

## Rail Law Alert – New Challenge to NEC Cost Policy

02.03.16

### MBTA Seeks Ruling Vacating the Northeast Corridor Commission's Cost Allocation Policy

In a lawsuit filed last week, the Massachusetts Bay Transportation Authority (MBTA) challenges the Cost Allocation Policy (the Policy) directed by Section 212 of the Passenger Rail Investment and Improvement Act (PRIIA), Pub. L. No. 110-432 (Oct. 16, 2008) (codified at 49 U.S.C. § 24905) issued by the Northeast Corridor Commission (the Commission) last fall. The lawsuit claims that Amtrak has now given it an ultimatum: renegotiate its existing shared use agreement with Amtrak to conform to the Policy, or face a proceeding at the Surface Transportation Board (STB) to impose costs pursuant to the Policy. MBTA claims that Amtrak's posture not only violates MBTA's long-standing shared use agreement with Amtrak, but that the Policy is void under the Administrative Procedure Act (APA) and the U.S. Constitution.

The Commission was established under PRIIA to, among other things, "develop a standardized formula for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation . . . that use Amtrak facilities or services or that provide such facilities or services to Amtrak." 49 U.S.C. § 24905(c)(1)(A). Its voting members consist of four representing Amtrak, five representing the U.S. Department of Transportation, and nine which are appointed by the States in the Northeast Corridor and the District of Columbia and which "serv[e] at the pleasure of[] the chief executive officer thereof." § 24905(a)(1)(C). Over the objection of Massachusetts and New York, and with New Jersey abstaining, the Commission promulgated the Policy on October 2, 2015, and reissued it on December 7, 2015, with various amendments. The recently enacted FAST Act, Pub. L. No. 114-94, § 11305(C)(3) (Dec. 4, 2015), provides that commuter rail agencies that fail to implement new agreements with Amtrak may be subject to an STB action to determine the appropriate compensation for shared facilities or services, at least in part as determined by the Policy.

In the United States District Court for the District of Massachusetts, MBTA argues:

- The Commission is unconstitutional, because nearly half of its members are appointed by and serve at the pleasure of State executives in violation of the Appointments Clause of the U.S. Constitution and the separation of powers doctrine;
- The Policy was promulgated without due process, as the majority of members have a pecuniary interest in the Policy's application, to the detriment of other members; and
- The Policy is a rule within the meaning of the APA, but was promulgated without public notice and comment as that Act requires.

According to MBTA's complaint, imposition of the Policy would result in approximately \$56 million in savings for Amtrak in the current fiscal year, while imposing substantial additional costs on states such as Massachusetts, New Jersey, Pennsylvania, and Maryland. The complaint also raises issues that are unique to the operating arrangement between MBTA and Amtrak, in particular because of MBTA's ownership of a part of the corridor Amtrak uses for its intercity operations. MBTA's claims raise novel issues of law that, no matter which party is successful, may have far-reaching consequences for commuter rail agencies operating on the Northeast Corridor. We will monitor the litigation and provide further updates on this and any related litigation as they develop.