WRITTEN TESTIMONY

MICHAEL NOLAND
PRESIDENT OF THE NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT (“SOUTH SHORE LINE”) AND CHAIRMAN OF THE COMMUTER RAIL COALITION

TO THE

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Commuter Rail Coalition

Alexandria Virginia

Introduction

On behalf of the members of the Commuter Rail Coalition, I want to thank you Chairman Nehls and Ranking Member Payne for the opportunity to testify on some very unique issues, challenges and opportunities facing the commuter rail agencies across the nation.

I also wish to report that the very significant funding increase we have seen since the passage of the Bipartisan Infrastructure Law has provided necessary funds for critical investment and the predictability that allows us to move towards, or to maintain, a state of good repair.

I am Mike Noland, Chairman of the Commuter Rail Coalition (CRC) and President of the Northern Indiana Commuter Transportation District, operator of the South Shore Line commuter rail system. Along with my colleagues Debra Johnson, CEO of Denver RTD, fellow Coalition board member David Dech, Executive Director of the South Florida Regional Transportation Authority, CRC board member Darren Kettle, CEO of LA Metrolink, and one of my CRC co-founders, New Jersey Transit's Kevin Corbett, we wish to review the state of commuter rail operations our industry faces today. From changing travel patterns and demographics altering how our customers use our service, and how we deliver that service, to changes taking place in the worldwide excess insurance industry that directly impacts our ability to deliver service, we are definitely in a state of change.

As President of the South Shore Line I oversee a 90-mile commuter railroad serving Northern Indiana with service into downtown Chicago. Today, I am here as Chairman of the CRC, an industry coalition representing the public agencies that provide over 98 percent of all commuter rail ridership and over 30 private sector suppliers and consultants that support our industry.

The Coalition just celebrated its five-year anniversary and are we are very proud of our collective efforts to communicate with one voice to critical stakeholders such as the U.S. Congress and the Department of Transportation, about trends in service and the needs of our industry going forward. Since day one our mission has been to engage and educate stakeholders on the tremendous value commuter railroads bring to the communities we serve.

Safe, Efficient, Climate Friendly

Commuter rail is not only safe, it is reliable, efficient, and climate friendly, proving to be an excellent return on the investment of public dollars. The 32 commuter rail agencies across the country pride themselves in providing 314 million (2022) riders with the safest mode of ground transportation.

How safe? According to the National Safety Council, commuter rail is the safest mode of ground transportation in the U.S. And with innovations in technology such as Positive Train Control (PTC) and human factors analysis, commuter railroads are continuously improving their safety performance.

The much-discussed PTC is just one of the many safety systems already in use by commuter railroads. My colleague Mr. Kettle just received a grant to introduce an intrusion detection system that will further enhance the capabilities of PTC in Southern California, and Mr. Corbett's New Jersey Transit will soon begin using AI to improve grade crossing safety on their light rail lines – a technology that will have application for commuter rail as well. The technology that railroads are installing today will be undergoing improvements and updates for decades to come.

Commuter rail performs better than almost every other mode in operating expenses per passenger mile traveled. According to the National Transit Database, only subways provide better cost effectiveness.

And of the top 20 US metro areas ranked by GDP, only three job centers are not served by commuter railroads. In the Chicago Metropolitan area alone, regional transit, of which commuter rail is an integral part, directly supports 126,000 jobs. Regional economic activity created by transit is approximately $5.6 billion per year while additional tax revenue created by transit is approximately $1 billion per year. In the Chicago region, the economic benefit returned per $1.00 invested in transit is $3.86[1].

The transportation sector as a whole – including private cars, commercial trucks, commercial and private planes - is responsible for nine percent of all greenhouse gas (GHG) emissions – the largest of all US sectors. According to the Federal Railroad Administration, however, the rail sector – freight and passenger combined - emits only two percent of GHG, while also reducing dependence on private cars and commercial trucking.

Rail's efficiency plays an important role in reducing the transport sector's emissions. Without transit, an additional 1.7 billion miles would be driven in the Chicago region, creating an additional 375,000 tons of greenhouse gas emissions and 1,500 additional severe traffic accidents[2].

As mentioned, I am the President of the South Shore Line commuter railroad, a 90- mile system serving Northwest Indiana, from South Bend International Airport to Millennium Station in Chicago. I have dedicated my career to providing safe and efficient rail service to millions of riders, and in Indiana we are thrilled that the South Shore service is being improved and expanded through a partnership with the Federal Transit Administration (FTA) with two Full Funding Grant Agreements as part of the Capital Investment Grant program. The combined impact of the new West Lake service, which will open in 2025, and the Double Track service, which will be open by this time next month, is nothing short of transformational for Northwest Indiana. The State of Indiana anticipates that these projects will generate in excess of $2.5 billion in private sector development over the next 20 years, and a conservative return of $2 for every state dollar invested (with a more likely $4 in return) from these rail projects. In fact, we are already seeing over $500 million of committed private sector investment through transit development next to our stations, before opening service on either project.

[1] "Transit is the Answer" (2023), Regional Transit Authority Strategic Plan.
[2] Id.

If the Chairman would indulge me for just a moment, I would like to thank Representative Yakym, a member of this subcommittee, for his support of this investment and for his keen interest in South Shore Line Service.

"Commuter rail" is traditionally defined as a passenger rail service that primarily operates within a metropolitan area, connecting commuters to a central city from adjacent suburbs or towns. Commuter rail systems are "heavy rail" using electric or diesel trains, as opposed to traditional subways or elevated "light rail" trains.

As my colleague Debra Johnson will address in greater detail, commuter rail as a mode has generated frequent jurisdictional questions within the federal government. Depending on the issue, we fall alternately under the jurisdiction of either the Federal Transit Administration or Federal Railroad Administration. We receive much of our federal assistance through formula funds, and we access to the Capital Investment Grant Program of the Federal Transit Administration for our large extension projects. The Federal Railroad Administration has safety oversight of all our operations and recently has also awarded some discretionary funding grants for commuter rail agencies.

The service we provide, as well as the make-up of our agencies, reflects the diverse communities we serve.

Ours is an industry with both a long history and significant recent growth: 12 new commuter rail services debuted in just the past 20 years. The oldest in the nation, the Long Island Rail Road, is this year marking its 190th anniversary. The South Shore Line service began over a century ago, and the Denver RTD launched commuter rail service is 2016.

Some of our agencies – like my own, Mr. Kettle's Metrolink, and Mr. Dech's Tri-Rail - are stand-alone commuter rail only service providers; others are part of multi-modal operations. Debra Johnson and Kevin Corbett both lead multi-modal agencies that provide a mix of rail and bus transit services.

At the South Shore Line, we are the direct providers of the service. On the Metra system in Chicago, where I previously served as Chief Counsel for 16 years, the agency contracts with the Union Pacific and Burlington Northern Sante Fe to provide some of its service, and it directly operates five other service corridors in their system. In Florida, Dave Dech's system contracts out to provide service through Herzog, and in Los Angeles, Darren Kettle's Metrolink system is operated by Amtrak.

Issues Facing Commuter Rail Today

My colleagues will delve into this more fully in their remarks, but myriad external factors illustrate that commuter rail has an opportunity to embrace an era of renaissance.

There is no better time for the CRC to have brought these voices together in support of the agencies and, collectively, the mode in addressing the need to:

- ⇒ Adapt to the post-pandemic ridership habits.
- ⇒ Responding to freight operating practices and safety issues that impact communities through which we travel
- ⇒ Balancing our needs with those of Amtrak's and other intercity passenger rail initiatives and ensuring that commuter railroads have equal footing in these discussions.

With respect to our interactions with Amtrak, it would be very beneficial for the commuter rail industry to have one oversight agency or administrative body with jurisdiction over issues impacting our systems to evaluate the sometimes competing priorities and balance everyone's needs.

Over the course of our long history, commuter railroads have met many challenges.

I am happy to report that our industry succeeded with one of the biggest yet —the installation of PTC across all of our systems. The cost of implementation, with over 90 percent funded with precious local resources from our capital development budgets, came to roughly $4 Billion for public agencies. And agencies are spending millions of dollars in ongoing, annual maintenance and upgrades to keep PTC in top form.

The logistical challenges to implement PTC were equally harrowing. One of the main hurdles was "interoperability": The requirement that any train operating over another railroad's tracks must be able to communicate seamlessly with the "back office" of that railroad's PTC system, in addition to its own system. Nowhere was that more difficult than in Chicago, with its dense rail network that sees 1,300 to 1,400 commuter and freight trains each day. Metra Chicago's PTC system must work seamlessly with the PTC systems of 12 other railroad companies including my South Shore Line—and on one of Metra's lines, the Southwest Service, it has to work with five.

Challenge of Procuring Liability Insurance

Currently we face a challenge to our ability to operate that is beyond our control, has nothing to do with our operations, and in our opinion, completely ignores the incredible safety record and commuter railroads' further safety enhancements, such as PTC. I am speaking about the challenge we face securing excess commercial liability insurance up to the federal liability cap. This problem threatens our ability to operate and will require close collaboration between the commuter rail industry and Congress. You are likely somewhat familiar with a similar scenario. The mainstream press has covered the fate of homeowners with no claims history losing their insurance as carriers exit various markets "due to declining profitability." (Newsweek, March 4, 2024)

In September 2023, the Senate Banking Committee held a hearing on *Perspectives on Challenges in the Property Insurance Market and the Impact on Consumers*. The climate the Senate Banking Committee examined for consumers is similar for commuter railroads. In a "hardened" insurance market, insurers are limiting their exposure by reducing coverage, or pulling out of markets entirely because they have made profitability calculations based on the range of payouts made to a broad range of insureds, such as following extreme weather events (hurricanes, tornados), wild-fires, coastal flooding, Texas grid failure, and mass-casualty events.

The issues we face in worldwide excess insurance market are serious. Commuter railroads currently carry $323 million in excess liability coverage, the federal cap. Under law, the federal cap will be CPI-adjusted by notice in early 2026, at which time commuter railroads will have only 30 days to secure the additional coverage. If we are unable to place this additional coverage, contractors and host railroads can declare breach of contract, requiring a railroad to stop running service.

Compounding this issue is the fact that we can only purchase small amounts of our excess insurance from US insurers; today the maximum we can purchase from domestic insurance carriers is only $32.5 million per railroad. Commuter railroads are forced to spend public dollars to purchase the balance, $300 million in additional coverage, in oversees insurance markets.

The Coalition's immediate focus, though, involves the need for a technical correction to modify the 30-day timeframe mandated in law that provides for an adjustment to the federal cap on passenger and commuter rail liability. I fear that if this provision is not adjusted from 30 to 365 days before the next adjustment—currently scheduled for the first quarter of 2026—we may have to shut down and suspend some or all of our commuter rail systems.

A bit of background: Limitations (or caps) on rail passenger liability first appeared in December 1997, as part of Title 49 U.S.C. Section 28103, when it was set at $200 million. Eight years later, in December 2015, the cap was incorporated into Section 11415 of the Fixing America's Surface Transportation ("FAST Act") and was increased to $294 million. The FAST Act also indexed the cap to inflation, to be adjusted every five years.

The largest commuter rail settlement to date occurred in 2010 as a result of the Chatsworth, California incident in which 25 people were killed and 135 injured. At that time the liability cap was $200M.

Following that event, Congress mandated the implementation of positive train control and the improved crashworthiness of passenger rail vehicles and set the wheels in motion to periodically adjust the liability cap as indexed by the Consumer Prices Index. No commuter rail incident of the magnitude seen in Chatsworth has occurred since.

The index methodology ensures that the aggregate allowable awards to all rail passengers, against all defendants, for all claims, including punitive damages, arising from a single accident or incident in the commuter rail or passenger rail industry is based on current dollars adjusted for inflation.

The cap was last adjusted in February 2021, when the five-year look back added roughly $26 million to the new liability limits.   The Department of Transportation triggered that increase by issuing a notice that the statutory adjustment to the rail passenger transportation liability cap under Section 11415 of the FAST Act would go into effect 30 days after the day the Secretary's notice was published in the Federal Register.

The liability cap of $323 million became effective on March 27, 2021. Every commuter railroad in the country raced to acquire the additional $26 million in coverage in the excess liability market. Many did not secure this additional coverage until nearly the end of this 30-day timeframe.

The cap is next scheduled to be adjusted in the first quarter of 2026. With the Consumer Price Index as the sole determinant of the adjustment, the Commuter Rail Coalition anticipates a significant increase up to and likely in excess of an additional $70 million dollars.

Due to the state of the domestic insurance market, all commuter rail agencies and Amtrak must procure a large proportion of their coverage from overseas insurers. U.S. insurers have, over time, exited the market for "excess liability" coverage, reasoning that they could deploy their capital in other areas and absorb less risk. The reasons domestic insurance companies exited the market are varied, but the fact remains that as public agencies we have no choice but to find this insurance coverage in foreign markets. Our need to purchase insurance outside the United States is certainly contrary to the Buy America initiatives so important to Congress.

Further, no single insurance company is willing to fully insure an agency for a potentially catastrophic event. Consequently, multiple excess insurance carriers participate to provide converge up the federal cap, building layers of insurance from just above our self-insured retention levels up the top layer of coverage. These layers are referred to as insurance "towers' and are built from the bottom (highest risk coupled with the highest premiums) to the top (lowest risk with the lowest premiums). Each insurance company has its own "appetite" for varying degrees of risk. This, of course, allows insurance companies to limit the amount of insurance available and is how they manage their risk or exposure to any one insured. Some companies will insure only at the lowest levels of the tower (the so-called "working layers") while others are interested only in the uppermost (and therefore "safest) levels of the tower.

As coverage is built, the individual tower layers themselves are often further subdivided and can consist of numerous insurance companies each taking a share of the coverage in that layer. This framework further spreads the risk for insurers: it is not uncommon for ten or more insurance companies to participate in a particular layer with each company committing to provide a portion of the coverage (typically from $2.5M to $10M). Though increasingly rare, some companies, if the layer is small enough, will commit to covering the entire layer, usually in an amount not greater than $20M to $25M.

If you were to examine each commuter railroad's insurance tower, you would find a distinct reliance on foreign markets, especially London, and in particular Lloyd's of London, the world's largest marketplace for excess casualty insurance. Bermuda is the second largest marketplace for excess casualty insurance, and other dominant carriers are located elsewhere in Europe.

As mentioned, purchasing excess liability insurance in foreign markets is not by choice but by necessity. So, taking my experience for the South Shoreline in Indiana, you would find that I have 22 participating insurers filling 35 slots on my insurance tower, a majority of the slots are covered by London insurers (many were from Lloyd's), seven were from Bermuda, and only one from the United States.

In Metra's last renewal, 22 slots were filled by London carriers, six slots were filled by Bermuda carriers and one slot was filled by a European carrier. Two additional carriers from London and one from Bermuda filled slots covering punitive damages. No carriers from the United States participated in the Metra tower.

Federal Law Does Not Mandate Insuring to the Cap

To be clear, commuter railroads are required to carry coverage up to the federal cap only as a result of third-party contracts. Federal law does not mandate that commuter railroads insure up to the federal liability cap. Rather, third-party contracts – such as trackage rights, purchase of service and vendor contracts – require that commuter railroads insure and indemnify those third parties up to the liability cap.

Many of these third-party agreements state that failure to maintain excess liability coverage up to the federal liability cap could lead to a commuter railroad being in breach of contract. As an example, a commuter railroad's inability to insure to the cap could result in vendors that supply software for PTC terminating a service that commuter railroads are federally required to have in place. Without PTC in place, the likely outcome is that commuter railroads would be forced to shut down service.

A host railroad can also contractually forbid operation of the commuter railroad on its tracks without the full limits of excess liability insurance being in place. And other third-party service providers could refuse to allow its conductors and engineers to operate the railroad's rolling stock to transport passengers.

So, while commuter railroads are not federally compelled to insure up to the liability cap, in all practical purposes, the cap serves as an existential requirement for our ability to operate service for the commuting public.

Given the hardened insurance market, recent indications of market capacity, and inflation's impact on the CPI that will be used to calculate the next increase in 2026, commuter railroads have a very real concern that if we are unable to obtain the required insurance within the 30 day implementation window we could be forced to shut down our service, likely with little or no warning to our customers.

Simply, if coverage is unattainable, we will be forced into shutting down until the coverage is obtained or some other type of financial guarantee is provided to the third-party.

Existing Threats to Securing Coverage

"Market Capacity in the Excess Insurance Industry" is the headline you see when you consider the greatest threat to continued coverage for any one of the commuter rail agencies nationwide. The number of insurers in the market willing to offer coverage, and those still in the excess insurance market who have coverage to place has shrunk over the past ten years and particularly in the past five years, in terms of the number of participating insurers and the amounts they are willing to commit for coverage. In December 2023 we were advised that excess insurance capacity available to the commuter rail industry stood at just over $400 million.

Why is capacity in the excess market being reduced? It is a complex set of market conditions that has absolutely nothing to do with commuter rail safety or commuter rail claims.

The insurance industry is highly cyclical. A "soft" market cycle is defined by lower insurance premiums, a broader appetite to assume risks and coverages, increased capacity (the availability of high limits), and greater underwriting flexibility. A "hard" market is characterized by higher insurance premiums, diminished capacity, more conservative underwriting, and fewer carriers writing certain coverage lines or insuring certain specific industries.

After 15+ years of a soft market, the insurance industry began experiencing a hardening of the market in 2018-2019. The effects of the current market are being seen across most lines of insurance and the majority of industries. Insurance experts we have consulted predict that the hard market will continue through this decade and likely beyond.

This exponentially hardening market is primarily due to greater frequency of catastrophic weather events, economic and social inflation[3], and litigation funding[4]. Coupled with a multitude of excess claims resulting in astronomically high settlements and verdicts, these conditions have created a vast imbalance in underwriting financials—a balance which the markets feel must be corrected for their own survival. Although these trends are not necessarily new, their impact is strengthening.

These challenges really presented themselves in clear terms in 2020 when the commuter rail industry, along with many others, saw significant rate increases – some as high as 75 percent from prior year premiums, predominantly at the high excess level. Excess insurers had suffered significant losses and decided to "level their losses".

[3] Social inflation describes the phenomenon when insurance claims costs are increasing more quickly than the standard rate of inflation. Social inflation's impact on claim costs ultimately leads to higher insurance costs for all consumers. Recently, incurred claim losses have increased much more rapidly in recent years—much more rapidly than in preceding years and more rapidly than economic inflation would predict.

[4] Litigation funding is the practice where a third-party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit.

Again, it is important to note that these "losses" in the insurance market were not the result of losses incurred in the commuter rail industry. I must underscore here the fact that we have all implemented PTC, which would have prevented most of the high exposure accidents over the past 20 years. The losses cited by insurance providers are the result of hurricanes and wildfires and mass shootings, as well as trends in auto claims in both frequency and severity due to a decrease in oil prices (more driving), increased cell phone and marijuana (distracted and impaired driving), and an increase in overall technological distractions in vehicles.

This came at a time when insurers had historical underpricing of premiums, an overall deterioration of reserves due to large payouts, and a lack of investment for new carriers.

The losses were building at a rapid pace, impacting many markets where excess liability coverage is used. The following examples illustrate settlements or verdicts in excess of $500 million across several industries over the past several years[5]:

Life Sciences

1.	Blood thinning drug causing stroke and death (2019)	$775M
2.	17 patients with defective hip replacements (various years)	$941M
3.	Opioid litigation (various years)	$48+B
4.	Class action—coil birth control (2020)	$1.6B
5.	New York State opioid litigation (2021)	$1.18B

Health Care

1.	Sexual abuse by university sports physician (2018)	$500M

Consumer Products

1.	Talc Litigation (2018-2020)	$5B
2.	Cable television provider held liable for murder by employee (2022)	$1.14B

Real Estate and Hospitality

1.	Hotel settlement for mass shooting resulting in 58 deaths (2019)	$800M

Transportation (Road)

1.	Truck driver negligently causing death of college student (2021)	$1B

[5] Statistics culled from "Liability Limit Benchmark & Large Loss Profile by Industry Sector 2023—Proper Protection in a Volatile World" (Chubb)

Manufacturing

1.	Engine defect litigation (2019)	$758M
2,	Class action regarding improper emission controls (2020)	$700M
3.	Class action regarding engine fires (2021)	$889M-$1.3B
4.	Faulty batteries for electric vehicles causing risk of fire (2021)	Up to $1.9B
5.	Death of two people due to truck's faulty roof (2022)	$1.72B

Oil and Gas

1.	Failure to investigate multiple leaks at gas storage facility (2021)	$1.1B

Utilities

1.	Wildfires (2017/2018)	$12B-$24B
2.	Gas leak and explosion killing one, injuring 25 (2018)	$790+M

Chemical

1.	Class action regarding chemical explosion (2017)	$671M
2.	Class action regarding agrichemicals (various years)	$11.22B

Transportation (Rail)

These losses alone, all of which occurred in the United States, total over **$105 billion**. It is worth noting that some claims do not reveal themselves until many years later (i.e., product liability, sexual abuse, etc.), circumstances for which insurers must hold adequate reserves.

It is worth noting that commuter rail does not appear on this list. Nevertheless, while commuter rail, as part of the excess liability insurance market, benefits from sharing risk with extensive coverage and low premiums in a soft market, it also suffers the shared consequences of shrinking coverage and very high premiums in a hard market fueled by social inflation and large losses.

As noted above, the largest commuter rail settlement to date occurred in 2010 as a result of the Chatsworth, California incident in which 25 people were killed and 135 injured. Since then, the commuter railroads have invested billions in myriad new safety systems and protocols. No commuter rail incident of the magnitude seen in Chatsworth has occurred since.

Underwriting Capacity

Even more problematic for commuter rail than exponentially rising premiums is the issue of "capacity" or, simply put, the availability of enough insurance to satisfy the requirements of all the insureds in a particular sector or market.
From the perspective of the excess liability markets, underwriting capacity is the maximum amount of liability that an insurance company agrees to assume from its underwriting activities. It represents an insurer's ability to retain risk. It is important for an insurance company to calculate and maintain its underwriting capacity so it will be able to pay claims when needed.

An insurance company's potential for profitability depends on its "appetite" for risk. The more risk it assumes by underwriting certain types of insurance policies (or by increasing the number of policies it writes), the more premiums it can collect and invest. However, the more risk an insurer accepts through the issuance of a large number of policies or larger risks, the more the possibility exists that it may become unprofitable, or worse, insolvent.

For an insurance company, striking the correct balance is essential to maintaining its financial health. An insurer's maximum amount of acceptable risk – or underwriting capacity - is a critical component of its operations.

The goal of good underwriting is to generate premiums that exceed the insurer's losses and expenses. They do that by underwriting policies that cover less volatile risks (as commuter rail is perceived to be), increasing premiums, and decreasing capacity.

Capacity for Commuter Rail

In general, capacity for lead excess insurers who underwrite commuter rail has greatly decreased over the past ten to twenty years. Non-lead excess insurers have decreased their capacity as well. The London and Bermuda excess insurance markets continuously monitor and adjust the amount of capacity they deploy. As a result of the current hard market, further capacity withdrawal is expected over the next few years.

Capacity withdrawal in the insurance industry is especially problematic when the commuter rail industry is staring at a significant increase in the federal cap on liability in 2026. Given recent inflation, we are concerned that the cap could increase by $70 million or more.

If one considers that 32 commuter railroads *each* will be competing for this additional coverage to meet the 2026 cap, it will be difficult – if not impossible - for all commuter railroads to obtain that coverage by the current 30-day deadline. Our best opportunity to obtain the new level of coverage is to have additional time to approach the excess insurance liability markets and not compete with each other in a the 30-day window. We need an immediate change to the 30-day implementation requirement to provide up to 365 days to place this additional coverage.

With respect to cost, the upper layers of a tower (for example $28,000,000 in excess of $295,000,000, bringing coverage up to the current $323M liability cap) cost an average of $16,000 per million. We can expect the cost for one commuter railroad to acquire another $70 million in coverage in 2026 would likely be an *additional* $1,120,000.

In addition to seeking relief on the need to place this coverage within 30-days of the 5-year liability cap adjustment, we must also address to the overarching problem of a market with limited capacity and the need to find alternative arrangements. Needless to say, if the excess insurance market fails, Congress and the commuter railroads together will need more than 30 days to put alternatives in place so that vital transportation services around the country do not grind to a halt.

What might those options include? One that we are considering is an industry pool formed by and funded through premiums paid by commuter railroads. Together, we are open to exploring all of our options, but are clear-eyed as to the hurdles of establishing such a pool.

<u>Alternative Arrangements</u>

To assume that the current foreign excess liability market can continue to support the requirements leveled on commuter railroads has proven to be unreliable. We must search for stable alternatives and we look forward to working with this committee and the Congress to find workable solutions.

We are clear-eyed as to the hurdles of establishing an industry insurance pool. A multi-state agreement to share liability is no small undertaking, especially when navigating varying state liability caps and tort immunity protections. We are actively discussing these options and ask Congress to assist us by supporting studies and, potentially, federally-supported loans needed for capitalizing a commuter rail industry liability pool.

To assume that the current market can continue to support commuter rail's needs has proven to be unreliable. We must search for stable options that all willing commuter railroads can participate in, and we look forward to working with this committee and the Congress to find equitable solutions.

<u>Amtrak and Commuter Railroads</u>

My final point has to do with Amtrak's relationship with commuter rail agencies and the need for the Surface Transportation Board to serve as the final arbiter for any disputes that arise between these two public assets over access rights to each other's property and the associated costs.

Commuter railroads frequently interact with freight railroads and Amtrak but have extremely limited access to the dispute resolution mechanisms afforded by the Surface Transportation Board (STB) given the current STB authorization language. This lack of a forum puts public agencies - commuter railroads - at a significant disadvantage when it comes to issues involving the freight railroads, especially the Class 1 railroads and Amtrak.

As background, in 1970 the Rail Passenger Service Act (RPSA) provided freight railroads the opportunity to transfer their chronically unprofitable intercity passenger operations to Amtrak. In exchange, 22 freight railroads that were party to the agreement were required to: (1) allow Amtrak "to operate wherever it wished" over their lines; (2) "grant Amtrak trains preference over their own freight trains;" and (3) allow the ICC (now Surface Transportation Board) to determine compensation for Amtrak's operations if they could not reach agreement with Amtrak. Freight railroads were also required to pay some level of compensation to Amtrak.

In short, the RPSA relieved 22 private railroads of their passenger common carrier obligations in exchange for Amtrak's right to priority access to tracks for incremental cost. The commuter agencies and handful of freight railroads were <u>not</u> part of this so-called "grand bargain": they did not transfer passenger operations to Amtrak and received no benefit from the Rail Passenger Service Act.   Yet those who were not party to the RPSA are held to the quid pro quo that they did not make.

It is inequitable to continue to subject commuter railroads to only the burden side of the grand bargain. Non-RPSA parties should not be at risk of being forced to provide access to Amtrak trains, absent a mutually acceptable agreement with Amtrak.

In April 2021 Amtrak sent letters to commuter railroads across the country introducing their vision for *Amtrak Connects US.* "We have developed a vision for the future that involves strategic expansion to increase train frequencies on some existing Amtrak corridor routes, and initiate new corridors to connect additional city-pairs, called *Amtrak Connects US*." The letter I personally received went on to state: "Some of these additional trains *will* (emphasis added) operate on NICTD rail lines."

Again, commuter agencies were not party to the grand bargain, we were not relieved of any financial burden assumed by Amtrak, and therefore, the CRC asserts that commuter railroads should not be subject to Amtrak's statutory ability to simply enforce it rights over commuter rail properties. The public assets that are commuter railroads must be on an equal footing to Amtrak and treated differently from the 22 freight railroads that received the benefit of the RPSA.

Further, commuter rail lines should not be seen as a preferred alternative from Amtrak's current routes. In the Indiana case, Amtrak desires to move their route from a freight line to the newly upgraded South Shore Line. The freight line where Amtrak currently operates in Indiana was just upgraded for their benefit; it received in excess of $65 million in state-funded enhancements to improve Amtrak service on the RSPA host railroad. Seemingly, Amtrak seeks to abandon the line that was improved by Indiana taxpayers for their benefit in order to avail themselves of the investments NICTD has secured to improve service for our own ridership.

Should Amtrak exercise its statutory authority and begin operating over the South Shore Line, their presence will negatively impact the capacity and maintenance calculations made to support the federal investment in NICTD service.

Further, under statute, Amtrak would only be required to pay the incremental costs of its use of the line. Host railroads have no leverage to negotiate or force Amtrak to pay anything approaching the actual cost of their presence on a rail line, meaning, in this case, that NICTD would be underwriting the cost of Amtrak service through Indiana.

The equation creates a circumstance that requires commuter railroads to subsidize the operating costs of Amtrak without fair compensation.

Conversely, when a commuter railroad operates over Amtrak-owned tracks, that access is billed at actual cost.

Amtrak has stated that they desire to reach an acceptable agreement in Indiana, but they have also recently and vigorously defended their statutory authority over commuter railroads.

Commuter authorities must be permitted to continue to realize the full, long-term value of the public investment that has been made in their lines and facilities and to protect the value of those investments for their own passengers. All railroads not party to the "grand bargain" must be protected when Amtrak seeks to exercise its will. There must be a forum for negotiation between equal parties for access and compensation.

The Commuter Rail Coalition believes the best approach to ensure a well-defined process for resolution is to adjust the statutory rights of Amtrak to require good faith negotiations between Amtrak and commuter rail systems when either party seeks trackage rights, and forum to adjudicate disputes. In our view, we believe the Surface Transportation Board is the right entity to deal with disputes between Amtrak and commuter railroads and we suggest that the STB be empowered with the authority to review and determine terms of any agreement between Amtrak and a commuter rail agency that remains in dispute.

Conclusion

Chairman Nehls and Ranking Member Payne I want to thank you again for the opportunity to explain some of the challenges we face in the commuter rail industry. If there is one message I wish to leave with you today, it is that commuter railroads face a changing landscape as our customers modify their travel patterns, and we embrace those opportunities that allow for us to offer safe reliable and affordable service. We look forward working cooperatively with you and the Congress to find the most expeditious, cost-effective solutions to the issues discussed here today. We all climbed a steep hill to meet the PTC mandate. The challenges we now face are equally as formidable but there are pathways to success. We look forward to working towards those solutions.