only involvement in the trains operation
24 is providing its equipment, claims credit for this
25 improvement.

1 And now I'd like to turn to the proposed
2 regulations, and I'll briefly touch on a few of the
3 comments that we submitted.

4 And, first, is that bidders should be
5 required to submit the access agreements with the host
6 railroads that Section 11307 requires with their
7 initial bids. The purpose of this is to ensure that
8 FRA and Amtrak resources are not wasted in addressing
9 bids from bidders who turn out to lack such agreements,
10 which are a statutory prerequisite contrary to the
11 implication of some of the previous testimony. And I
12 also did want to clarify that we do not interpret the
13 requirement that there be an access agreement with the
14 host railroad as applicable to Amtrak. And if Amtrak
15 happens to be the host or one of the hosts in the case
16 of many of the long distance routes noted previously
17 the commenter who stated that I would note obviously
18 missed the statement in our comments, which appears on
19 page 2 at the second paragraph that we assume, and I
20 think that's the only thing that makes logical sense,
21 that although there is a requirement to have agreements
22 with each host railroad that that requirement does not
23 apply to Amtrak. So I don't think there's any dispute
24 about that.

25 Second, to protect the traveling public, all

1 bidders, and not just bidders who are required by
2 Section 11307 and Amtrak to provide -- or to comply
3 with the requirements of 49 U.S.C. 24405, all bidders
4 should be required to comply with the liability
5 requirements of 49 U.S.C. 28103(c) of the Rail
6 Passenger Service Act.

7 Third, the procedures and documentation
8 requirements FRA will utilize to ensure that bidders
9 comply with the passenger rail safety requirements that
10 have been mentioned in Iowa Pacific's comments and in
11 ours should be detailed so that future bidders will be
12 familiar with such requirements and be cognizant of
13 their responsibilities.

14 Fourth, the regulations should provide for
15 FRA to ascertain from Amtrak, as we suggested in our
16 written comments, the feasibility of providing access
17 to facilities and equipment and services that a bidder
18 contemplates Amtrak will provide. North Carolina in
19 its comments made a very good point that some of the
20 stations that we use, as well as other facilities, are
21 owned by third parties, and in some cases our
22 agreements to -- or in many cases our agreements to
23 utilize those facilities are not transferable to other
24 parties. So if a bidder wishes to utilize those
25 facilities, they're going to need to -- they and FRA

1 and -- the bidder are going to need to be aware of
2 that, and the bidder may need to either enter into an
3 agreement with the entity provided the facility or
4 identify an alternative facility to use. Because we,
5 you know, again there's nothing we can do about that.
6 Our agreements aren't -- in some cases are not
7 transferable.

8 And relatedly also the access agreements that
9 we've talked about between the non-host rail carrier
10 and the host railroad should provide assurances that
11 there will be adequate infrastructure as required by 49
12 U.S.C. 24405(c)(1). That there will be adequate
13 infrastructure not just when the service begins, but
14 that there will be adequate infrastructure to
15 accommodate a future resumption of service by Amtrak if
16 a bidder ceases to provide service on the route, a
17 possibility that the statute contemplates, or upon
18 termination of the Competitive Rail Service Pilot
19 Program, which unless extended has a limited life under
20 the statute.

21 Finally, I would note that several other
22 commenters have agreed with Amtrak's recommendation
23 that the maximum operating subsidy a bidder can
24 receive, which is limited by Section 11307 to 90
25 percent of the route's operating loss, be a readily

1 determinable amount. We've proposed in our written
2 comments a definition of operating subsidy that ties to
3 the operating loss that is shown in Amtrak's publicly
4 available monthly performance reports. That definition
5 in accord with the statute excludes capital cost,
6 depreciation, other non-cash cost and interest. And
7 with regard to interest, I would note that contrary to
8 the speculation of one of the commenters, the interest
9 that Amtrak incurs is on capital investments. We don't
10 borrow money to cover operating expenses.

11 And I'd like to then turn to some of the --
12 several of the comments and some of the other parties'
13 proposals. And I'll just touch -- although there are
14 many that we agree with, I did want to touch on a few
15 that propose that FRA adopt regulations that are either
16 at odds with the statutory language, that are premised
17 on erroneous factual assumptions or that would give the
18 commenters competitive advantages that are unrelated to
19 the matters that the regulations address.

20 First, Section 11307 provides only for an
21 operating subsidy. It doesn't authorize capital grants
22 to bidders. And the operating subsidy that it
23 authorizes, 90 percent of the previous year's subsidy
24 adjusted for inflation, is the maximum amount that a
25 bidder can receive, not a fixed amount under the

1 statute. Amtrak believes that in determining whether
2 to award a subsidy and the subsidy amount, FRA should
3 take into effect the impact of making an award on other
4 long distance routes and ensure that a decision to
5 award a subsidy to a bidder is consistent with
6 Congress' objective of reducing federal funding
7 requirements for long distance routes.

8 Second, some commenters who compete against
9 Amtrak, including competing in the operation of for-
10 profit commuter services, have urged FRA to adopt
11 regulations that would give bidders virtually
12 unfettered access to Amtrak's cost revenue and other
13 data. And while it's understandable that competitors
14 would like to have that kind of data about their
15 competitors, there isn't anything in Section 11307 that
16 authorizes or requires Amtrak to release such data.
17 And certainly the release of such data is not necessary
18 to carry out that provision. I would note that route
19 level information, which several bidders have
20 identified as necessary, regarding the cost, revenues,
21 ridership, on-time performance, customer satisfaction
22 of each route is already available on Amtrak's website.
23 And that Amtrak's written -- in our written comments we
24 suggested that the way to address the need for bidders
25 to determine what the cost of a service they anticipate

1 Amtrak would be providing to them is to have FRA obtain
2 that cost from Amtrak. And, of course, the statute
3 Section 11307 provides that if there is a dispute over
4 such cost that the Surface Transportation Board will
5 resolve the dispute. So we think, you know, that
6 having FRA obtain that information from Amtrak coupled
7 with the statutory provisions that provide for STB
8 adjudication of any disputes over what the cost should
9 be, that's the appropriate way to address that issue.

10 And I would note also that one commenter
11 suggested that Amtrak be required to provide access and
12 service based on unit cost of usage used for state
13 supported trains. Most of Amtrak's costs for state
14 supported trains are not based on unit cost but,
15 rather, on route-specific costs. And the cost of
16 providing services, such as for example reservation
17 services and station services, varies significantly
18 from route-to-route. So there's no factual predicate
19 or common sense in the suggestion that cost should be
20 based upon unit costs which aren't, you know, aren't
21 normally calculated. They should be based on, as we've
22 suggested and as the statute requires, the actual cost
23 of providing a service on a specific route.

24 I also wanted to note that the services that
25 Amtrak can be required to provide do not, and the

1 statute is very clear on that, include our access
2 rights to host railroad lines or Amtrak train and
3 engine crews. Section 11307 specifically states that
4 it does not affect Amtrak's access rights. It
5 specifically requires bidders to have their own access
6 agreements, unlike Section 217 of PRIIA, which one of
7 the commenters referenced earlier, and suggested was
8 analogous. It's not. The Section 11307 requires
9 access agreements. And I would also note that the
10 Surface Transportation Board has ruled that Amtrak's
11 access rights are not transferable, and that was in the
12 *Springfield Terminal*, 3 S.T.B. 157, 172 (1998). And
13 that Amtrak's host railroad agreements generally
14 provide like many other agreements that our rights
15 under those agreements are not transferable. There was
16 a reference earlier in the hearing to Amtrak's
17 operation of a service known as the Texas Limited
18 during the 1980s between Houston and Galveston, Texas.
19 The Texas Limited service was a charter train that
20 Amtrak operated under a voluntary agreement with the
21 charterer and under a voluntary agreement with the host
22 railroad, the Southern Pacific Railroad, that agreed to
23 accommodate the train. The operation of that train was
24 not based upon an STB order issued pursuant to Amtrak's
25 statutory access rights; and, therefore, has no

1 relevance to -- you know, doesn't somehow undermine the
2 clear statutory language that requires that there be
3 access agreements between the service provider and the
4 host railroad, and specifically precludes the service
5 provider from piggybacking onto Amtrak's access rights.

6 One small point is that one of the
7 Association of Independent Passenger Rail Operators
8 suggested at page 3 of its comments that FRA should
9 impose service standards on Amtrak if it submits a bid.
10 I would note that Section 11307 and the language that's
11 codified at 49 U.S.C. 24711(b)(e) and (b)(4)
12 specifically authorizes FRA to impose service standards
13 only on, quote, a winning bidder that is not or does
14 not include Amtrak, end quote. Obviously, there are
15 lots of other metrics and service standards that
16 already apply to Amtrak under the statute and as
17 implemented by FRA. But there's nothing in the statute
18 that authorizes FRA to impose additional service
19 standards on Amtrak. In fact they're specifically
20 precluded by the statutory language.

21 And then, finally, if there is a dispute
22 between a bidder and Amtrak over whether access to
23 Amtrak facilities and services is necessary or as
24 Section 11307 specifically states, will unreasonably
25 interfere with other Amtrak operations or with the cost

1 of such access or services, Section 11307 specifies
2 that the dispute is to be resolved by the Surface
3 Transportation Board. And contrary to the suggestions
4 of some of the commenters there is nothing in Section
5 11307 that authorizes FRA to prescribe the procedures
6 the FRA will follow to -- I'm sorry, that the STB will
7 follow, impose deadlines by which the STB must render a
8 decision, adopt presumptions as to how the STB will
9 rule to grant interim access to a bidder prior to an
10 STB decision, to address requests for access to Amtrak
11 equipment, Section 11307 specifically states that that
12 can only be addressed by the Surface Transportation
13 Board. And that's clear when you compare the statutory
14 language of 49 U.S.C. 24711(c)(1) and 49 U.S.C.
15 24711(g)(1)(A). And there's certainly nothing that
16 authorizes FRA to circumvent the clear statutory
17 language as one commenter suggested by imposing access
18 agreements not ordered by the STB and Amtrak, grant
19 agreements.

20 And I would also note in response to one of
21 the suggestions made in the oral comments, not in the
22 written comments but in the oral comments by one of the
23 commenters, who suggested that FRA should include in
24 the regulations very specific provisions regarding how
25 requests for equipment would be handled. I would note

1 that the ability to provide equipment to third parties
2 may be limited -- and to allow those third parties to
3 maintain equipment and so forth may in some cases be
4 limited by applicable labor agreements and by financing
5 agreements depending on what type of access is required
6 and so forth. So that's totally not something that
7 should be addressed without any consideration of all
8 those issues. And the regulations have something that
9 under Section 11307 the STB is directed to address on a
10 case-by-case basis in a proceeding in the event that
11 there is a dispute.

12 And I guess I would also want to note that
13 when we talk about disputes that Amtrak and the State
14 of Indiana reached a consensual agreement not requiring
15 the STB adjudication, which PRIIA Section 217 provided
16 for that we reached a consensual agreement under which
17 we agreed to provide access and services necessary for
18 the state to contract out a portion of the services
19 provided. So I wouldn't automatically assume that any
20 dispute is going to be destined to the STB. In that
21 case we, you know, reached an agreement. And if there
22 is a successful bid under 217, we would certainly
23 endeavor to reach an agreement with the bidder rather
24 than resorting to the STB adjudication.

25 And that's all I have at this point. Happy

1 to address any questions that the FRA staff may have.

2 HEARING OFFICER NISSENBAUM: Well, thank you,
3 Mr. Slattery.

4 And we did have one additional speaker sign
5 the list to make oral comments, Malcolm Kelly [sic]
6 from NARP. Malcolm.

7 MR. KENTON: Good afternoon. My name is
8 Malcolm Kenton, M-a-l-c-o-l-m K-e-n-t-o-n. I want to
9 thank you for providing me the opportunity to testify
10 and for considering public and stakeholder comments on
11 the final rulemaking for the Competitive Passenger Rail
12 Service Pilot Program.

13 I serve as elected member of the all
14 volunteer Council of Representatives of the National
15 Association of Railroad Passengers, the nation's oldest
16 and largest consumer advocacy organization, working for
17 almost 50 years to expand and improve the nation's
18 passenger train network. I've been involved with the
19 Association in some capacity for over a decade. And I
20 also work with independent passenger rail operators as
21 a consultant. But most importantly, I'm a concerned
22 U.S. citizen, who frequently travels by train, and
23 routinely relies on long distance passenger trains for
24 transportation. I'm here primarily to represent the
25 passengers' perspective.

1 I will echo the comments of the AIPRO. Those
2 are echoed regarding the inadequacy of the 60-day time
3 limit. That given the complexity of determining the
4 equipment, facilities, personnel and services needed to
5 operate long distance trains, the 60 days seems
6 insufficient to allow a complete petition to be
7 prepared that meets all the statutory and regulatory
8 requirements. And that if FRA has any leeway on this,
9 perhaps only an outline or draft petition should be
10 required before the 60-day deadline. And a longer
11 deadline could be allowed to follow-up with the
12 complete petition that describes in detail how the
13 petitioner proposed to operate the route, cooperate
14 with the host railroads and Amtrak and provide onboard
15 and customer service.

16 I'll also echo the comments of others
17 regarding the determination of subsidy to be made
18 available. FRA should do all that's within its power
19 to facilitate information sharing between Amtrak and
20 eligible petitioners under the Pilot Program so that
21 non-Amtrak petitioners have a reasonable idea of the
22 level of service they will receive -- level of subsidy,
23 rather, they will receive to operate a particular long
24 distance route. So if this amount is based on 90
25 percent of the amount Amtrak receives for that route,

1 an amount that Amtrak does not make public for
2 legitimate reasons, and for the same reason that
3 uncertainty about future years funding levels makes it
4 near impossible for Amtrak to conduct a long-range
5 capital planning, not having a reasonable estimate of
6 the subsidy they will have to work with would hamstring
7 non-Amtrak operators planning efforts and put them at a
8 competitive disadvantage to Amtrak, which already has
9 access to the necessary information.

10 FRA'S final rule should define the same level
11 of service for the purpose of enforcing the statutory
12 requirement that are weighing on Amtrak petitioner to
13 provide at least the same level of service over the
14 selected route as Amtrak has previously provided. This
15 definition should include serving at least all the same
16 stations, providing sleeping car and full dining car
17 service if previously provided by Amtrak, maintaining
18 at least the previous frequency of operation, and
19 maintaining same day or next day connections with the
20 Amtrak trains and connecting rail and bus services,
21 other Amtrak trains and connecting rail and bus
22 services provided by the route as operated by Amtrak.
23 Also a route awarded to a non-Amtrak operator must not
24 become a less useful part of the national passenger
25 train network than the route that was under Amtrak

1 operation. Instead, successful petitioners should be
2 encouraged to provide even greater levels of customer
3 service.

4 And with that in mind, I would note the
5 Congress' intent in Section 11307 includes
6 encouragement of novel and outside the box approaches
7 to the running of successful passenger train service.
8 FRA's rules explicitly encourage petitioners to offer
9 innovative ideas for achieving outcomes desired by
10 passengers, outcomes that Amtrak has had difficulty
11 achieving for a variety of reasons. Such outcomes
12 include better onboard food and beverage services,
13 these include healthier, more sustainable or locally
14 sourced and special diet friendly fare as well as
15 greater collaboration between intercity train operators
16 and local transportation lodging and tour providers.
17 And, finally, enhanced onboard amenities such as a
18 greater variety of overnight accommodations at
19 different price points, and faster and more reliable
20 wireless Internet connectivity onboard.

21 Thank you again for the opportunity to
22 testify and for considering suggestions. I and NARP
23 look forward to being a resource to FRA as it develops
24 and carries out this promising Pilot Program.

25 HEARING OFFICER NISSENBAUM: Thank you,

1 Malcolm. I'm sorry for butchering your name. I won't
2 try again, but and thank you to everyone who spoke and
3 made comments and those of you who submitted for the
4 record. And as we said, there will be another 30 days
5 available to respond to any comments that were made
6 here or and to review what's in the docket and submit
7 any additional clarifications or comments.

8 Folks have been patient in sitting here for
9 awhile. We may have one or two clarifying comments or
10 questions. And I guess I just want to put one out for
11 folks to either respond to now or perhaps to submit for
12 the record if you'd prefer. And that is we did have a
13 comment from a state DOT concerned about the potential
14 impact, and this is really with respect to the
15 operating subsidy question, concern about the potential
16 impact on the state's financial responsibility for its
17 existing services that may in some way be impacted by
18 the long distance route that is competed out. So I'm
19 just curious if there are either any comments or input
20 on that again today or if you'd rather consider that
21 issue. I think it's something that FRA needs to look,
22 along with, obviously, the impact on, you know, the
23 federal support, which has already been discussed.
24 Does anyone want to speak to that now?

25 MR. CHAMBERS: I'll speak to it briefly. I

1 had --

2 HEARING OFFICER NISSENBAUM: Ray, do you
3 mind?

4 MR. CHAMBERS: I had this discussion. I
5 won't say with whom, but with one of the state --

6 HEARING OFFICER NISSENBAUM: Ray Chambers.

7 MR. CHAMBERS: -- rail directors who has a
8 state supported route, and there is a long distance
9 route that goes right through that same territory. And
10 this is one of those -- we're getting in the weeds here
11 on an awful lot of issues. An awful lot of good issues
12 are getting on the table. But we realized that this is
13 something that needs to be fleshed through, and I'm
14 going to talk it over with my guys, and I'll see if
15 anybody has any additional comments on it. But this is
16 one of those areas where you either bid on a long
17 distance route that passes through where there is a
18 state subsidized route or if you want to incorporate
19 the state subsidized route, you've got to bring the
20 state into the partnership. And we realize that there
21 are all sorts of different parameters there that may be
22 allowed by the statute that nobody has even thought
23 about at this point. So with that, I'll just say this
24 is again one of those issues that's got layers to it,
25 and we'll get back to you with some written thoughts

1 and comments. I'll get back to the state rail director
2 that I talked to and because I think it's very
3 important and a very good question. We have 15 of
4 these long distance routes, and, of course, we had a
5 discussion this morning, are those routes sacrosanct
6 that's got to be end point to end point or is it
7 possible to parse it in other ways? Probably it's end
8 point to end point, but we don't know that for sure.
9 And then how do they relate to the state supported
10 routes? How do you bring the states into it? So very
11 important question. I don't know the answer to it, but
12 it needs to be discussed, and we will get further
13 thoughts on it.

14 HEARING OFFICER NISSENBAUM: Thank you.

15 MR. CHAMBERS: Anybody from my -- want to
16 comment on that?

17 HEARING OFFICER NISSENBAUM: Anyone else want
18 to speak to that at all?

19 MR. HEFFNER: Actually, it's not about that
20 specifically but sort of a follow-up to something else,
21 if this is the time.

22 HEARING OFFICER NISSENBAUM: Absolutely.
23 Come on up.

24 MR. HEFFNER: Okay.

25 HEARING OFFICER NISSENBAUM: And just clarify

1 your name and organization --

2 MR. HEFFNER: Certainly.

3 HEARING OFFICER NISSENBAUM: -- please for
4 the record.

5 MR. HEFFNER: My name is John Heffner. I'm
6 an attorney with Strasburger and Price here in
7 Washington. I've been representing Iowa Pacific since
8 its formation as a freight carrying short line in 2001.
9 I've been involved in Iowa Pacific's passenger
10 projects. I've ridden the Hoosier State. I've ridden
11 the so-called Pullman Sleeping Car Service on the
12 Hoosier State. I was a paying customer unknown to Iowa
13 Pacific. And while this is not the gist of the few
14 things that I want to say, I want to tell you that the
15 service was excellent. It was served on a plate that
16 would break in a derailment. The dinner was freshly
17 made. And as much as I like Amtrak and ride Amtrak
18 trains, I don't understand why Amtrak cannot do that,
19 and I do not accept the excuses that have been given.
20 There's no reason why you can't make fresh food and
21 served on a china plate.

22 I would also note that Iowa Pacific is fully
23 compliant with federal law. It is under the Railroad
24 Retirement System. God forbid if its employees are
25 injured or worse killed, they are covered by FELA.

1 They are covered by the Railway Labor Act. And I agree
2 with the concept of let's level the playing field, and
3 that includes leveling the playing field as Mr. Ellis
4 stated in his comments on the cost side of things.

5 Now a few other select comments. Most days
6 of the week I take the service provided by Keolis out
7 of Alexandria, about a 15-minute trip. Because Metro
8 service has become so unreliable. I will take the VRE
9 again tonight home, and I will walk point five miles to
10 where my car is legally parked all day long. Keolis
11 provides a superb service. And if Keolis can provide
12 an excellent commuter rail service, why can't it
13 provide an equally excellent either short distance,
14 medium distance or even long distance service?

15 I would also note that Iowa Pacific has its
16 own fleet of equipment, its own locomotives, and
17 they're in use every day on the Hoosier State.

18 That aside, I would also like to note that we
19 would like the opportunity to respond, and we will
20 respond with written comments on the October 7th
21 deadline. Mr. Slattery made a lot of very good points
22 as did the labor representatives. We want to digest
23 those and get back to you on it.

24 In terms of just a few other things, capital
25 grants and operating grants. There are references to

1 Davis-Bacon. There are references to funding that is
2 provided by FTA, and labor protective conditions are
3 attached to those. But a lot of those grants are
4 really capital grants. And here what we're talking
5 about is operating grants. So it's kind of an apples
6 and oranges or a grapes and grapefruit type comparison.

7 My second point, I worked at the U.S. Railway
8 Association back in the dark ages of the 3R and the 4R
9 Act. And my recollection of Section 405 in terms of
10 labor protective conditions it was kind of a one-time
11 thing dealing with a very unusual situation where you
12 had seven bankrupt railroads that were putting their
13 workforces together for Conrail and some spin-off
14 lines, including the Northeast Corridor and those
15 routes that the so-called profitable carriers like the
16 Chessie System or the Norfolk and Western, Southern
17 Railway, et cetera, took over that had been operated by
18 the bankrupt railroads. Similarly you had other labor
19 protective conditions that came into play with the
20 *Milwaukee Road Restructuring* and *Rock Island* case. And
21 later on I believe the labor representative, one of the
22 labor representatives, Mr. Edelman, mentioned New York
23 Dock. New York Dock is a labor protective condition
24 that evolved in the late 1970s through or by I should
25 say the Interstate Commerce Commission, and that

1 applies typically where you've got two decent sized
2 railroads merging, not too short lines. But either two
3 Class I's merging or maybe a Class I and a Class II in
4 some sort of controlled type transaction. And a
5 significant element of labor protection, labor
6 protective missions -- and I would say that Iowa
7 Pacific, incidentally, has a good workforce and it
8 believes in good workforce, and you can't have a good
9 railroad or a good airline or a good anything without a
10 good and dedicated workforce. But the issue here with
11 New York Dock as I understand the way it works is you
12 have to have an implementing agreement, and you can't
13 consummate the deal until you've got the implementing
14 agreement. What we're talking about here is a four-
15 year operating timeframe with maybe an option for
16 another four years. I remember back in my distant past
17 there was a case that I -- with a name something like
18 Pittsburgh and Lake Erie Railroad. I don't remember,
19 you know, who it was versus the P&LE. Might have been
20 PLE versus the Railway Labor Executives Association.
21 And the court there made the comment that if you can't
22 get an implementing agreement, this whole process could
23 go on forever and ever and ever. So I can see a
24 situation where an entity, whether it's Iowa Pacific or
25 Herzog or Keolis wanted to take over a given passenger

1 train, they couldn't reach an implementing agreement,
2 therefore they couldn't implement the train, and by the
3 time maybe they got it, the time would be up. So
4 that's an issue I think that the FRA does need to pay
5 some attention to.

6 So those are the substance of my comments. I
7 would hasten to add that -- just thinking if there's
8 anything else that's pertinent. I think competition is
9 good. I have Comcast at home. We have a cable
10 monopoly in Alexandria. Comcast stinks. I think
11 there's a room, an area where private passenger service
12 can improve the quality of passenger service that all
13 Americans enjoy. Thank you.

14 HEARING OFFICER NISSENBAUM: Thank you for
15 your comments.

16 Is there anyone else who would like to make
17 any additional comments at this time?

18 MR. EDELMAN: I would. Thank you.

19 HEARING OFFICER NISSENBAUM: Mr. Edelman, you
20 want to step up?

21 MR. EDELMAN: I'll be quick. First of all,
22 the 4R protections were not a one-time deal. They
23 actually got written into the PRIIA statute, and they
24 still apply to various things. So there's that. The
25 New York Dock, we're not asking for New York Dock

1 conditions. We're asking for the 4R Act, equivalent to
2 the 4R Act conditions exactly as set out by the
3 statute.

4 Again, not years and years and years. It's
5 60 days for an implementing agreement under the 4R Act.
6 The Pittsburgh and Lake Erie case did not involve that.
7 It involved the statutory immunity provision that comes
8 with the Interstate Commerce Act, and the Interstate
9 Commerce Commission approved a -- approved mergers and
10 was immunity from other law. So whatever else is
11 about, that's what it concerned, not the employee
12 protections. I'll save the rest for later. One
13 question is, will we have the transcript before the
14 October 7 time?

15 HEARING OFFICER NISSENBAUM: Yes.
16 Approximately 10 days we hope to have the transcript
17 available for folks to look at.

18 Any other comments at this point? Does the
19 Panel have any other questions, clarifying questions?

20 Well, I will say that I have found this very
21 informative. We've had some I think important issues
22 that have been raised by really all parties here, and I
23 think it will be quite helpful as we're sort of
24 deliberating on how to proceed with the final rule, and
25 we'll look forward to any additional comments that you

1 may have. We know that this may have sparked some
2 additional interest and some clarifications folks want
3 to put on the record; please do that. This is an
4 important -- very important rule to us, and we want to
5 make sure we get it right. So thank you all for
6 participating. Thank you for being here today.

7 And this hearing is adjourned.

8 (Whereupon, at 3:45 p.m., on September 7,
9 2016, the Public Hearing was concluded.)

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C E R T I F I C A T E

This is to certify that the attached
proceedings before the Federal Railroad Administration
in the matter of:

Public Hearing

On

Competitive Passenger Rail Service Pilot Program

PLACE: Washington, DC

DATE: September 7, 2016

were held as herein appears, and that this is the
original transcript thereof for the file of the
Agency.



Tom Bowman, Reporter
FREE STATE REPORTING, INC.