Freight Rail
Customer Alliance

Subcommittee on Railroads, Pipelines, and Hazardous Materials
of the House Transportation and Infrastructure Committee

Hearing:

"*Stakeholder Views on Surface Transportation Board Reauthorization*"

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10:00amEST

Written Comments
Submitted by
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On behalf of the Freight Rail Customer Alliance

INTRODUCTION

Chairs DeFazio and Payne, Ranking Members Graves and Crawford, and Members of the Subcommittee, thank you for holding today's hearing, "*Stakeholder Views on Surface Transportation Board Reauthorization*," and for the opportunity to submit these written comments.

I am Emily Regis. I am the Fuels Resource Manager for Arizona Electric Power Cooperative, Inc., or AEPCO, a nonprofit rural electric generation and transmission cooperative in Arizona. We serve six member nonprofit distribution cooperatives that provide retail electric power to more than 400,000 residences and business in Arizona, California, and New Mexico, predominately in lower income areas. AEPCO relies on the Union Pacific Railroad, BNSF Railway, and a short line to deliver coal for our power plants. As things stand now, we cannot keep the lights on unless the railroads deliver the coal.

I also serve as Vice President of the Freight Rail Customer Alliance or FRCA. FRCA represents large trade associations for more than 3,500 electric utility, agriculture, chemical and alternative fuel companies, and their customers in all 50 states. FRCA's members, like AEPCO, depend on railroads to be able to run their businesses and serve their customers. In addition, I serve as President of the National Coal Transportation Association (NCTA), an association of coal consumers, producers, and service providers. I also currently serve as a Member, representing the small utility sector, of the Rail Energy Transportation Advisory Committee of the Surface Transportation Board (Board or STB).

In addition, I had the privilege of participating on behalf of FRCA during the subcommittee's *Railroad Shippers Roundtable* that was held in 2019. That informal roundtable discussion and this hearing are important public venues to 1) learn more about the longstanding challenges facing freight rail shippers and 2) what Congress, the STB, and stakeholders, can do to support freight rail. It is a vital component of our nation's economy as a key element in the supply chain. It is relied upon by farmers to deliver crops to market and by utilities and propane suppliers to receive the fuel we need to serve our customers. Freight rail also enhances our global competitiveness.

THANK YOU

To begin, FRCA appreciates your leadership in realizing the ***Surface Transportation Board Reauthorization Act of 2015 (Act)***, P.L. 114-110, which marked for the first time since 1998 that the Board was reauthorized. The reauthorizing law: (1) provided much-needed reforms to the Board's process to address numerous historical shortcomings experienced by the Board and industry stakeholders; (2) improved the Board's transparency; (3) helped the Board operate more expeditiously and efficiently; and (4) better enabled the Board to strike a more equitable balance among the interests of its diverse stakeholders. The ***Act*** also expanded the size of the Board from three Members to five Members to allow the agency to become more functional and collaborative. Considering that the ***Act*** expired on September 30, 2020, FRCA again welcomes this opportunity to share its members' experiences and views as you develop the next STB authorization.

FRCA also thanks Chairs DeFazio and Payne for requesting the Government Accountability Office (GAO) to conduct a study on the impacts of Precision Scheduled Railroading (PSR). The results of this study, once finalized and released, promise to assist all stakeholders in developing the next STB authorization.

These submitted written comments will discuss: 1) continued rail carrier service performance problems that some FRCA members and many other shippers continue to experience, and 2) offer some suggestions on how Congress can assist the Board in better utilizing its existing statutory authority or by granting additional statutory authority to address those problems more effectively.

NEED FOR A BALANCED APPROACH IF DIFFERENTIAL PRICING IS TO WORK

FRCA wishes to make clear that is not calling for reregulation or a return to the pre-Staggers Act era. To the contrary, the largely captive shippers that are FRCA members appreciate the need for differential pricing and a vigorous and healthy railroad industry. We agree that one size does not fit all.

But there is a need for balance so that markets can work. When railroads face neither effective competition from other railroads, nor effective oversight, shippers and the economy suffer. In 1980 there were 40 Class I railroads. Today there are only seven Class I carriers moving 90% of our nation's freight with several pending new mergers before the Board including two Class I carriers and in an era of PSR. When there is a lack of competition in the marketplace, more specifically, the lack of competition between rail carriers where railroads enjoy immunity from most anti-trust protections, it is incumbent upon the Federal government, in this case the STB per the ***Staggers Rail Act***, to facilitate competition.

FRCA also deeply appreciates the efforts of STB Chairman Oberman and the Board to address the lack of competition and poor service in the railroad industry, particularly since the emergence of PSR. For instance, FRCA appreciates the Board's consideration in a pending rulemaking of the need to have Class I railroads report First-Mile/Last-Mile (FMLM) data, in the aggregate, to the Board.

Such FMLM data is critical for measuring the end-to-end service being provided by the common carrier railroads.

Without that data, shippers and the Board: 1) lack insight into the overall functioning of the rail network that shippers need for planning and operational purposes; 2) lack data to assess whether any service problems are specific to them or more general, whether they are being singled out for any service problems, and whether service is improving, deteriorating, or remaining stable generally; 3) are hamstrung in assessments of the extent to which railroads are properly discharging their common carrier obligation. Requiring submission of the data should not unduly burden the railroads in so far as they must necessarily already collect, monitor, and utilize the data, especially to the extent they seek to adopt and utilize the principles of PSR. While the Board does require the submission of significant railroad performance data pursuant to *United States Rail Service Issues—Performance Data Reporting,* Docket No. EP 724 (Sub-No. 4), the data does not include the FMLM component except in so far as it is incorporated in the rail origin to rail destination data for unit trains and intermodal service.

FRCA also appreciates that the challenges the pandemic poses for railroads, as it does for all of us that depend on employees working in close proximity with each other to operate large, complicated physical assets. Nonetheless, railroad service and volumes appear to have been disproportionately affected, notwithstanding what should be significant advantages, particularly in the ability to operate long trains with only two train crew members.

LACK OF RAILROAD COMPETITION – HIGHER RATES FOR SHIPPERS

In general, captive shippers pay higher rates because they lack an effective competitive option. The STB has, various rate reasonable remedies available in theory, but they work for only a modest minority of shippers. Thanks in large part to the ***Act,*** and the recommendations made in the STB's 2019 *Rate Reform Task Force Report*, the Board is making some efforts to address this problem through a Final Offer Rate Review process that is also being considered in conjunction with a rail carrier-proposed voluntary arbitration process. In addition, the Board issued a Final Rule on Market Dominance which was in response to another recommendation in the *Rate Reform Task Force Report* "to develop a standard for pleading market dominance that will reduce the cost and time of bringing a rate case." The Board may also be renewing its competitive access efforts in reciprocal switching, which FRCA strongly supports, but the railroads have been able to stall those efforts for now eight years, or over forty when one considers that reciprocal switching was part of the ***Staggers Rail Act of 1980***.

The Board, however, has yet to take further action to flesh out its revenue adequacy constraint, rate reasonableness methodology or on alternatives to the Stand-Alone Cost (SAC) test for larger rate cases. The railroad industry and markets have changed vastly since 1980, and updates to these three elements are needed so that shippers can have viable options to obtain rate relief, especially when the stand-alone cost methodology is a poor fit for their circumstances. With PSR, the railroads have reduced and eliminated their ability to respond to challenges and opportunities to save costs. But rates have gone up, not down, as service has been reduced and compromised.

LACK OF RAILROAD COMPETITION – FINANCIAL HEALTH OF RAILROADS

The railroads always highlight to their investors their reduced operating ratios. Those reductions have not been achieved from growing volumes or improving service. Instead, they result from raising rates, reducing quality of service, and lowering costs, often on the backs of their workers.

Under these circumstances, operating ratio reductions reflect how service reductions, not cost savings, are being passed through to customers.

A goal of the ***Staggers Rail Act of 1980*** was to restore financial stability to the U.S. rail system. By all accounts, this goal has been achieved. The railroads have not needed to raise new equity in decades and have excellent debt capital at favorable interest rates. Under PSR, the railroads have sought to reduce their capital expenditures. The railroads' high returns have led to excess capital, which they have sought to distribute through repeated dividend increases as well as sizeable stock buybacks. Rather than invest in their networks to improve service, the railroads have sought to reduce capacity and focused instead on rewarding their investors.

One measure of the financial health of a Class I rail carrier is the Board's annual determination of "revenue adequacy." The Board's website provides information on the number of Class I carriers that have been deemed "revenue adequate" from 2000 through 2020. For the period form 2014-2020, substantial segments of the railroad industry have achieved revenue adequacy under the Board's measure, and some have done repeatedly:

- ✓ 2014, 2015, and 2016: Four.
- ✓ 2017: Five.
- ✓ 2018: Three.
- ✓ 2019: Five.
- ✓ 2020: Six (BNSF, CSX, Grand Trunk Corp., KSC, Soo Line, and UP).

Only Kansas City Southern (KCS) failed to achieve revenue adequacy in any of those years, and it has now been acquired into voting trust by Canadian Pacific Railway and at a massive premium. The

Board's revenue adequacy findings confirm the railroads industry's accumulation of substantial railroad strength.

However, FRCA has long been concerned that the Board's annual determinations of "revenue adequacy" for Class I carriers do not reflect the true health of the overall railroad industry and its individual carriers. FRCA believes that the health of the rail carriers is actually much stronger than what the figures and pattern from above illustrate.

In a competitive environment, this would not happen. Volumes would flow to competitors with lower rates or better service, and the cost savings would be passed through to consumers. The lack of effective competition among railroads is why the railroads are able to raise rates, lower costs, degrade service, and increase their margins and profits.

The resulting service problems can be more severe than the rate problems that result from the lack of effective service. In particular, many electric utilities across the country have, for the past 18 months or so, faced difficult weather conditions, natural disasters, and an increase in natural gas prices (for those utilities that can burn natural gas) that has forced utilities to burn more coal. However, despite the need for more coal, utilities have been hit with poor rail carrier service performance resulting in unpredictable coal deliveries which in turn increases costs. While AEPCO and most other coal-burning utilities can stockpile coal, doing so costs money. The variability of service means that a utility can never know if its stockpile is too big or small. In addition, the quality of coal is compromised when the stockpile is too big or not big enough.

To provide an indication of the inadequacy and lack of predictability in service FRCA, along with NCTA and the National Rural Electric Cooperative Association (NRECA) have the results from its 4th *Utility On Time Performance (OTP) Metric Survey*. It should be noted that these results include both plants and utilities that are captive to a single railroad and those that have the ability to receive service from two carriers. In other words, the service problems are hardy confined to captive shippers, but extends to those that are sometimes called "competitively-served."

The data collected covers July 2021 through December 2021 representing 28 plants that ship coal in the United States on the Union Pacific Railroad, BNSF Railway and the Norfolk Southern. Coal Supply regions represented in the data include, the Southern Powder River Basin (SPRB), and Northern Powder River Basin (NPRB), Rockies, Northern Appalachia (NAPP), Central Appalachia (CAPP) and Illinois Basin (ILB):

Coal Regions	SPRB	NPRB	Rockies	NAPP	CAPP	ILB	Other
Plants	14	4	2	1	1	4	2

Service

The utilities that responded to the survey reported the following:

- 92% reported rail service issues that have impacted their company's coal transportation.
- 60% reporting railroad service as worse than it was in 2019 and 2020.
- 64% of those respondents also reporting that their company had to modify its operations in the second half of 2021 because of railroad service issues, disruptions, and delays.

1. **Utilities responded to specific questions about how their operations have been impacted by railroad service issues:**

Answer Choices	Responses	
No issues. Service has been about the same as usual	0.00%	0
Railroad service has been deteriorating for several months	58.33%	7
Coal Inventory stockpiles reduced below target levels	83.33%	10
Coal Unit Curtailment efforts were necessary to conserve coal supply	58.33%	7
Coal supply commitments for the year were not met	50.00%	6
Rail car maintenance was impacted due to loss of time	50.00%	6
Force Majeure declared	8.33%	1
Restricted from adding more train sets by the railroads	50.00%	6
Train sets had to be parked as mandated by the railroads	16.67%	2
Additional trains or leases were necessary to make up deliveries	25.00%	3

Costs

Of those utilities that responded, over 90% reported that railroad service issues have increased costs for their utility. The utilities were asked how much they estimate that railroad service issues in 2021 have increased costs in general for their company.

- 30% of the utilities reported cost increases of between $100,000 and $ 1 M.
- 50% reported cost increases of between $1 M and $10 M.
- 20% reported cost increases of over $10 M to $20 M.

2. **The utilities were asked what specifically they attribute these cost increases to:**

Answer Choices	Responses	
Extra costs for purchase power to replace coal generation	50.00%	5
Extra costs for natural gas to replace coal generation	40.00%	4
Additional train leases were necessary to make up deliveries	30.00%	3
Increased labor costs at your company to manage inventory or other production issues	70.00%	7
Had to make spot purchases of coal from other mines because railroads could not deliver from contracted mine sources	30.00%	3
Other	20.00%	2

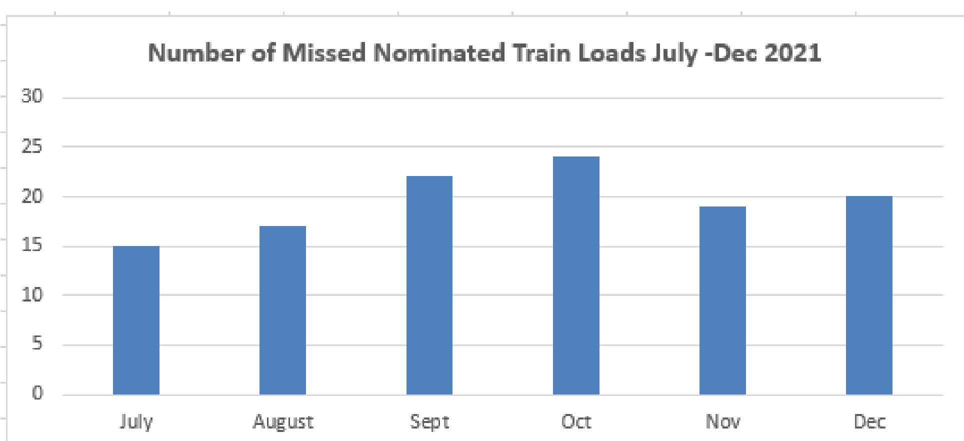
3. The utilities were also asked what type of railroad service issues they experienced:

Answer Choices	Responses	
Longer transit times	75.00%	9
Lack of railroad crews causing delays	91.67%	11
Delayed train pick ups	66.67%	8
Trains being doubled in transit	58.33%	7
Lack of locomotive power	75.00%	9
Poor communication	50.00%	6
Missed car switches	33.33%	4
Increased charges by the railroads	25.00%	3
Other (please specify)	16.67%	2

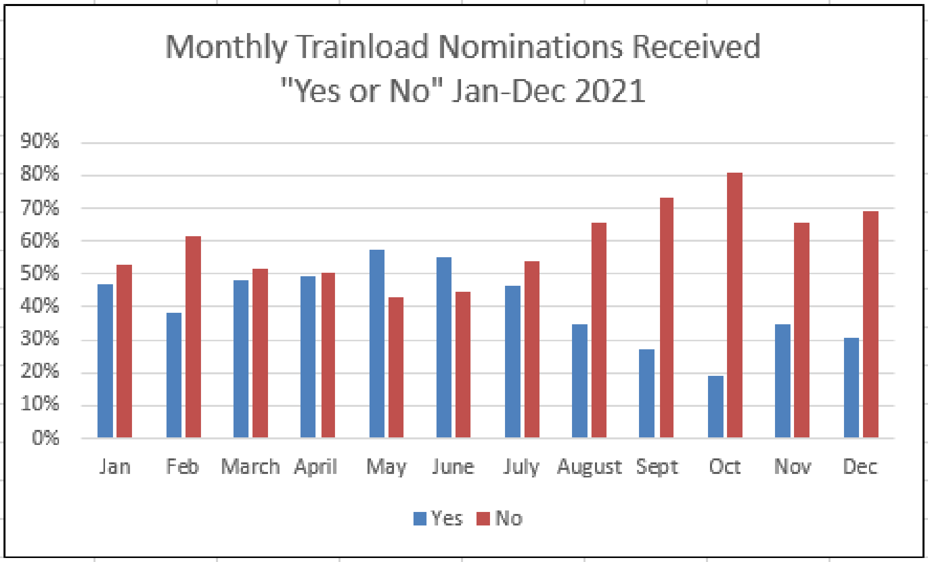
Nominations

Another area that can be challenging for both utility shippers and railroads is the nomination process. Utilities provide the railroads with information on volume nominations (anticipated supply needs) and their required train loading schedule for each month, utilities are required to provide a trainload or volume nomination request to the railroad via online interactive planning tools on each railroad's website.

For the six-month period of July – December 2021, the chart below shows that for the 28 plants that responded the number of trainloads they were short of their trainload nominations each month:



To provide a full year comparison, the chart below shows the utilities that participated in the survey for the January thru July 2021 period, combined with the 3rd *Utility OTP Metric Survey* results covering July through December 2021 survey, shows the percentage of nominated trainloads received by plants and not received.



Transit Time

For the six-month period of July – December 2021, this survey also collected monthly utility railroad performance metrics to show mine to plant transit time by railroad and mine source by month. The carriers and mine regions serving the participating plants were reported as follows:

Railroads	UPRR	BSNF	NS	Multi
Plants	6	17	3	2

Mine Region	SPRB	NPRB	Rockies	ILB	NAPP	CAPP
Plants	16	4	2	4	1	1

1. The chart below represents the group of plants shipping coal from the SPRB coal region reporting the percentage of forecasted trainload nominations received as equal to, 10% better, 10% worse, 20% worse and 30% worse than their forecast nominated trainloads.

SPRB Plants (16)	Equal to	10% Better	10% Worse	20% Worse	30% Worse
July	31%	6%	19%	25%	19%
Aug	38%	6%	19%	6%	31%
Sept	6%	6%	44%	19%	19%
Oct	6%	6%	50%	6%	31%
Nov	25%	6%	13%	44%	13%
Dec	19%	6%	25%	38%	13%

2. The chart below represents the group of plants shipping coal from the NPRB coal regions:

NPRB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	50%	0%	0%
Aug	25%	25%	25%	25%
Sept	50%	25%	25%	0%
Oct	25%	0%	75%	0%
Nov	0%	50%	50%	0%
Dec	25%	25%	0%	50%

3. The chart below represents the group of plants shipping coal from the ILB coal regions:

ILB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	0%	0%	50%
Aug	0%	25%	0%	75%
Sept	0%	0%	0%	50%
Oct	0%	0%	0%	75%
Nov	0%	0%	25%	75%
Dec	0%	0%	0%	100%

4. Two plants shipping coal from the Rockies reported their forecasted nominations received as the following:

Rockies (2)	July	Aug	Sept	Oct	Nov	Dec
Plant A	20% Worse	20% Worse	Equal to	Equal to	30% Worse	30% Worse
Plant B	Equal to	10% Worse	10% Worse	20% Worse	20% Worse	20% Worse

5. One plant shipping coal from NAPP reported its forecast nomination as 30% worse than forecasted for July, August, September, October, and December and equal to its forecast in November 2021.

Comments from Shippers

Along with the plant forecasted trainload nominations received questions, the survey also collected comments from shippers about their respective experiences with the carriers over the six-month period July through December 2021. Some of those comments are listed below.

1. Railroads seem to be worried about velocity and reducing set count on their systems. Unfortunately, even if you gain velocity and reduce equipment it still takes the same amount of crews to move forecasted coal and they all seem to be short
2. The number of permits (trainload nominations) would have been higher however the railroad elected to park half of my rail fleet which reduced the number of permits they could satisfy
3. Service issues related to locomotive power problems and lack of crews have been ongoing for several months.
4. Lack of crews may be the biggest issue, our railroad will leave an unloaded train on our site for up to 2-3 days until another set is unloaded, then they send a crew to double the trains and depart.
5. Communication was terrible.
6. Even though our railroad service was not great in 2021, our communication with the railroads was great. They were all forthcoming with their challenges, even giving us frequent updates on their efforts to hire new staff and get them trained. We could tell they were doing the best they could and were prioritizing our shipments over other traffic.
7. Increased bunching of trains caused us to incur costs to add coal to our stockpile and then pull coal off our stockpile more than in the past.
8. All 4 major providers had issues with crews, power, and communication in 2021. Reduction in employees that worked the 24-hour desks resulted in terrible communication and lack of crews kept trains sitting.

Bottom line is that July 2021 – December 2021 was an incredibly challenging time for many utilities who were experiencing railroad transportation service issues in receiving coal supply to power plants.

SUGGESTIONS FOR CONGRESS

Absent effective competition, we need effective oversight and truly streamlined processes. We are not asking for the Board or Congress to micromanage service. We are asking for backstops that can be enforced. As you and your Congressional colleagues consider the next authorization of the STB, FRCA asks that you consider the following:

1. Common Carrier Obligation

The common carrier obligation, to provide service on reasonable request, is supposed to require that carriers provide a level of service that meets a shipper's reasonable needs. But it has not been serving that function, as railroads have been providing service that is both poor and unreliable, For example, UP's most recent monthly announcement (CN2022-4, February 4, 2022, https://www.up.com/customers/announcements/customernews/allcustomernews/CN2022-4.html) showed trip plan compliance of 68% for manifest (reflecting an improvement of 6 percentage points) and 78% for intermodal. That's inadequate, and it is based on internal calculations that are not disclosed to the shipper, the Board, or the public.

We believe the common carrier standard needs to be something meaningful, with consequences to apply that is not met. In the reauthorization, FRCA recommends a statutorily clarified definition of "common carrier obligations" and calls upon the Board to:

- ✓ Review and evaluate the extent to which railroad operating, financial, investment, marketing and other business practices may be impairing the ability of and incentives for railroads to fulfill their common carrier obligations, in the aggregate, and provide adequate and economical service to their customers, including those shipping or receiving under contracts or exempt transportation arrangements.

- ✓ Collect data needed for that evaluation, including data regarding first-mile/last-mile service issues and the extent to which shipper and receiver investment in railroad infrastructure is not efficiently utilized by the railroads (which the Board is in its initial consideration stages in Ex Parte No. 767, *FIRST MILE/LAST MILE).*
- ✓ Impose fines and other penalties or allow shippers to recover appropriate damages to the extent the agency finds that railroads are not fulfilling their common carrier obligations in the aggregate as well as individually and are not providing adequate and economical service to their customers, including those shipping or receiving under contracts or exempt transportation arrangements. In terms of a fine or a penalty, current statute generally limits the Board's penalty authority to about $8,736 per violation. That is too little, unless applied to each carload or each day each carload is delayed.

An alternative is larger penalties tied to the overall level of service. Legislation might be needed to establish such penalties and to include contract and exempt movements in the assessment. Otherwise, railroads might use contracts to evade their common carrier obligation.

Another option for Congress to consider, is awarding damages to the injured shipper, but that almost never happens and would likely turn into a protracted and expensive proceeding for the shipper.

2. Rates

FRCA suggests that the next authorization encourage the Board to continue its proceedings on Revenue Adequacy and when determining a revenue adequate constraint commensurate with current market conditions, the Board shall consider but not limited to:

- Viable and effective revenue adequacy constraint is needed as part of the Board's oversight.
- Continued recognition that rail carriers need differential pricing to cover their costs and serve as many shippers as possible. But once rail carriers recover their costs and achieve revenue adequacy, allowing further unrestrained rate increases, does not guarantee further infrastructure investment but rather, punishes captive shippers. (The Board's predecessor, the Interstate Commerce Commission, recognized this in 1985.)
- Measuring revenue adequacy based on whether a rail carrier's return on investment exceeds the cost of capital can be a reasonable approach, but other measures should be considered.
- Not including the use of "replacement cost methodologies" when determining rail carrier revenue adequacy.
- The measurement period should be of a fixed length – five years is sufficient.
- Rate increase constraint should be a key element of a revenue adequacy constraint.
- A shipper to use the simplified road property investment analysis in a simplified SAC case against a revenue adequate rail carrier.
- Continued development of the Report's recommended use of Incumbent Network Cost Analysis (INCA) in a simplified SAC case.

3. Commodity Exemptions

The elimination of commodity exemptions should also be considered. When the exemptions were adopted, tariffs and contract summaries needed to be filed. Those requirements ended over twenty-five years ago. Exemptions are a solution to a problem that no longer exists.

4. Length and Funding Levels

FRCA recommends that the next authorization be a minimum of five years at funding levels commensurate with the previous enacted Fiscal Year (FY) appropriation levels for the STB.

The highest possible annual authorized and appropriated funding levels for the Board is made more acute by the:

- Unprecedented demand placed on STB's regular activities and resources given the pending rail merger proceedings before the Board – all of which pose significant service and rate issues for captive shippers, and questions concerning the structure of a probable more consolidated freight rail industry.
- Implementation of the On-Time Performance Standards for passenger rail.
- Number of formal and informal railroad performance service complaints
- Continued reliance on data transparency and access by all stakeholders let alone additional data and analytical capabilities to continue enhancing the Board's evidence-based decision-making.
- Board operating with a full complement of Members.

Thank you for holding this hearing, allowing FRCA to submit its comments, and for your continued consideration. We are happy to answer any questions you may have and look forwarding to the dialogue continuing.