

- (1) Carry a hazardous material as cargo; or
  - (2) Carry a flammable or combustible liquid, including oil, in bulk; or
  - (3) Are manned.
- \* \* \* \* \*

**PART 91—INSPECTION AND CERTIFICATION**

■ 12. The authority citation for part 91 continues to read as follows:  
**Authority:** 33 U.S.C. 1321(j); 46 U.S.C. 3205, 3306, 3307; 46 U.S.C. Chapter 701; Executive Order 12234; 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Executive Order 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

- 13. Amend § 91.01–10 as follows:
  - a. Revise paragraphs (c)(1)(i) and (ii); and
  - b. In paragraph (c)(2), remove the words “seagoing barges of 100 gross tons and over,” and add, in their place, the words “inspected seagoing barges”.

The revisions read as follows:

**§ 91.01–10 Period of validity for a Certificate of Inspection**

\* \* \* \* \*

(c)(1) \* \* \*

- (i) Inspected seagoing barges proceeding beyond the Boundary Line for the sole purpose of changing place of employment.
- (ii) Inspected seagoing barges making rare or infrequent voyages beyond the Boundary Line and returning to the port of departure.

\* \* \* \* \*

**PART 188—GENERAL PROVISIONS**

■ 14. The authority citation for part 188 continues to read as follows:  
**Authority:** 46 U.S.C. 2113, 3306; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

**§ 188.05–1 [Amended]**

■ 15. In Table 188.05–1(a), row 4, column 4, of § 188.05–1, remove the text “All seagoing barges except those covered by columns 2 and 3.” and add, in its place, the text “All manned seagoing barges.”

Dated: December 6, 2011.

**J.G. Lantz,**  
*Director of Commercial Regulations and Standards, U.S. Coast Guard.*

[FR Doc. 2011–32007 Filed 12–13–11; 8:45 am]

**BILLING CODE 9110–04–P**

**DEPARTMENT OF TRANSPORTATION  
 Federal Railroad Administration  
 49 CFR Part 269**

[Docket No. FRA–2009–0108; Notice No. 2]

RIN 2130–AC19

**Alternate Passenger Rail Service Pilot Program**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule is in response to a statutory mandate that FRA complete a rulemaking proceeding to develop a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes to petition FRA to be considered as a passenger rail service provider over such a route in lieu of Amtrak for a period not to exceed five years after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008. The final rule develops this pilot program in conformance with the statutory directive.

**DATES:** This final rule is effective on February 13, 2012.

**FOR FURTHER INFORMATION CONTACT:** Alexander Roth, Office of Railroad Policy and Development, FRA, 1200 New Jersey Ave. SE., Washington, DC 20590 (telephone: (202) 493–6109); or Zeb Schorr, Attorney-Advisor, Office of Chief Counsel, FRA, 1200 New Jersey Ave. SE., Mail Stop 10, Washington, DC 20590 (telephone: (202) 493–6072).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

By notice of proposed rulemaking (NPRM) published on September 7, 2011 (76 FR 55335), FRA proposed an alternate passenger rail service pilot program in response to a statutory mandate—specifically, § 214 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Public Law No. 110–432, Division B (Oct. 16, 2008). The comment period for the NPRM closed on November 7, 2011. FRA received written comments submitted by Ratp Development America, the Transportation Trades Department of the AFL–CIO, the American Short Line and Regional Railroad Association, the Association of Independent Passenger Rail Operators, Herzog Transit Services, Inc., First Transit, Veolia Transportation N.A., and two individuals.

General comments are addressed in this section, and more specific comments are addressed in the relevant sections of the preamble below. Some comments were generally supportive of the NPRM, and other comments were generally unsupportive of the NPRM.

A comment sought clarification regarding whether an eligible rail carrier under the pilot program could create a separate company to manage and operate the passenger operation, or whether it could enter into a private access rights agreement with an alternative rail passenger operator. This final rule develops a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes to petition FRA to be considered as a passenger rail service provider over such a route in lieu of Amtrak. This final rule does not prohibit an eligible rail carrier from creating a separate company to manage and/or operate the passenger rail service, or from entering into an agreement with a third party to manage and/or operate the passenger rail service. However, a pilot program petition must be submitted by a rail carrier or rail carriers that own the infrastructure as described in § 269.7 of this final rule. In addition, such information regarding the management and/or operation of the service would be relevant to FRA’s evaluation of the bid, and should be described in detail pursuant to § 269.9 of this final rule.

Several comments stated that the pilot program should allow a State to submit a petition (with the concurrence of the infrastructure owner), and/or that there should be a statutory role for States in the pilot program. Comments also stated that State involvement is particularly important to bidding on State-supported routes (which are eligible under the pilot program) as such routes are largely funded by States. A comment further stated that States should be able to participate in the pilot program process both out of a matter of fairness and to ensure that existing contracts between States and Amtrak would not be unconstitutionally impaired. As an initial matter, § 214 of PRIIA only provides that a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes may submit a petition. See 49 U.S.C. 24711(a)(1). Section 214 does not establish a statutory role for States in the pilot program petition process. In compliance with this statutory mandate, this final rule provides that only an eligible rail carrier may submit a petition. However, a State may participate in the pilot program process. Specifically, a

petitioning rail carrier may include, in its bid package, documentation of a State's approval of the bid for the particular State-supported route. Indeed, § 269.9(b)(4) of this final rule requires, in part, that a bidder describe the sources of non-Federal funding, including any State operating subsidy and any other State payments. *See also* 49 U.S.C. 24711(a)(3).

Comments stated that the pilot program should include the right-of-way owner as a full partner in the proposed service, and that the pilot program should recognize the importance of protecting the capacity required for freight operations. As an initial matter, FRA agrees that freight railroads (and commuter railroads, for that matter) are critical partners to the success of intercity passenger rail that makes use of their facilities. Furthermore, the pilot program recognizes that a bid submitted by an eligible rail carrier must describe how that rail carrier would operate over right-of-way on the route that it does not own. Specifically, § 269.9 of this final rule requires a bidder to describe the operating agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the bidder.

A comment stated that FRA should solicit the opinion of States on how the pilot program, as applied to State-supported routes, could best be made to successfully work. As noted, FRA published the proposed rule in the **Federal Register**, but did not receive any comments from a State.

Another comment contested the constitutionality of § 201 of PRIIA, which defines the national railroad passenger transportation system, but did not relate the comment to the proposed rule.

Lastly, one comment generally disagreed with the NPRM and stated that a better way to meet the requirements of PRIIA would be to convert Amtrak into a § 501(c)(3) nonprofit corporation. FRA disagrees. As discussed above, the NPRM (and this final rule) was in response to a specific statutory mandate that FRA complete a rulemaking proceeding to develop an alternate passenger rail service pilot program.

#### *a. Summary of Final Rule*

This final rule is in response to a statutory mandate that FRA complete a rulemaking proceeding to develop a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes to petition FRA to be considered as a passenger rail service provider over such a route in

lieu of Amtrak for a period not to exceed five years after October 16, 2008 (the date of enactment of PRIIA). Section 214 further provides that those routes described in 49 U.S.C. 24102(5)(B), (C), and (D) and in 49 U.S.C. 24702 are eligible for the pilot program, and that the program not be made available to more than two routes.

Section 214 also provides for, among other things, the following: The establishment of a petition, notification, and bid process through which FRA would evaluate bids to provide passenger rail service over particular routes by interested rail carriers and Amtrak; FRA's selection of a winning bidder by, among other things, evaluating the bids against the financial and performance metrics developed under section 207 of PRIIA; FRA's execution of a contract with the winning bidder awarding the right and obligation to provide passenger rail service over the route, along with an operating subsidy, as well as requiring compliance with the minimum standards established under section 207 of PRIIA, among other things; that Amtrak must provide access to its reservation system, stations, and facilities to a winning bidder; that employees used in the operation of a route under the pilot program would be considered an employee of that rail carrier and would be subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak; that the winning bidder must provide hiring preference to displaced qualified Amtrak employees; that the winning bidder would be subject to the grant conditions under 49 U.S.C. 24405; and that, if a winning bidder ceases to operate the service or to otherwise fulfill their obligations, the FRA Administrator, in collaboration with the Surface Transportation Board, would take any necessary action to enforce the contract and to ensure the continued provision of service.

#### *b. Adequate Resources Certification*

Section 214 provides that, before FRA may take any action allowed under 49 U.S.C. 24711, the Secretary of Transportation (Secretary) must certify that the FRA Administrator has sufficient resources that are adequate to undertake the pilot program. FRA understands this requirement to mean that FRA may not proceed with any action under a pilot program developed by this final rule until the Secretary has issued such a certification.

It should also be noted that section 214 requires FRA to award to a winning bidder, among other things, an operating subsidy. 49 U.S.C. 24711(a)(5)(B). PRIIA

did not authorize funds for FRA to use to pay for any such operating subsidy, or any other costs arising from the proposed pilot program; nor did Congress appropriate funds for the pilot program.

Comments stated that the pilot program should allow for the transfer of current and existing service subsidies made by FRA to Amtrak to operators selected under the pilot program. However, FRA does not have the authority to transfer any such existing subsidies. Other comments stated that there should be a mechanism for FRA to award an operating subsidy to pay for costs associated with the pilot program. As described above, no funds have been appropriated to the FRA to provide such financial assistance.

A comment also stated that a mechanism needs to be created to clearly identify the route by route subsidy and the method of transfer, and that such information would be critical to a fair bidding process. The comment goes on to suggest that FRA analyze and rank all Amtrak routes (national and State-supported). In addition, the comment notes that the cost allocation methodology of § 209 of PRIIA should be the basis for determining the appropriate subsidy amount for these routes. FRA notes that useful route-by-route Amtrak cost information is published in the Quarterly Report on the Performance and Service Quality on Intercity Passenger Train Operations (available at <http://www.fra.dot.gov/rpd/passenger/2165.shtml>). FRA also notes that avoidable cost outputs are not yet available, and that eight quarters of comparable fully allocated cost data has not yet been accumulated. However, waiting for this data, and for the States and Amtrak to arrive at a final consensus on the § 209 methodology, could potentially delay publication of this final rule well beyond the expiration of the pilot program itself (October 16, 2013). Furthermore, in order to be competitive, prospective bidders will likely need to provide the service at cost levels below those of Amtrak's. It is the bidder's verifiable cost projections for their proposed service, rather than the historical Amtrak costs, that will be particularly important in the bidding process.

This final rule incorporates the adequate resources certification requirement by providing, in § 269.3(a), that part 269 is not applicable to any railroad, unless and until, the Secretary certifies that FRA has sufficient resources that are adequate to undertake the pilot program. Only upon such certification does the pilot program become available. As described below,

the time period within which petitions may be filed with FRA is triggered by FRA providing notice of the Secretary's certification.

A comment stated that the Secretary must quickly certify that FRA has adequate resources to undertake the program; the comment further provided that substantial FRA resources would not be required for the pilot program. The Secretary will issue this certification when appropriate. In addition, it must be noted that FRA will expend valuable resources in administering the pilot program, especially in the thorough evaluation of each of the petitions and bid packages that may be received.

### *c. Timeline Established by the Final Rule*

The final rule establishes deadlines for filing petitions, filing bids, and FRA's execution of contract(s) with any winning bidders. As to the filing of petitions, § 269.7(b) of the final rule requires a petition to be filed with FRA no later than 45 days after FRA provides notice of the Secretary's certification that the FRA Administrator has sufficient resources that are adequate to undertake the pilot program. This deadline is necessary in order to comply with the statutory mandate. Specifically, 49 U.S.C. 24711(a)(4) requires FRA to, as relevant here, "give preference in awarding contracts to bidders seeking to operate routes that have been identified as one of the five worst performing Amtrak routes under section 24710" of title 49 of the United States Code. In order to comply with this statutory directive to "give preference" to "the five worst performing Amtrak routes," FRA must be able to evaluate all bids at the same time. Section 269.7(b)'s petition deadline enables FRA to evaluate all bids at the same time and to "give preference" where appropriate as directed by the statute.

In addition, §§ 269.3(c) and 269.7(d) of the final rule also take into consideration the possibility that the period during which a railroad may provide passenger rail service under this pilot program, which is currently set by statute to expire on October 16, 2013, is extended by statute. In that event, the final rule requires petitions to be filed with FRA no later than 60 days after the enactment of such statutory authority and requires such petitions to otherwise comply with the requirements of this part.

A comment stated that the "worst performing routes" criteria must be modified to assure that other routes, including State-supported routes, be eligible for the pilot program. Another

comment sought clarification regarding whether petitions for routes which were not one of the worst performing routes would be permitted to compete against one of the worst performing routes.

Section 214 of PRIIA mandates which routes are eligible for the pilot program, as follows: Those routes described in 49 U.S.C. 24102(5)(B), (C), or (D) and 49 U.S.C. 24702. See 49 U.S.C. 24711(a)(1). As such, Amtrak State-supported routes under 49 U.S.C. 24702 are eligible for the pilot program. In addition, the worst performing routes preference is required by statute, and simply provides that FRA shall give preference in awarding contracts to bidders who are seeking to operate such routes. See 49 U.S.C. 24711(a)(4). FRA is not required to select such routes; instead, the worst performing routes preference is one factor in FRA's evaluation of the bids submitted.

As to the filing of bids, § 269.9 requires the Petitioner and Amtrak to both file bids with FRA no later than 60 days after the petition deadline established by § 269.7(b). Section 269.9(b) articulates the bid requirements. The 60-day time period gives a bidder sufficient time to prepare a bid that satisfies the bid requirements, while also limiting the duration of the bid process.

One comment stated that a petitioner's failure to submit a bid within the timeline established by this final rule should result in an automatic disqualification of that party from bidding on the route at issue. The comment stated that late bids would defeat what is already a short-duration program, and would allow a party to game the process. The final rule is clear that under § 269.9 both the petitioner and Amtrak must file bids with FRA no later than 60 days after the petition deadline established by § 269.7(b). No allowance is made for exceptions to this deadline. Furthermore, § 269.13 requires FRA to execute a contract with the winning bidder(s) no later than 90 days after the bid deadline established by § 269.9.

Lastly, as to the award and execution of contracts with winning bidders, § 269.13 requires FRA to execute a contract with the winning bidder(s) no later than 90 days after the bid deadline established by § 269.9. Section 214 of PRIIA requires FRA to "execute a contract within a specified, limited time." 49 U.S.C. 24711(a)(5). The 90-day time period is a limited period for FRA and the winning bidder(s) to execute an agreement(s) that satisfies the requirements of § 269.13, including FRA's obligation of an operating subsidy

in compliance with the statutory requirements.

## **II. Section-by-Section Analysis**

### *Section 269.1 Purpose*

This section provides that the final rule carries out the statutory mandate set forth in 49 U.S.C. 24711 that requires FRA to develop a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates a passenger rail service route to petition FRA to be considered as a passenger rail service provider over that route in lieu of Amtrak.

A comment sought clarification regarding the meaning of the term "own" as it is used in this section (and as it is used in § 269.7(a) of this final rule). The comment further stated that the party responsible for maintenance of such infrastructure under 49 CFR part 213 should be considered an owner for purposes of this section. However, § 214 of PRIIA is clear in that only a rail carrier or rail carriers that own such infrastructure may submit a petition under the pilot program. See 49 U.S.C. 24711(a)(1). The statute does not authorize FRA to expand this statutory directive by allowing a party responsible for maintenance of such infrastructure to submit a petition. Furthermore, and as noted above, this final rule does not prohibit an eligible rail carrier from entering into an agreement with a third party (such as an entity that maintains the infrastructure) to manage and/or operate the passenger rail service.

### *Section 269.3 Application*

Paragraph (a) of this section provides that the final rule does not apply to any railroad, unless and until, the Secretary certifies that FRA has sufficient resources that are adequate to undertake the pilot program. This section also states that, upon receipt, FRA will provide notice of the certification on the FRA public Web site. This paragraph is based on the statutory directive in 49 U.S.C. 24711(e). In addition, as discussed in § 269.7(a), FRA's notice of the Secretary's certification will trigger the 45-day deadline by which an eligible railroad may petition FRA under the pilot program.

Paragraph (b) of this section provides that the pilot program will not be made available to more than two Amtrak intercity passenger rail routes. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(b).

Paragraph (c) of this section provides that any rail carrier or rail carriers awarded a contract to provide passenger

rail service under the pilot program may only be able to provide such service for a period not to exceed five years after October 16, 2008 (the date of PRIIA's enactment), or a later date authorized by statute. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(1). In addition, this paragraph also takes into consideration the possibility that the 5-year limitation period established in PRIIA is extended by statute.

Several comments stated that the pilot program should be extended to allow for a longer program period (e.g., extending the program to five years from the time an award is made), which the comments stated would allow pilot program operators to function more efficiently, and would be a more appropriate period of time considering the work necessary to operate a route. However, as discussed, § 214 of PRIIA requires that the pilot program not exceed five years after the date of PRIIA's enactment (October 16, 2008). In addition, the final rule does take into consideration the possibility that the period established in PRIIA may be extended by statute.

#### Section 269.5 Definitions

This section contains the definitions for the final rule. This section defines the following terms: Act; Administrator; Amtrak; File and filed; Financial plan; FRA; Operating plan; Passenger rail service route; Petitioner; Railroad, and Secretary. Among other definitions, this section defines "passenger rail service route" to mean those routes described in 49 U.S.C. 24102(5)(B), (C), and (D) and in 49 U.S.C. 24702. This definition is based on the statutory directive contained in 49 U.S.C. 24711(a)(1). In addition, this section defines "railroad" to mean a rail carrier or rail carriers, as defined in 49 U.S.C. 10102(5). This definition is based on the statutory directive contained in 49 U.S.C. 24711(a)(1) and (c)(3).

This section also defines "financial plan" to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: An annual projection of the revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds) attributable to the route; and a statement of the assumptions underlying the financial plan's contents. In addition, this section defines "operating plan" to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: A complete description of the service planned to be offered, including the train schedules, frequencies, equipment

consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; and a statement of the assumptions underlying the operating plan's contents. The final rule requires bidders to include a financial plan and an operating plan—as those terms are defined here—in their bids. These definitions will ensure that bids contain sufficient information to be evaluated.

#### Section 269.7 Petitions

Paragraph (a) of this section provides that a railroad that owns infrastructure over which Amtrak operates a passenger rail service route may petition FRA to be considered as a passenger rail service provider over that route in lieu of Amtrak for a period of time consistent with the time limitations described in section 269.3(c). This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(1). This paragraph does not require that a railroad own all of the infrastructure over which Amtrak operates a passenger rail service route in order to file a petition.

Comments sought clarification regarding the routes that are eligible under the pilot program (one comment sought confirmation that all current non-Northeast Corridor Amtrak-operated routes are eligible for the pilot program, whether part of Amtrak's national system or State-supported, and regardless of the length of the route). A related comment sought clarification regarding the eligibility of routes which connected with or utilized Northeast Corridor or other Amtrak-owned infrastructure. As discussed above, PRIIA and this final rule provide that all of the routes described in 49 U.S.C. 24102(5)(B), (C), and (D) and in 49 U.S.C. 24702 are eligible. See 49 U.S.C. 24711(a)(1). Amtrak's Northeast Corridor is not eligible for the pilot program. See 49 U.S.C. 24711(a)(1) (statute does not include 49 U.S.C. 24102(5)(A) in the description of eligible Amtrak routes). As noted, FRA will examine any agreement(s) necessary for the operation of the proposed passenger service over right-of-way on the route that is not owned by the petitioning railroad, as described in § 269.9(b)(2) of this final rule. This analysis would include any Amtrak-owned infrastructure on the route at issue (whether voluntary or pursuant to

a Surface Transportation Board order under § 217 of PRIIA).

Another comment asked whether the proposed rule "exercise[s] any jurisdiction" over the process in which a State enters into a contract with a party other than Amtrak to operate a State-supported intercity passenger route (or whether such a situation more appropriately falls under § 217 of PRIIA). Section 214 of PRIIA does not address this issue, nor does this final rule.

In seeking clarification regarding the meaning of the term "passenger rail service route" as used in Paragraph (a) of this section, a comment questioned whether the Chicago-Milwaukee route 21 Hiawatha is included as part of the route 25 Empire Builder because it uses the same trackage, and whether route 25, which has two destinations, Seattle and Portland, is one route or two. Determination of these site-specific details can only be made in response to specific petitions. For this final rule to address every such situation—of which the national rail network could present more than one—would add needless complexity and would delay the rulemaking process.

A comment questioned FRA's authority to permit a rail carrier that does not own all of the infrastructure on a particular eligible route to access that portion of the infrastructure owned by another party. This comment misconstrues the proposed rule. Under the NPRM and this final rule, a railroad that owns infrastructure over which Amtrak operates certain passenger rail service routes may petition FRA. As noted, a railroad does not have to own all of the infrastructure over which Amtrak operates in order to file a petition. However, in that event, FRA would expect the railroad to describe in its bid the agreement(s) necessary to operate over right-of-way that is not owned by the bidding railroad, in compliance with § 269.9(b) of this final rule.

A comment also stated that a railroad should be able to offer service over a shorter route (as compared to the Amtrak route) if the omitted section of the route would continue to be provided with service by another passenger train. However, § 214 of PRIIA and this final rule require that a railroad selected to provide rail passenger service over a route under the pilot program must continue to provide passenger rail service on the route that is no less frequent, nor over a shorter distance, than Amtrak provided on that route before the award. See 49 U.S.C. 24711(c)(1)(A).

Paragraph (b) of this section provides that a petition submitted to FRA under this rule must: Be filed with FRA no later than 45 days after FRA provides notice of the Secretary's certification pursuant to proposed § 269.3(a); describe the petition as a "Petition to Provide Passenger Rail Service under 49 CFR part 269"; and describe the route or routes over which the petitioner wants to provide passenger rail service and the Amtrak service that the petitioner wants to replace. This paragraph is intended to ensure that a petition provides clear notice to FRA.

Paragraph (c) of this section provides that, in the event that a later statute extends the time period under which a railroad may provide passenger rail service pursuant to the pilot program, petitions would have to be filed with FRA no later than 60 days after the later of the enactment of such statutory authority or the Secretary's issuance of the certification under § 269.3(a), and that the petition must otherwise comply with the requirements of the pilot program. This paragraph takes into consideration the possibility that the 5-year limitations period established in PRIIA is extended by statute.

#### Section 269.9 Bid Process

Paragraph (a) of this section provides that FRA will notify Amtrak of any eligible petition filed with FRA no later than 30 days after FRA's receipt of such petition. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(2).

A comment stated that Amtrak should be required to provide any bidder under the pilot program with route performance information for the previous five years (including ridership, passenger-miles, and revenues by class of service between each city-pair). However, such a requirement is beyond the authority created by § 214 of PRIIA.

A comment also stated that FRA and Amtrak should work with bidders under the pilot program to develop a proposal that is mutually beneficial to all parties (e.g., a proposal in which Amtrak continues to provide some of its services for the route at issue). The statutory mandate sets forth a competitive process in which a railroad and Amtrak bid for a route. The statute does not authorize a requirement that Amtrak work on a collaborative bid with a railroad that is seeking to replace Amtrak.

A comment sought clarification regarding whether Amtrak is restricted to bidding its current fully-allocated financial performance under the route profitability system, or whether Amtrak could be allowed to propose anything materially different from its current

performance. That comment went on to state that Amtrak should not be able to make a bid materially different from its current fully-allocated financial and performance metrics and that Amtrak should not be able to make a bid based on incremental costs because its overhead is devoted to servicing these passenger routes. However, § 214 of PRIIA and this final rule are intended to foster improved and more competitive passenger rail service. The comment's proposed restrictions would stifle innovation and work against that very purpose. Moreover, all bidders have an inherent interest in minimizing the cash losses of the service in question: Amtrak, because it operates under a limited Federal operating grant; and the competing bidder(s), which would need to minimize both the subsidy requirement and the cash drain on their corporate finances (so as to both win the bid and safeguard their profitability). FRA believes that these inherent factors will prohibit bids that do not cover their full costs, and in any event, FRA will be carefully evaluating all bids for their viability.

Paragraph (b) of this section describes the bid requirements, including a requirement that such bids must be filed with FRA no later than 60 days after the petition deadline established by § 269.7. Paragraph (b) further provides that such bids must: (1) Provide FRA with sufficient information to evaluate the level of service described in the proposal, and to evaluate the proposal's compliance with the requirements described in § 269.13(b); (2) describe how the bidder would operate the route (including an operating plan, a financial plan and, if applicable, any agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the railroad), and, if the bidder intends to generate any revenues from ancillary activities (i.e., activities other than passenger transportation, accommodations, and food service) as part of its proposed operation of the route, then the bidder must fully describe such ancillary activities and identify their incremental impact in all relevant sections of the operating plan and the financial plan, and on the route's performance under the financial and performance metrics developed pursuant to § 207 of the Act, together with the assumptions underlying the estimates of such incremental impacts; (3) describe what Amtrak passenger equipment would be needed, if any; (4) describe in detail, including amounts, timing, and intended purpose, what sources of Federal and non-Federal funding the

bidder would use, including but not limited to any Federal or State operating subsidy and any other Federal or State payments; (5) contain a staffing plan describing the number of employees needed to operate the service, the job assignments and requirements, and the terms of work for prospective and current employees of the bidder for the service outlined in the bid; and (6) describe how the passenger rail service would comply with the financial and performance metrics developed pursuant to § 207 of PRIIA (at a minimum, this description must include, for each Federal fiscal year fully or partially covered by the bid: A projection of the route's expected on-time performance and train delays according to the metrics developed pursuant to § 207 of PRIIA; and the net cash used in operating activities per passenger-mile attributable to the route, both before and after the application of any expected public subsidies). This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(3) and (a)(6).

FRA is making one technical change to the rule text in Paragraph (b)(6) in order to permit FRA to better compare and evaluate bids. Paragraph (b)(6) provides that a bid must describe how the passenger rail service would comply with the financial and performance metrics developed pursuant to § 207 of PRIIA, and then proceeds to list what that description must include. The last item in that list is the net cash used in operating activities per passenger-mile. FRA is making one technical change here by further stating that the net cash must be both before and after the application of any expected public subsidies. This clarification is consistent with the statutory mandate and the metrics developed pursuant to § 207 of PRIIA, and allows for FRA to be able to compare the net cash numbers provided by Amtrak and a rail carrier. See 49 U.S.C. 24711(a)(4).

Paragraph (c) of this section provides that FRA may request supplemental information from a petitioner and/or Amtrak where FRA determines such information is needed to evaluate a bid. In such a request, FRA will establish a deadline by which the supplemental information must be submitted to FRA. This paragraph allows FRA to request additional information where the information provided in a bid prevents FRA from adequately evaluating the proposal.

#### Section 269.11 Evaluation

This section provides that FRA will select a winning bidder by evaluating the bids against the financial and

performance metrics developed under section 207 of PRIIA and the requirements of this part, and will give preference in awarding contracts to bidders seeking to operate routes that have been identified as one of the five worst performing Amtrak routes under 49 U.S.C. 24710. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(4).

#### *Section 269.13 Award*

Paragraph (a) of this section provides that FRA will execute a contract with the winning bidder(s) consistent with the requirements of § 269.13 and as FRA may otherwise require, no later than 90 days after the bid deadline established by § 269.9(b). This paragraph also provides that FRA will provide timely notice of these selections to all petitioners and to Amtrak. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(5).

Paragraph (b) of this section provides that, among other things, such a contract will: (1) Award to the winning bidder the right and obligation to provide passenger rail service over that route subject to such performance standards as FRA may require, consistent with the standards developed under section 207 of PRIIA; (2) award to the winning bidder an operating subsidy for the first year at a level not in excess of the level in effect during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation, and for any subsequent years at such level, adjusted for inflation; (3) condition the operating and subsidy rights upon the winning bidder continuing to provide passenger rail service on the route that is no less frequent, nor over a shorter distance, than Amtrak provided on that route before the award; (4) condition the operating and subsidy rights upon the winning bidder's compliance with the minimum standards established under section 207 of PRIIA and such additional performance standards as FRA may establish; and (5) subject the winning bidder to the grant conditions established by 49 U.S.C. 24405. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(5), (c)(1), and (c)(4).

A comment stated that FRA should mandate contractual provisions for liability and insurance that are consistent for all parties. However, the statutory mandate does not authorize such a requirement. It should be noted that § 214 and this final rule do require that a winning bidder under the pilot program shall be subject to the grant conditions under 49 U.S.C. 24405. See 49 U.S.C. 24711(c)(4). One requirement

under 49 U.S.C. 24405(c)(1)(D) is compliance with the liability requirements consistent with 49 U.S.C. 28103, which among other things limits rail passenger transportation liability.

Paragraph (c) of this section provides that the winning bidder will make their staffing plan, submitted as required by § 269.9(b)(4), available to the public after the bid award. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(a)(6).

#### *Section 269.15 Access to Facilities; Employees*

Paragraph (a) of this section provides that, if an award under § 269.13 is made to a rail carrier other than Amtrak, Amtrak must provide access to its reservation system, stations, and facilities directly related to operations to the winning bidder awarded a contract, in accordance with § 217 of PRIIA, necessary to carry out the purposes of the final rule. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(c)(2).

A comment stated that the rolling stock, stations, and reservation systems that Amtrak uses need to be available to pilot program operators at no cost. As discussed, § 214 of PRIIA requires that Amtrak provide access to its reservation system, stations, and facilities. See 49 U.S.C. 24711(c)(2). However, § 214 does not authorize FRA to require Amtrak to provide such access at no cost.

A comment sought clarification regarding how FRA would establish an equitable cost basis for third party access to Amtrak's reservation system, stations, and facilities in a timely manner. As required by statute and this final rule, Amtrak is required to provide such access in accordance with § 217 of PRIIA, which provides a process by which a cost is agreed upon by the parties. See 49 U.S.C. 24711(c)(2).

A comment also sought clarification as to whether such access includes access to services provided by Amtrak employees, including reservation agents, redcaps, gate agents, Qualified Maintenance Persons or Qualified Persons. The statute and this final rule only provide that Amtrak shall be required to provide access to its reservation system, stations, and facilities; the statute does not authorize access to services performed by Amtrak employees.

A comment stated that Amtrak should not be able to prevent operation of a route by a private rail carrier by withholding services directly related to Amtrak's control of its facilities, stations, or reservation systems. FRA agrees that Amtrak must comply with the requirements of the statute and this

final rule. In providing access to its reservation system, stations, and facilities, Amtrak would need to allow the third-party to successfully use the reservation system, stations and facilities.

A comment sought clarification regarding whether the term "facilities" as used in paragraph (a) of this section encompasses Amtrak's contracted right to use facilities it does not own and provided the hypothetical example of whether a bidder for the Vermonter route would have access to the portion of the Northeast Corridor between New Haven and New York City owned by Metro North. That comment went on to state that the definition should be broad and should encompass all facilities to which Amtrak has access through ownership, lease or contract. Section 214 of PRIIA does not authorize such a broad definition. Putting aside circumstances in which Amtrak owns the infrastructure and § 217 of PRIIA may apply, neither the statute nor this final rule require that owners of right-of-way not owned by a bidding railroad must provide access to their infrastructure. As described above, pursuant to the statutory mandate, the pilot program developed by this final rule only permits a rail carrier or rail carriers that own infrastructure to petition FRA. In the event that a bidder does not own all of the infrastructure on the route, the bid must describe the operating agreements necessary for operation on the right-of-way not owned by the railroad.

Paragraph (b) of this section provides that the employees of any person used by a rail carrier in the operation of a route under the final rule will be considered an employee of that carrier and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak, including provisions under § 121 of the Amtrak Reform and Accountability Act of 1997 relating to employees that provide food and beverage service. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(c)(3).

Paragraph (c) of this section provides that a winning bidder will provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan submitted by the winning bidder. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(c)(4).

#### *Section 269.17 Cessation of Service*

This section provides that, if a rail carrier awarded a route under this rule ceases to operate the service or fails to

fulfill its obligations under the contract required under § 269.13, the Administrator, in collaboration with the Surface Transportation Board, will take any necessary action consistent with title 49 of the United States Code to enforce the contract and ensure the continued provision of service, including the installment of an interim service provider and re-bidding the contract to operate the service. This section further provides that the entity providing service would either be Amtrak or a rail carrier eligible for the pilot program under § 269.7. This paragraph is based on the statutory directive contained in 49 U.S.C. 24711(d).

### III. Regulatory Impact and Notices

#### 1. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under Executive Orders 12866 and 13563, and U.S. Department of Transportation (DOT) policies and procedures. See 44 FR 11034; February 26, 1979. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this final rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC-10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; please refer to Docket No. FRA-2009-0108.

As part of a RIA, FRA generally assesses quantitative measurements of the cost and benefit streams expected to result from the adoption of a rule. However, in this case, due to the limited number of routes that can be awarded under the pilot program (only two routes can be awarded), and the short timeframe in which this pilot program will operate (until 2013), it is not feasible to perform an analysis for an extended period. There are no alternate service provider railroad regulatory costs because the program is voluntary with respect to such rail carriers. Regulatory costs will be triggered for

Amtrak if one or more alternative service providers bid on a route(s). For informational purposes, FRA included in the RIA appendices detailing the estimated average costs for both a railroad and Amtrak to participate in the pilot program. FRA estimates the average cost for each individual railroad to participate in the program and to submit the required bid proposal (the majority of the cost) at about \$300,000 per route, and the average cost for Amtrak at about \$150,000 per route (regardless of how many individual railroads bid on the individual Amtrak route). Non-Amtrak railroads that participate voluntarily will do so because they consider the benefits to exceed the costs. Thus, any participation will be net-beneficial with respect to the voluntary participant. Any costs to Amtrak are regulatory costs incurred solely due to the requirements of this final rule, and will primarily be associated with costs associated with developing bids.

Given that this pilot program is voluntary for alternate service providers and is not currently funded by Congress, FRA estimates that this regulation will not result in any benefits or costs.

#### 2. Regulatory Flexibility Act

To ensure potential impacts of rules on small entities are properly considered, FRA developed this final rule in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

#### Purpose

As noted earlier in this final rule, the purpose of this rulemaking is to respond to a statutory mandate to develop a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes to petition FRA to be considered as a passenger rail service provider over such a route in lieu of Amtrak for a period not to exceed 5 years after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The final rule develops this pilot program in conformance with the statutory directive.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary of Transportation certifies that the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), FRA has issued a final policy that formally establishes “small entities” as including railroads that meet the line-haulage revenue requirements of a Class III railroad. Title 49 Code of Federal Regulations CFR Part 209, Appendix C. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity. *Id.* Additionally, Section 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Such governments will not be directly impacted by this final rule.

#### Rationale for Choosing Regulatory Action and Legal Authority

FRA is initiating this final rule in response to a statutory mandate set forth in Section 214 of the PRIIA. Section 214 requires FRA to complete a rulemaking proceeding to develop a pilot program that permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates certain passenger rail service routes to petition FRA to be considered as a passenger rail service provider over such a route in lieu of Amtrak for a period not to exceed 5 years after the date of enactment of the PRIIA. This final rule develops this pilot program in conformance with the statutory directive.

#### Description of Regulated Entities and Impacts

This final rule is applicable to railroads that own infrastructure upon which Amtrak operates those routes described in 49 U.S.C. 24102(5)(B), (C), and (D) and in 49 U.S.C. 24702, which may include small railroads. “Small entity” is defined in 5 U.S.C. 601 as including a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 500 employees, or a “commuter rail system” with annual

receipts of less than \$7 million. See "Size Eligibility Provisions and Standards," 13 CFR Part 121, Subpart A. Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes "small entities" or "small businesses" as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891 (May 9, 2003) (codified at Appendix C to 49 CFR Part 209). The \$20 million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for the final rule.

#### Minimum Requirements for Pilot Program Applications

Small railroads face the same requirements for entry in the pilot program as other railroads. The railroad must own infrastructure over which Amtrak operates those routes described in 49 U.S.C. 24102(5)(B), (C), and (D), and in 49 U.S.C. 24702.

#### Disclosure of Assumptions

The purpose of this economic analysis is to provide pertinent information on the effects of the regulation, 49 CFR Part 269, Alternate Passenger Rail Service Pilot Program. FRA believes that the regulation will not have any effect on small railroads since participation in the pilot program is voluntary, only two routes are available for award, the program expires in 2013, and it is unlikely that Federal funding not currently available will be available for the program. FRA does not anticipate that any small railroads will be interested in taking over such an existing, eligible Amtrak route.

#### Criteria for Substantial Number

This regulation is voluntary for all rail carriers, except Amtrak, which will be impacted only if another carrier petitions to participate in the pilot program. Therefore, there are no mandates placed on large or small railroads. Consequently, this regulation will not affect a substantial number of small entities, and most likely will not impact any small entities.

#### Criteria for Significant Economic Impacts

The factual basis for the certification that this final rule will not have a significant economic impact on a substantial number of small entities is that the pilot program is voluntary for all rail carriers except Amtrak; and no small entities are anticipated to apply. Therefore, this regulation is not expected to have a significant economic impact on a substantial number of small entities.

FRA notes that this regulation does not disproportionately place any small railroads that are small entities at a significant competitive disadvantage. Small railroads are not excluded from participation, so long as they are eligible. This regulation and the underlying statute are aimed at railroads taking over an entire route. If Amtrak uses 30 miles of a small railroad's infrastructure in a route that is 750 miles long, the small railroad could not apply to take over just its own segment, but will have to apply to take over the whole route. Thus, the ability to bid on a route is not constrained by a railroad's size.

#### Request for Comments

FRA invited comments from all interested parties on this certification. FRA also requested comments on the regulatory impact analysis and its underlying assumptions. FRA particularly encouraged small entities that could potentially be impacted by the proposed regulation to participate in the public comment process by submitting comments on this assessment or this rulemaking to the official DOT docket. Although FRA received comments on the proposed rule, none were related to either economic analysis.

#### Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule does not require, or otherwise impose, any requirements upon any small entities. Instead, this final rule develops a pilot program under which an eligible small entity may voluntarily elect to participate. Furthermore, the final rule establishes a very limited pilot program that applies to no more than two Amtrak routes.

#### 3. Paperwork Reduction Act

According to the Paperwork Reduction Act of 1995 and OMB's Implementing Guidance at 5 CFR 1320.3(c), "collection of information

means, except as provided in section 1320.4, the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit." FRA expects that the requirements of this final rule will affect less than 10 railroads or "persons" as defined in 5 CFR 1320.3(c)(4). Consequently, no information collection submission is necessary, and no approval is being sought from the Office of Management and Budget (OMB) at this time.

#### 4. Environmental Impact

FRA has evaluated this final rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this document is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because the rulemaking would not result in a change in current passenger service; instead, the program would only potentially result in a change in the operator of such service. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

#### 5. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue

a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. This final rule will not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. As explained, FRA has determined that this final rule has no federalism implications. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

#### 6. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This monetary amount of \$100,000,000 has been adjusted to

\$140,800,000 to account for inflation. This final rule will not result in the expenditure of more than \$140,800,000 by the public sector in any one year, and thus preparation of such a statement is not required.

#### 7. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this final rule is not a “significant energy action” within the meaning of Executive Order 13211.

#### 8. Privacy Act Information

Interested parties should be aware that anyone is able to search the electronic form of all written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://www.dot.gov/privacy.html>.

#### List of Subjects in 49 CFR Part 269

Railroads; Railroad employees.

#### The Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, by adding part 269 to read as follows:

#### PART 269—ALTERNATE PASSENGER RAIL SERVICE PILOT PROGRAM

Sec.

269.1 Purpose.  
269.3 Application.  
269.5 Definitions.  
269.7 Petitions.  
269.9 Bid process.  
269.11 Evaluation.  
269.13 Award.  
269.15 Access to facilities; employees.  
269.17 Cessation of service.

**Authority:** Sec. 214, Div. B, Pub. L. 110-432; 49 U.S.C. 24711; and 49 CFR 1.49.

#### § 269.1 Purpose.

The purpose of this part is to carry out the statutory mandate set forth in 49 U.S.C. 24711 requiring FRA to develop a pilot program that permits a railroad that owns infrastructure over which Amtrak operates a passenger rail service route to petition FRA to be considered as a passenger rail service provider over that route in lieu of Amtrak.

#### § 269.3 Application.

(a) *Certification.* This part will not be applicable to any railroad, unless and until, the Secretary certifies that FRA has sufficient resources that are adequate to undertake the pilot program developed by this part. FRA will provide notice of the certification on the FRA public Web site upon receipt.

(b) *Route limitations.* The pilot program developed by this part will not be made available to more than two Amtrak intercity passenger rail routes.

(c) *Time limitations.* Any railroad awarded a contract to provide passenger rail service under the pilot program developed by this part shall only provide such service for a period not to exceed either five years after October 16, 2008, or a later date authorized by statute.

#### § 269.5 Definitions.

As used in this part—  
*Act* means the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. 110-432, Division B (Oct. 16, 2008)).

*Administrator* means the Federal Railroad Administrator, or the Federal Railroad Administrator’s delegate.

*Amtrak* means the National Railroad Passenger Corporation.

*File and Filed* mean submission of a document under this part on the date the document was postmarked, or the date the document was emailed to FRA.

*Financial plan* means a plan that contains, for each Federal fiscal year fully or partially covered by the bid: An annual projection of the revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds) attributable

to the route; and a statement of the assumptions underlying the financial plan's contents.

*FRA* means the Federal Railroad Administration.

*Operating plan* means a plan that contains, for each Federal fiscal year fully or partially covered by the bid: A complete description of the service planned to be offered, including the train schedules, frequencies, equipment consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; and a statement of the assumptions underlying the operating plan's contents.

*Passenger rail service route* means those routes described in 49 U.S.C. 24102(5)(B), (C), and (D) or in 49 U.S.C. 24702.

*Petitioner* means a railroad, other than Amtrak, that has submitted a petition to FRA under section 269.7 of this part.

*Railroad* means a rail carrier or rail carriers, as defined in 49 U.S.C. 10102(5).

*Secretary* means the Secretary of the U.S. Department of Transportation.

#### § 269.7 Petitions.

(a) *In General.* A railroad that owns infrastructure over which Amtrak operates a passenger rail service route may petition FRA to be considered as a passenger rail service provider over that route in lieu of Amtrak for a period of time consistent with the time limitations described in § 269.3(c) of this part.

(b) *Petition Requirements.* Each petition shall:

(1) Be filed with FRA no later than 45 days after FRA provides notice of the Secretary's certification pursuant to § 269.3(a) of this part using the following method: email to [Prria214@dot.gov](mailto:Prria214@dot.gov);

(2) Describe the petition as a "Petition to Provide Passenger Rail Service under 49 CFR part 269"; and

(3) Describe the route or routes over which the petitioner wants to provide passenger rail service and the Amtrak service that the petitioner wants to replace.

(c) *Future petitions.* In the event that a statute extends the time period under which a railroad may provide passenger rail service pursuant to the pilot program developed by this part, petitions under this section shall be

filed with FRA no later than 60 days after the later of the enactment of such statutory authority or the Secretary's issuance of the certification under § 269.3(a), and shall otherwise comply with the requirements of this part.

#### § 269.9 Bid process.

(a) *Amtrak notification.* FRA will notify Amtrak of any eligible petition filed with FRA no later than 30 days after FRA's receipt of such petition.

(b) *Bid requirements.* A petitioner and Amtrak must both file a bid with FRA to provide passenger rail service over the route to which the petition relates no later than 60 days after the petition deadline established by § 269.7 of this part using the following method: email to [Prria214@dot.gov](mailto:Prria214@dot.gov). Each such bid must:

(1) Provide FRA with sufficient information to evaluate the level of service described in the proposal, and to evaluate the proposal's compliance with the requirements described in § 269.13(b) of this part;

(2) Describe how the bidder would operate the route. This description must include, but is not limited to, an operating plan, a financial plan and, if applicable, any agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the railroad. In addition, if the bidder intends to generate any revenues from ancillary activities (*i.e.*, activities other than passenger transportation, accommodations, and food service) as part of its proposed operation of the route, then the bidder must fully describe such ancillary activities and identify their incremental impact in all relevant sections of the operating plan and the financial plan, and on the route's performance under the financial and performance metrics developed pursuant to section 207 of the Act, together with the assumptions underlying the estimates of such incremental impacts;

(3) Describe what Amtrak passenger equipment would be needed, if any;

(4) Describe in detail, including amounts, timing, and intended purpose, what sources of Federal and non-Federal funding the bidder would use, including but not limited to any Federal or State operating subsidy and any other Federal or State payments;

(5) Contain a staffing plan describing the number of employees needed to operate the service, the job assignments and requirements, and the terms of work for prospective and current employees of the bidder for the service outlined in the bid; and

(6) Describe how the passenger rail service would comply with the financial

and performance metrics developed pursuant to section 207 of the Act. At a minimum, this description must include, for each Federal fiscal year fully or partially covered by the bid: a projection of the route's expected on-time performance and train delays according to the metrics developed pursuant to section 207 of the Act; and the net cash used in operating activities per passenger-mile (both before and after the application of any expected public subsidies) attributable to the route.

(c) *Supplemental information.* FRA may request supplemental information from a petitioner and/or Amtrak where FRA determines such information is needed to evaluate a bid. In such a request, FRA will establish a deadline by which the supplemental information must be filed with FRA.

#### § 269.11 Evaluation.

FRA will select a winning bidder by evaluating the bids against the financial and performance metrics developed under section 207 of the Act and the requirements of this part, and will give preference in awarding contracts to bidders seeking to operate routes that have been identified as one of the five worst performing Amtrak routes under 49 U.S.C. 24710.

#### § 269.13 Award.

(a) *Award.* FRA will execute a contract with the winning bidder(s), consistent with the requirements of this section and as FRA may otherwise require, no later than 90 days after the bid deadline established by § 269.9(b) of this part. FRA will provide timely notice of these selections to all petitioners and Amtrak.

(b) *Contract requirements.* Among other things, the contract between FRA and a winning bidder shall:

(1) Award to the winning bidder the right and obligation to provide passenger rail service over that route subject to such performance standards as FRA may require, consistent with the standards developed under section 207 of the Act, for a duration consistent with § 269.3(c) of this part;

(2) Award to the winning bidder an operating subsidy for the first year at a level not in excess of the level in effect during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation, and for any subsequent years at such level, adjusted for inflation;

(3) Condition the operating and subsidy rights upon the winning bidder continuing to provide passenger rail service on the route that is no less frequent, nor over a shorter distance,

than Amtrak provided on that route before the award;

(4) Condition the operating and subsidy rights upon the winning bidder's compliance with the minimum standards established under section 207 of the Act and such additional performance standards as FRA may establish; and

(5) Subject the winning bidder to the grant conditions established by 49 U.S.C. 24405.

(c) *Staffing Plan Publication.* The winning bidder shall make their staffing plan required by § 269.9(b)(4) of this part available to the public after the bid award.

**§ 269.15 Access to facilities; employees.**

(a) *Access to facilities.* If the award under § 269.13 of this part is made to a railroad other than Amtrak, Amtrak must provide access to its reservation system, stations, and facilities directly related to operations to the winning

bidder awarded a contract under this part, in accordance with section 217 of the Act, necessary to carry out the purposes of this part.

(b) *Employees.* The employees of any person used by a railroad in the operation of a route under this part shall be considered an employee of that railroad and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak, including provisions under section 121 of the Amtrak Reform and Accountability Act of 1997 relating to employees who provide food and beverage service.

(c) *Hiring preference.* The winning bidder shall provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan submitted by the winning bidder.

**§ 269.17 Cessation of service.**

If a railroad awarded a route under this part ceases to operate the service or fails to fulfill its obligations under the contract required under § 269.13 of this part, the Administrator, in collaboration with the Surface Transportation Board, shall take any necessary action consistent with title 49 of the United States Code to enforce the contract and ensure the continued provision of service, including the installment of an interim service provider and re-bidding the contract to operate the service. The entity providing service shall either be Amtrak or a railroad eligible for this pilot program under § 269.7 of this part.

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**Joseph C. Szabo,**  
*Administrator, Federal Railroad Administration.*

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