EXHIBIT 3-OO

Docket No. DCA-08-MR009

NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594

Southern California Regional Rail Authority
Comments on How Federal Preemption Affects
California PUC's Ability to Ensure Railroad Safety

Exhibit 3-OO

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, DC 20594

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In the Matter of the Investigation of the Collision of Southern California Regional Rail Authority (Metrolink) Passenger Train No. 111 and Union Pacific Railroad Freight Train No. LOF 65-12 in Chatsworth, California, on September 12, 2008

Docket No. DCA-08-MR009

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COMMENTS OF THE SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY CONCERNING PREEMPTION OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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April 3, 2009

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In the Matter of the Investigation of the Collision of Southern California Regional Rail Authority (Metrolink) Passenger Train No. 111 and Union Pacific Railroad Freight Train No. LOF 65-12 in Chatsworth, California, on September 12, 2008

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EXECUTIVE SUMMARY

At its public hearing regarding the collision of Metrolink Passenger Train No. 111 and Union Pacific Railroad Freight Train No. LOF 65-12, the National Transportation Safety Board ("NTSB" or "Board") invited the Southern California Regional Rail Authority ("SCRRA" or "Metrolink") and other participants in the hearing to submit a White Paper on the subject of the extent of the jurisdiction of the California Public Utilities Commission ("CPUC") over the safety of passenger rail transit in California in the face of the comprehensive federal scheme of statutes and regulations that pertain to interstate railroad operations and safety. SCRRA respectfully submits this White Paper to address these questions.

To be clear, SCRRA is an advocate for the implementation of Positive Train Control, or "PTC", on its system right now. It is taking aggressive steps to ensure its compliance with the federal mandate for implementation of PTC. SCRRA's statement in this White Paper that the federal law preempts CPUC's attempts to regulate the installation of collision avoidance systems on commuter rail lines in California is consistent with that view and with the actions that SCRRA is taking in this regard at this time.

Since its enactment of the Federal Railroad Safety Act ("FRSA") in 1970, Congress has placed primary jurisdiction over rail safety matters with the federal government. Under the FRSA, the Federal Railroad Administration's ("FRA's") promulgation of a federal regulation covering a rail safety concern displaces the States' authority to regulate the same subject matter. The FRSA expressly applies to commuter railroads such as Metrolink. In addition, Congress has given preemptive effect to the Surface Transportation Board's ("STB's") regulation of the broad areas of rail operations that are within that agency's jurisdiction. Taken together, these federal statutes confirm that state authorities are preempted from regulating in the area of rail safety, except in very limited areas, as described herein.

More specifically, the FRA has regulated extensively in the field of collision-avoidance systems for decades, including last year's congressional mandate that PTC, a state-of-the-art collision-avoidance technology, must be implemented by a majority of railroad systems

nationwide by the end of 2015. With the federal government fully occupying the field of collision-avoidance regulation, the CPUC has no jurisdiction to act in this area.

The need to recognize the preemptive effect of federal law with respect to PTC is particularly acute for commuter rail operators such as Metrolink. The tracks Metrolink has acquired and/or used for its system continue to be used by interstate freight and passenger common carriers. Metrolink in fact shares all of its 388 route miles of track with freight railroads and over 200 route miles with Amtrak. Implementation of PTC within Metrolink's system therefore will require close coordination with Amtrak and the freight railroads that share the same tracks. It would not advance public safety to have the CPUC require one type of collision-avoidance system for Metrolink while Amtrak and the freight railroads must use the PTC system that the FRA has mandated. Public safety will be better served by having Metrolink, Amtrak, and the freight railroads all use the same PTC system.

Notwithstanding the broad scope of federal preemption, the CPUC does have a role in ensuring that railroad transportation within California is safe. That jurisdiction, however, is limited to very specific areas. For example, federal statutes carve out a specific segment of intrastate rail transit networks that may be regulated by the CPUC: fixed guideway transportation systems such as the Los Angeles Metro. Additionally, the states have a role in addressing essentially local railroad safety hazards and performing inspection and enforcement tasks that have been expressly delegated to them by the FRA. In fact, the State of California plays a vital role in enforcing federal railroad safety law as part of the State Partnership Program. The CPUC routinely acts for the FRA by enforcing federal regulations through recommendations that the FRA issue citations to operators CPUC determines to have violated those federal requirements.

In sum, although the CPUC has a defined role regarding rail safety, its desire to impose California-only requirements for collision-avoidance systems is misplaced. The federal government has fully occupied that field, and this Board should defer to the decisions that Congress and the FRA have made regarding PTC.

I. BACKGROUND

On September 12, 2008, a Metrolink commuter rail train carrying 225 passengers collided head-on with a Union Pacific Railroad Company ("UP") freight train in Chatsworth, CA. Twenty-six people were killed and another 135 suffered injuries. At the time of the accident, the Metrolink train was operating on a single-tracked corridor that it shares with both UP freight trains and Amtrak.

The NTSB instituted an accident investigation, and as part of that investigation held a public hearing on March 3 and 4, 2009. The topics discussed at the hearing included the railroad operating rules in effect at the time of the accident in addition to more general railroad safety issues such as signals, the use of cell phones and collision-avoidance systems.

The CPUC presented testimony at the public hearing on March 4. Richard Clark, the Director of CPUC's Consumer Protection and Safety Division, suggested to the NTSB that his

agency believes that it could and should expand its role in regulating and enforcing safety systems for intrastate commuter rail lines in California. Mr. Clark explained that CPUC's desire to expand its jurisdiction in the area of railroad safety led to its decision to issue an Order Instituting Rulemaking to Consider Implementation of Collision-Avoidance Systems on Commuter Rail Lines (hereinafter the "CPUC OIR") on November 25, 2008.[1] Metrolink responded to the OIR on March 24, 2009,[2] asserting there, as it does here, that CPUC's attempt to assert jurisdiction over the design, installation and use of collision-avoidance systems on the Metrolink system is fully preempted by federal law.

Mr. Clark stated at the hearing before the Board that the CPUC believes that it can assert authority over intrastate rail operations, and that the rulemaking commenced by the OIR will explore the extent to which its authority is preempted. Mr. Clark also stated that the CPUC is concerned that any collision-avoidance technology to be installed on California intercity and commuter rails must meet the minimum standards that the State feels are appropriate. One of the questions the CPUC is considering as part of its rulemaking is whether installation of something short of full PTC control would impede progress, acknowledging the NTSB's concern that any order the CPUC might issue related to collision-avoidance systems could slow progress towards the adoption of PTC or other appropriate collision-avoidance systems in California and possibly nationwide.

Because the CPUC discussed its views regarding federal preemption and its desire to expand its role with respect to the safety of intrastate commuter rail operations at the public hearing, the NTSB asked the CPUC to develop a White Paper on the topic, and invited Metrolink and other organizations to respond as well.[3] The purpose of this White Paper is to confirm that while the CPUC has a role in assuring the safety of railroad operations within California, it is the federal government that has primary jurisdiction over most aspects of railroad operations in the State, including safety generally and the attendant implementation of collision-avoidance systems. The CPUC's jurisdiction is limited in view of the federal government's statutory and regulatory occupation of the field of railroad safety.

More specifically, Congress and the FRA have legislated and regulated extensively in the field of railroad safety and collision-avoidance systems for decades. Most recently, in 2008 Congress mandated that state-of-the-art collision-avoidance systems shall be implemented on most railroad systems nationwide by the end of 2015. This body of federal law expressly preempts the CPUC and other state agencies from regulating in this area insofar as such regulation would interfere with compliance with federally mandated systems. The federal government's longstanding regulation of this field, reinforced by recent statutory mandates, confirms that there is no room for the CPUC to require additional or different standards on the Metrolink's operations, which occur in very dense mixed traffic with interstate freight and interstate intercity passenger services.

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[1] CPUC OIR, R.08-11-017 (Nov. 25, 2008).

[2] *See* Response of Southern California Regional Rail Authority to Order Instituting Rulemaking to Consider Implementation of Collision-Avoidance Systems on Commuter Rail Lines in California, CPUC Doc. No. R.08-11-017 (March 24, 2009).

[3] In addition to Metrolink, at the hearing on March 4, 2009, the NTSB invited the following organizations to submit White Papers on the subject of the CPUC's proper jurisdiction over commuter rail services in California: UP, the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET").

A. History of the Metrolink Commuter Rail System

An understanding of why the federal mandate for creation and implementation of avoidance-collision systems on the interstate rail network preempts any actions by the CPUC *vis-à-vis* Metrolink requires, first, an understanding of the creation of Metrolink's rail network and its ongoing, direct and inextricable link to the interstate system of railroad transportation. "Metrolink" is the trade name for the regional commuter rail service operated by SCRRA. SCRRA is an independent Joint Powers Authority ("JPA") created pursuant to Cal. Public Utilities Code § 130255 and the California Joint Powers Act, Cal. Gov't Code § 6500 *et seq.* The members of the JPA are the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, San Bernardino Associated Governments and the Ventura County Transportation Commission.[4]

In the early 1990's, the Los Angeles County Transportation Commission ("LACTC")[5] began the process of acquiring property interests in lines of railroad owned by existing freight carriers. LACTC at first, and then all five of the SCRRA member agencies, entered into a combination of purchase and lease transactions with three separate freight carriers to acquire ownership of or other usage rights on rail lines in the five-county area: Southern Pacific Transportation Company ("SP"),[6] the Atchison, Topeka and Santa Fe Railway Co. ("Santa Fe")[7] and UP.

At the outset, LACTC hoped that its acquisitions would not bring it and the county transportation agencies that now make up SCRRA within the jurisdiction of the Interstate Commerce Commission ("ICC").[8] Under 49 U.S.C. § 10901, when an unregulated non-rail carrier purchases an existing railroad line, the purchaser becomes a regulated carrier with a common carrier obligation to provide freight service unless the STB[9] finds that the purchaser did not acquire sufficient rights and obligations with respect to the rail lines to have assumed that common carrier obligation.[10]

In proceedings before the ICC relating to its first acquisitions from SP, LACTC argued that the transactions, and consequently LACTC itself, were not subject to the jurisdiction of the

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[4] The JPA Agreement among the five country transportation agencies may be found at http://www.metrolinktrains.com/documents/About/JPA_agreement.pdf.

[5] The LACTC subsequently merged with the Southern California Rapid Transit District to form the Los Angeles County Metropolitan Transportation Authority, which succeeded to all of LACTC's rights and obligations with respect to the lines of railroad that Metrolink uses for its commuter rail operations.

[6] SP has subsequently merged into UP.

[7] Santa Fe is now part of the combined BNSF Railway Company.

[8] *See Orange County Transp. Auth., Riverside County Transp. Auth., San Bernardino Associated Gov'ts, San Diego Metro. Transit Dev. Bd., N. San Diego County Transit Dev. Bd. – Acquisition Exemption – The Atchison, Topeka and Santa Fe Rwy. Co.* (hereinafter "*Orange County*"), 10 I.C.C.2d 78, 79 (1994) (observing that LACTC and other local transit agencies "usually do not want to acquire a freight common carrier obligation and also do not want to incur other regulatory obligations that are triggered by Commission jurisdiction").

[9] The STB is the successor to the ICC which was abolished on December 31, 1995. *See* ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995).

[10] *See generally State of Maine, Dept. of Transp. – Acquisition and Operation Exemption – Maine Central R.R. Co.*, 8 I.C.C.2d 835 (1991) (hereinafter "*State of Maine*").

ICC because LACTC was not "holding itself out to perform common carrier rail service and [it lacked] the ability to do so."[11] LACTC made this argument because, in general, LACTC either entered into shared use agreements with the freight carriers and Amtrak that would require those other carriers to continue their common carrier services, or the freight railroads agreed to terminate their common carrier services on acquired lines. After investigating the circumstances surrounding the acquisition transactions, however, the ICC disagreed with LACTC, and ruled that the rights and obligations acquired by LACTC gave it sufficient ability to "interfere" with the freight carriers' ability to fulfill their common carrier obligations. After concluding that LACTC was acquiring "substantial power over the lines, and SP [was] retaining very little power,"[12] the ICC held that the LACTC had acquired a common carrier obligation through its acquisition of the SP trackage. As a result, the ICC concluded that LACTC did become, for limited purposes, a rail carrier providing transportation subject to the jurisdiction of the ICC.[13]

The ICC later reached a similar conclusion regarding the interests acquired by the five SCRRA member agencies, as well as two agencies in San Diego County, from Santa Fe. In its first decision on the matter in 1994, the ICC stated that that the question of whether a freight operator such as Santa Fe has "retained sufficient interest in and control over" the trackage over which a local commuter operator has acquired rights requires case-by-case analysis.[14] The question is whether the freight carrier will still be able to "fulfill its common carrier obligation so that the transaction would fall outside our jurisdiction."[15] After evaluating the specific terms and conditions of the shared use agreements executed between Santa Fe and the transit agencies, the ICC determined that Santa Fe had "not retained sufficient ability to serve freight shippers to justify a finding that we lack jurisdiction over the acquisition of the rail assets."[16]

Three years later, the STB reiterated and expanded on this holding after reconsidering the Santa Fe acquisitions:

> When the ICC designated these Transit Agencies to be "rail carriers" in the first place, its only reason for doing so was to assure that they did not unduly interfere with the provision of common carrier freight service by carriers such as Santa Fe that were selling their underlying rights-of-way without eliminating their common carrier obligation to provide service over them.[17]

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[11] *Southern Pac. Transp. Co. – Abandonment Exemption – Los Angeles County CA*, 9 I.C.C.2d 385, 387-88 (1993).
[12] *Id.* at 388.
[13] *Id.* at 387-88. In a recent decision, the STB confirmed that LACMTA's common carrier obligation is quite limited, and as a result, the extent of the STB's regulation over LACMTA as a common carrier is also quite limited. *Los Angeles County Metro. Transp. Auth. – Abandonment Exemption – In Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X), slip op.* (Service Date July 17, 2008). This recent decision confirms that the lines owned by LACMTA and used by Metrolink are still considered part of the interstate rail network and are thus subject to the STB's federal jurisdiction.
[14] *Orange County* at 83 (citing *State of Maine).*
[15] *Id.*
[16] *Id.* at 90-91. In this decision, the ICC did disclaim jurisdiction over one section of track, but found the majority of the transactions between Santa Fe and SCRRA were within federal jurisdiction.
[17] *Orange County Transp. Auth., Riverside County Transp. Auth., San Bernardino Associated Govt's, San Diego Metro. Transit Dev. Bd., N. San Diego County Transit Dev. Bd. – Acquisition Exemption – The Atchison, Topeka and Santa Fe Rwy. Co.*, STB Fin. Docket No. 32173, *slip op.* at 4 (Service Date Mar. 12, 1997).

With this decision, the STB clarified that the agencies' use and management of the tracks that they acquired from the freight carriers fall within the jurisdiction of the STB because of the unavoidable impact Metrolink operations have on the general system of transportation.

Standing alone, Metrolink's operations would not be subject to STB jurisdiction since they are entirely intrastate. However, as illustrated by the ICC and STB decisions discussed above, because SCRRA acts as the agent for its five member agencies in operating the Metrolink commuter rail system, those Metrolink operations are inextricably linked to the operation of the interstate freight and passenger trains that share the lines it uses. Metrolink shares all of its 388 route miles of track with Class I freight railroads and over 200 route miles with Amtrak. The relationship between Metrolink and the interstate carrier railroads is complex because Metrolink and its member agencies serve as both host and tenant to the interstate operators.[18] Metrolink's operations are intertwined with those of UP and BNSF – the two Class I freight operators currently sharing its lines – as well as Amtrak. SCRRA generally controls dispatching on most of the system it uses, and therefore it exercises control over the movement of freight trains. SCRRA maintains the tracks owned by its member agencies that are also used by the interstate carriers. SCRRA installs and maintains the signals on those tracks, both the signals that control the movement of trains and offer grade-crossing protection. Whatever systems Metrolink may install on its network to control or affect the movement of its trains would, as a result, directly impact the operation of the interstate trains that share that network. As a result, any attempt by the CPUC to mandate the installation of a particular collision-avoidance system on Metrolink would impose the same requirement on UP, BNSF and Amtrak, and expand the impact of its action beyond California's borders.

B. Metrolink's Development of Positive Train Control Pursuant to the Rail Safety Improvement Act of 2008

The Rail Safety Improvement Act of 2008 ("RSIA")[19] confirms that federal law occupies the field of regulation of collision-avoidance systems on the interstate rail network and on commuter rail systems. The RSIA gives the Secretary of Transportation express statutory authority to regulate the implementation of Positive Train Control ("PTC"), the most state-of-the-art form of collision-avoidance system available.[20] The statute sets a deadline of the end of 2015 for nationwide implementation of PTC on most rail systems.[21] It leaves no room for debate as to what technology Congress believes is the most effective way to achieve the very same objectives set out by the CPUC in the OIR; the answer, according to Congress, is PTC. It also clearly includes commuter rail operations that share tracks with interstate freight within the universe of lines that are governed by the PTC mandate:

> Not later than 4 years after the date of enactment of the Rail Safety Improvement Act of 2008, the Secretary of Transportation, by regulation, shall require each

[18] *See COMMUTER RAIL: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, GAO-04-240, at 10 (Jan. 2004), *available at* http://www.gao.gov/new.items/d04240.pdf.
[19] Pub. L. No. 110-432, 122 Stat. 4857 (2008).
[20] 49 U.S.C. § 20157.
[21] 49 U.S.C. § 20157(a)(1).

railroad carrier that is a Class I railroad . . . or a railroad carrier that provides intercity rail passenger or commuter rail passenger transportation--

(A) to develop a railroad safety risk reduction program . . . that systematically evaluates railroad safety risks on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities . . . .[22]

The RSIA requires that a detailed technology plan and schedule for the implementation of PTC be a key component of the railroads' safety risk reduction programs.[23] Implementation of PTC on a majority of the nation's freight and commuter rail lines is mandatory by the end of 2015.[24] Implementation of PTC systems in California, and in the congested Los Angeles Basin, is an even higher priority for the FRA.[25]

PTC is defined in the Act as, "a system designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position."[26] So long as they perform these core functions, PTC systems may vary widely in complexity and sophistication, but at base, they perform four core functions with automatic intervention capability: 1) prevent train-to-train collisions; 2) enforce speed restrictions; 3) provide protection for roadway workers and their equipment operating under specific authorities; and, 4) protect against the movement of a train through a switch left in the wrong position.[27] PTC systems will vary based upon the level of automation and functionality they implement, the system architecture used, and the degree of train control they are capable of assuming.

Pursuant to the RSIA, Metrolink is working diligently to develop a plan and to implement PTC on the tracks its member agencies own. Although the FRA has not yet issued final rules as to the technical standards for interoperability, braking algorithms and other issues,[28] and although the availability and extent of the wireless communication spectrum that will be available has not yet been confirmed, Metrolink is working closely with UP and BNSF to develop plans for development and implementation of the mandated system on the tracks they share.

The ongoing development of the system for Metrolink will require assessment and incorporation of the unique features of the Los Angeles Basin operating environment. There is a dense mix of passenger and freight operations in this territory; the region consists of an interlacing web of multiple freight main line tracks as well as numerous yards and sidings. Throughout the region, there are hundreds of at-grade crossings, and other significant conditions such as steep mountain grades and complex passenger terminals. Given all these features that are shared by Metrolink and the interstate freight and passenger common carriers, in addition to

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[22] 49 U.S.C. § 20156(a)(1).
[23] 49 U.S.C. §§ 20156(d)(2) & (e)(4).
[24] 49 U.S.C. § 20157(a).
[25] The FRA testified to this fact at the hearing in this matter on March 4, 2009.
[26] 49 U.S.C. § 20157(i)(3).
[27] *See* 66 Fed. Reg. 42,352, 42,354 (Aug. 10, 2001); 49 U.S.C. § 20157(i)(3).
[28] Draft regulations are slated for release in April 2009.

working for Metrolink operations, any system developed by SCRRA must also function fully for the trains operated by BNSF, UP, Amtrak and the San Diego County "Coaster" system.

SCRRA has already begun the complex and detailed process of developing the Product Safety Plan for the PTC system it will implement according to the requirements of 49 C.F.R. Part 236, Subpart H. It has developed an aggressive schedule for development and implementation of the system mandated by RSIA because it shares tracks with interstate freight and passenger carriers. SCRRA is developing a budget, and is already dedicating substantial staff resources and scarce funds on development of this system in order to meet the statutory deadline. It is working closely with BNSF and UP to ensure that the systems they have developed and are planning to use will work together with the system Metrolink will acquire and install. Interoperability is not only mandated by the RSIA, but essential for achievement of the safety benefits the systems are intended to produce.

Given this direct, inextricable connection between Metrolink and the interstate common carrier network, and the pervasive federal regulation that applies to every aspect of the operation of Metrolink's system related to the development and implementation of collision-avoidance systems, Metrolink respectfully submits to the Board that any attempt by the CPUC to impose additional regulation of collision-avoidance systems is fully preempted by federal law.

II. NUMEROUS FEDERAL STATUTES LARGELY PREEMPT THE CPUC'S REGULATION OF COMMUTER RAIL OPERATIONS

Metrolink is a hybrid system of sorts: while its own trains operate wholly within the State of California, it has tracks, crossings, signal systems, wayside equipment and dispatchers operating as part of the interstate freight and passenger network. As discussed above, the first reason that the CPUC is preempted from regulating the field of collision-avoidance systems within California is that such an attempt at regulation would interfere with the federally mandated PTC efforts already underway in California pursuant to the RSIA.

The second reason the NTSB should not support expanded jurisdiction for the CPUC is that the federal regulatory scheme pertaining to railroad safety is comprehensive. There are numerous federal statutes that comprise the federal government's total occupation of the field of railroad safety, thereby preempting any attempts by the CPUC to mandate the use by Metrolink of particular safety measures.

The Supremacy Clause of the U.S. Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[29] State laws that "interfere with, or are contrary to" federal law must be invalidated.[30] Preemption may be express or implied.[31] In either instance, the Supreme Court has long recognized that "'the purpose of Congress is the ultimate

[29] Article VI, cl. 2 of the United States Constitution.
[30] *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).
[31] *See Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

touchstone' in every pre-emption case."[32] With respect to express preemption, Congressional intent "primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it."[33] A court "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."[34]

In the absence of an express directive from Congress, preemption may "be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law."[35] State regulation will be found to be preempted where state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[36] Implied preemption exists when "the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose."[37]

Here, federal preemption is express, as described below. Therefore, an attempt by the CPUC to regulate Metrolink's operations, other than to the limited extent described in Section IV, below, would present an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the numerous statutes and regulations discussed in this White Paper. As a result, any such purported mandate – insofar as it attempts to regulate Metrolink's operations in a way that affects interstate commerce – would be preempted by federal law.

A. CPUC Regulation Would Be Preempted by the Interstate Commerce Commission Termination Act of 1995

The Interstate Commerce Commission Termination Act of 1995 ("ICCTA")[38] vests the STB with broad and exclusive jurisdiction over "rail carriers" when they are providing interstate transportation.[39] The ICCTA defines "rail carriers" as persons "providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation."[40] Even though 49 U.S.C. § 10501(c)(2) establishes that the STB does not have jurisdiction over mass transportation provided by a government authority or an entity that contracts with a government

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[32] *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 543 (2008) (alteration in original) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996)).
[33] *Green Mountain R.R. Corp. v. Vermont,* 404 F.3d 638, 641 (2d Cir. 2005) (quoting *Medtronic,* 518 U.S. at 485-86).
[34] *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993) (hereinafter "*Easterwood*").
[35] *Altria Group,* 129 S.Ct. at 543 (citing *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995)). *See also Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983).
[36] *Gade,* 505 U.S. at 98.
[37] *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300 (1988) (citation, internal quotation marks and alterations omitted).
[38] Pub. L. No. 104-88, 109 Stat. 803 (*codified at* 49 U.S.C. § 10101 *et seq.*).
[39] 49 U.S.C. § 10501(2).
[40] 49 U.S.C. § 10501(5).

authority,[41] the STB nonetheless has the authority to exercise its jurisdiction over local government authorities in some circumstances. As discussed previously, the STB has expressly exercised its jurisdiction over the member agencies of SCRRA, on whose behalf SCRRA acts by acquiring property that is also used for interstate freight transportation. Because interstate operations continue following SCRRA's acquisition, SCRRA also acquires the power to control or interfere with the ability of the freight and passenger common carriers to fulfill their common carrier obligations. It is this latitude to affect such carriers' operations that brings the agencies within federal jurisdiction.[42]

The original Interstate Commerce Act was "among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring preemption questions from the time of its enactment."[43] The ICCTA repealed some of the economic regulation that had previously been administered by the ICC; however, it left intact the general preemptive reach of the ICC's jurisdiction. The ICCTA's jurisdictional provision contains an express preemption clause: "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."[44] The ICCTA "preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'"[45]

A CPUC mandate to install or implement a particular collision avoidance system, if different from the PTC system mandated by Congress in the RSIA, would "have the effect of managing or governing rail transportation" and would not have a merely "remote or incidental effect on rail transportation." Scarce resources that must be dedicated to implementation of the PTC mandate, or other resources dedicated to operation of the Metrolink network, would have to be reallocated. The CPUC's attempt to regulate this aspect of SCRRA's operation would therefore be fully preempted by federal law.

B. CPUC Regulation Would Be Preempted by Federal Railroad Administration Regulations

In addition to the STB's broad administrative powers over rail carriers, the FRA has principal federal regulatory authority over railroad safety.[46] The roles of the FRA and the STB, which primarily (though not exclusively) regulates economic activity of rail carriers, should be viewed as "complementary."[47]

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[41] "Government authority" is defined by 49 U.S.C. § 5302(a) to include political subdivisions of states; authorities of at least one state or political subdivision of a state; Indian tribes; and public corporations, boards, or commissions established under the laws of a state.
[42] *See* discussion *supra*, pp. 4-6.
[43] *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).
[44] 49 U.S.C. § 10501(b).
[45] *Island Park v. CSX Transp., Inc.*, ___ F.3d ___, 2009 WL 585649, *4 (2d Cir. 2009) (quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (internal quotation omitted)).
[46] *Island Park* at *9.
[47] *Id.*

Congress created the FRA with passage of the Department of Transportation Act of 1966.[48] The FRA's purpose is to promulgate and enforce rail safety regulations; administer railroad assistance programs; conduct research and development in support of improved railroad safety and national rail transportation policy; provide for the rehabilitation of Northeast Corridor rail passenger service; and, consolidate government support of rail transportation activities.[49]

For the past four decades, the FRA has promulgated hundreds of rules regulating railroad operations and safety.[50] The statutes and regulations discussed below represent the FRA's nearly total occupation of the field of safety on the nation's rail network.

1. The Federal Railroad Safety Act

The Federal Railroad Safety Act ("FRSA") is "[e]xplicitly addressed to the issue of safety."[51] The statute's purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.'"[52] The statute expressly applies to commuter railroads such as Metrolink by virtue of the definition of "railroad" contained in 49 U.S.C. § 20102(2)(A)(i). That commuter railroads are included within the FRA's safety jurisdiction is confirmed by regulation at 49 C.F.R. Part 209, App. A, which states:

> The Safety Act and, as amended by the RSIA, the older safety statutes apply to "railroads." Section 202(e) of the Safety Act defines railroad as follows:
>
> The term "railroad" as used in this title means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area . . . and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.
>
> Prior to 1988, the older safety statutes had applied only to common carriers engaged in interstate or foreign commerce by rail. The Safety Act, by contrast, was intended to reach as far as the Commerce Clause of the Constitution (*i.e.*, to all railroads that affect interstate commerce) rather than be limited to common carriers actually engaged in interstate commerce. . . . Thus, with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use.

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[48] Pub. L. No. 89-670 (*codified at* 49 U.S.C. § 103(3)(e)(1)).
[49] *See* http://www.fra.dot.gov/us/content/2.
[50] *See* 49 C.F.R. Parts 200-268.
[51] *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 109 F. Supp. 2d 1186, 1193 (N.D. Cal. 2000), *rev'd on other grounds*, 346 F.3d 851 (9th Cir. 2003) (quoting 49 U.S.C. § 20101; *Easterwood*, 507 U.S. at 662.
[52] *Id.*

Given this expansive jurisdiction, the FRSA establishes that all laws, regulations and orders related to railroad safety should be "nationally uniform to the extent practicable."[53] It accords preemptive effect to FRA safety regulations:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement.[54]

Where the FRA has promulgated rail safety regulations, the states' limited authority to regulate the same subject matter is contained in this narrow savings clause:

> A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.[55]

Under § 20106, therefore, preemption arises once the FRA issues a regulation "covering" the "subject matter" of the state's statutory or common law in question.[56] In *CSX Transp., Inc. v. Easterwood*, the Supreme Court authoritatively construed this language, holding that "covering" occurs when a federal regulation "substantially subsume[s]" the subject matter of the state law.[57] The "subject matter" of a state law is "the safety concerns" that the law addresses.[58]

With respect to collision-avoidance systems, which the CPUC is attempting to regulate in the proceeding commenced by the OIR, the FRA has promulgated a host of regulations: 49 C.F.R. Part 236, Subpart E, "Automatic Train Stop, Train Control and Cab Signal Systems," which regulates Automatic Train Control ("ATC"), Automatic Cab Signal ("ACS") and Automatic Train Stop ("ATS") systems; and Part 236, Subpart H, "Standards for Processor-Based Signal and Train Control Systems," which pertains to the development of all digital-based signal and train control systems.[59]

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[53] 49 U.S.C. § 20106.
[54] *Id.*
[55] *Id.*
[56] *Easterwood*, 507 U.S. at 664.
[57] *Id.* at 664.
[58] *Burlington N.R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989).
[59] In compliance with Subpart E of these regulations, on January 9, 2009, Metrolink received FRA approval to install additional ATS inductors on its lines. Letter to Darrell J. Maxey, SCRRA, from Grady C. Cothen, Jr, FRA (January 9, 2009) (transmitting approval of SCCRA's request, No. FRA-2008-0134).

In light of this comprehensive body of regulation, courts have consistently held that state regulation of signal and train control systems is preempted by the Part 236 regulations.[60] The latest of these regulations are the Subpart H regulations for PTC, adopted in order to "promote the safe operation of processor-based signal and train control systems, subsystems, and components" and prescribe "minimum, performance-based safety standards for safety-critical products, including requirements to ensure that the *development, installation, implementation,* inspection, testing, operation, maintenance, repair, and modification of those products will achieve and maintain an acceptable level of safety."[61]

The history of the Subpart H rulemaking makes clear that the FRA affirmatively chose to adopt performance-based safety standards for processor-based signal and train control systems rather than dictate prescriptive requirements for PTC.[62] This decision establishes that the subject matter of the FRA's regulation is not just the performance of PTC systems, but whether they are to be installed at all, because "preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action."[63] This principle has been repeatedly upheld in the area of railroad regulation.[64]

Accordingly, the RSIA confirms that there is no room for the CPUC to attempt to require the installation of different collision-avoidance systems at this time. That is, although the Subpart H regulations did not "require that they be installed," the more recent RSIA *does* include such a requirement. PTC *must* be installed by no later than the end of 2015. The federal statute thereby fully occupies the field and, under the FRSA, preempts any state's efforts to impose different or additional requirements.

It should also be noted that the CPUC cannot escape preemption through application of the FRSA's "essentially local" hazard exception at § 20106(1), which preserves a state's authority to respond to local hazards that are not capable of being adequately addressed through uniform national standards.[65] As demonstrated above, Congress's and the FRA's actions concerning PTC establish that uniform national standards are contemplated and are already being developed. As a result, the hazards being addressed cannot be called "essentially local." Many of the operating conditions affecting commuter rail in California such as the sharing of track by

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[60] *See, e.g.*, *Major v. CSX Transp., Inc.*, 278 F. Supp. 2d 597, 610 (D.Md. 2003) (holding that claims based on the design and operation of a railway's signal system are preempted by the FRSA); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 864 (D. Kan. 1986) (finding that the signal standards in Part 236 "are aimed at reducing the possibility of derailments and train collisions").

[61] 49 C.F.R. §§ 236.901(a)&(b) (emphasis added).

[62] *See* 66 Fed. Reg. 42,352, 42,355-60 (Aug. 10, 2001) (analyzing the advantages and disadvantages of adopting a performance-based standard); 70 Fed. Reg. 11,051, 11,053 (March 7, 2005) ("FRA has . . . chosen to issue a final rule that establishes a performance standard for processor-based train control systems, but does not require that they be installed.").

[63] *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002).

[64] *See, e.g.*, *Marshall v. Burlington N.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (holding that a state requirement for oscillating or strobe lights on locomotives was preempted by the FRA's considered decision to not require such lights); *Burlington N.R.R. Co.*, 880 F.2d at 1106-08 (reaching the same conclusion regarding a state caboose requirement).

[65] *See, e.g.*, *Union Pacific R.R. Co. v. California Pub. Utils. Comm'n*, 346 F.3d 851, 860-61 (9th Cir. 2003) (and cases cited therein).

passenger and freight providers exist in other areas of the country as well, and as a result they are properly the subject of uniform national regulation.

2. The Locomotive Inspection Act

The Locomotive Inspection Act ("LIA") authorizes the FRA to issue standards for the maintenance and testing of locomotives and prohibits all freight and commuter rail that is part of the general system of transportation from using unsafe locomotives.[66] While the LIA does not contain an express preemption provision, it has long been interpreted to occupy the field extending to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances."[67] Therefore, any state regulation that addresses part of the locomotive or its appurtenances is preempted.

The implementation of *any* modern collision-avoidance system will require regulation of the design, construction and material for equipment used in locomotives. PTC, ATC, ACS and ATS all require installation of equipment on locomotives that is integral to the operation of these systems. PTC systems rely on close integration between the locomotive, the wayside equipment and the dispatcher. Therefore, one of the largest tasks related to the upcoming PTC rollout will be the installation of equipment in the locomotives.

An example of such a PTC system is the Electronic Train Management System ("ETMS") recently approved by the FRA for implementation by BNSF pursuant to its obligations under 49 C.F.R. § 236.913(a). A key component of the ETMS system is the substantial equipment installed on the locomotive for communication with the rest of the system: a computer display unit, a communication radio to communicate with dispatch, a wayside communication radio, VHF antennas and cabling for the radios, a GPS unit, a Train Management Computer that connects the entire system, an electronic air brake interface and other similar items.[68]

Older collision-avoidance systems such as ATC, ACS and ATS also employ multi-component communications systems to control trains. Such systems translate existing wayside signals into visible or audible indications inside the locomotive cab, requiring equipment to be installed in the locomotive to pick up the signals from the rails or wayside equipment, translate the signals into a visible or audible signal, and enforce brake application, if necessary.[69] Because there are in fact no collision-avoidance systems that would not require the installation of

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[66] 49 U.S.C. § 20701; 49 C.F.R. §§ 229.3 & 236.0.

[67] *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 611 (1926) (invalidating a state law requiring fire doors and cab curtains since the law would affect "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances"; the fact that the ICC had not issued regulations on fire doors and cab curtains was irrelevant because the LIA was "intended to occupy the field" regarding locomotive design and construction). *See also Union Pacific R.R. Co.*, 109 F. Supp. 2d at 1209 (dynamic brakes and telemetry devices held to be within exclusive federal jurisdiction); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997) (holding that claims of defective brakes and engines were preempted by the LIA's "broad preemptive sweep . . . necessary to maintain uniformity of railroad operating standards across state lines.").

[68] *See* Application of UP and BNSF for Rehearing of Order Instituting Rulemaking to Consider Implementation of Collision-Avoidance Systems on Commuter Rail Lines in California, CPUC R.08-11-017 (hereinafter "*Application of UP and BNSF for Rehearing*"), p. 27. *See also* 49 C.F.R. Parts 235-236.

[69] *Id.* at 29.

equipment on locomotives, any CPUC mandate relating to locomotive design would almost certainly run afoul of the FRA's detailed regulations concerning all of the collision-avoidance systems: PTC, ATC, ACS and ATS.

And furthermore, even if the CPUC were able to craft a regulation that on its face appears to require only Metrolink and the other intrastate commuter rail carriers to adopt a collision-avoidance system, the interstate freight carriers and Amtrak would be directly impacted, given the significant amount of track they share. For example, the ATC, ACS and ATS regulations at 49 C.F.R. § 236.566 require parity with regard to implementation of collision-avoidance systems, irrespective of the carrier: "the locomotive from which brakes are controlled, or each train operating in automatic train stop, train control, or cab signal territory shall be equipped with apparatus responsive to the roadway equipment installed on all or any part of the route traversed, and such apparatus shall be in operative condition." This requirement that any locomotive must be equipped to interface with any available wayside equipment would make any CPUC regulation aimed at commuter rail a *de facto* regulation of interstate freight rail as well. And while this FRA provision does not specifically address PTC systems, as a practical operational matter, that the protection provided by a PTC system would be diminished if some trains sharing track were not controlled by the same system.[70]

3. The Signal Inspection Act

The Signal Inspection Act ("SIA") is another relevant body of FRA-administered law. It gives the federal government exclusive authority to regulate all aspects of the installation, maintenance, testing, removal and modification of signal systems.[71] The structure of the SIA is similar to other railroad statutes with preemptive effect: the LIA, discussed above, as well as the Safety Appliance Act ("SAA"), codified at 49 U.S.C. § 20301 *et seq.*[72] While neither the LIA nor the SAA includes an express preemption provision, both have long been held to preempt their field of safety regulation.[73] The SIA should similarly be treated as preempting regulation in the field of signal systems.

The SIA gives the Secretary of Transportation the authority to inspect signal systems in order to determine if they are in safe operating condition, paralleling the LIA's authority over locomotive parts.[74] Both statutes also require railroad carriers to report malfunctions and accidents.[75] The SIA further provides that the Secretary has exclusive authority to regulate signal systems: "[a] carrier may discontinue or materially alter a signal system required under

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[70] The RSIA does address this concern relating to the implementation of PTC systems by requiring "interoperability" in the PTC system, which is defined in part as the ability of the "tenant railroad to communicate and respond to the positive train control system." This will require parity between or among commuter and freight carriers' respective PTC systems.

[71] 49 U.S.C. 20501 *et seq.*

[72] For example, both the SAA and the SIA use similar language giving the Secretary authority to change or modify the enumerated requirements. *See* the SIA at 49 U.S.C. § 20503 and the SAA at 49 U.S.C. § 20302(d).

[73] *See e.g.*, *Napier*, 272 U.S. at 612-13 (discussing LIA field preemption); *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57, 60-61 (1934) (discussing of SAA field preemption).

[74] *See* 49 U.S.C. §§ 20502(b) & 20701. This authority has been delegated to the FRA.

[75] *See* 49 U.S.C. §§ 20503 & 20703.

this paragraph only with the approval of the Secretary."[76] The FRA has promulgated its detailed regulations related to signal systems pursuant to the SIA in 49 C.F.R. Parts 235 and 236.

Because any of the collision-avoidance systems that CPUC might possibly adopt would have an impact on the signal system, and because many of such signals would have to be installed on the track owned or used by Class I freight carriers and Amtrak by virtue of the shared nature of the Metrolink system, the SIA also preempts the CPUC from regulating in this field.

III. CALIFORNIA CASE LAW SUPPORTS PREEMPTION OF CPUC REGULATION IN THE AREA OF RAILROAD SAFETY

The depth and breadth of the federal preemption of state law on the subject of railroad safety has recently been confirmed by the California Court of Appeal in *SCRRA v. Superior Court*, 163 Cal. App. 4th 712 (2008). The court concluded that federal regulations preempt state law-based negligence claims of passengers, workers and survivors involved in the January 26, 2005 Glendale accident.

SCRRA v. Superior Court addresses whether federal regulation of the construction and operation of passenger rail equipment preempted arguments that operation of Metrolink trains in "push mode" was negligent. The court carefully reviewed the federal railroad safety regulations in place at the time of the incident, noting a history of federal rulemakings aimed at promoting safety in every area of railroad operations and reducing railroad-related accidents and incidents, culminating in the 1999 Passenger Equipment Safety Standards, published at 49 C.F.R. Part 38.[77] "The regulations contain 'comprehensive Federal safety standards for railroad passenger equipment' . . . . The stated purpose of these regulations is 'to prevent collisions, derailments, and other occurrences involving railroad passenger equipment . . . and to mitigate the consequences of any such occurrences, to the extent they cannot be prevented.'"[78]

Based on its analysis of these regulations, the Court of Appeal reversed the trial court's ruling that because there was no rule, regulation or order that expressly addressed *operation* (*i.e.*, time, place and manner) of trains in push-pull mode, the plaintiff's state-law claims were not preempted by the federal regulatory scheme. The appellate court rejected the trial court's conclusion, finding that the FRA's regulations:

> . . . take into account the operating environment in which rail passenger service occurs. As indicated in the Passenger Equipment Safety Standards, "the railroad operating environment in the United States requires passenger equipment to operate commingled with very heavy and long freight trains, often over track with frequent grade-crossing used by heavy highway equipment." Thus, FRA's regulations are "tailored to the nation's operating environment in order to provide for the safety of rail operations in the United States." FRA's regulation of push-pull service thus accounts for the operational and safety concerns presented by

[76] 49 U.S.C. § 20502(a)(1).
[77] *Id.* at 719-27.
[78] *Id.* at 724 (quoting 64 Fed. Reg. 25,540, 25,540 (May 12, 1999)).

passenger rail operations in urban areas. Consequently, the regulations address not only the design, but also the use of the cab car in the forward position of a Tier I commuter train.[79]

Furthermore, relying on the holding of *Easterwood*, the court examined whether the FRA's safety planning regulations also preempted state law. After study, the FRA decided to impose safety planning requirements for Tier I operations (trains operating at speeds of 125 mph or less) that were less rigorous than those it mandated for Tier II operations (trains operating at speeds above 125 mph).[80] The Court of Appeal found that "FRA's flexible approach to the regulation of Tier I system safety planning does not suggest FRA intended to leave regulation of these matters to local authorities."[81] Instead, the FRA had decided to continue voluntary compliance for Tier I operators while focusing on the "greater need" for system safety planning in Tier II operations.[82] Understood "in the context of the overall structure of the regulations," the court concluded that the 1999 Passenger Equipment Safety Standards were the result of an extensive, legislatively mandated consideration of proposed rules and comments dealing with the construction of passenger cars, including cab cars, and as such had occupied the field of passenger rail safety in this instance.[83]

This California court's June 2008 ruling in *SCRRA v. Superior Court* confirms the preemptive effect of the federal government's regulation of railroad safety. As a result, there is no room for CPUC to attempt to require a system that is different from or supplemental to the PTC system mandated by the RSIA.

IV. THE CPUC HAS A LIMITED BUT VALUABLE ROLE IN THE FEDERAL SCHEME FOR RAILROAD SAFETY IN RAIL TRANSIT AND CONVENTIONAL RAILROADS

A. Federal Statutes Carve Out Certain Rail Transit Systems from the Federal Jurisdictional Umbrella

While the federal preemptive regime is explicitly and demonstrably comprehensive, the statutes carve out an exception for fixed guideway transportation systems over which states may exercise authority. For example, the ICC Termination Act of 1995 excludes "street, suburban or interurban electric railways not operated as part of the general system of transportation" from the definition of rail carriers.[84] Although, as noted above, Metrolink is very much "part of the general system of transportation," there remains an entire network of fixed guideway systems that have no connection to the interstate transportation system that are not subject to the jurisdiction of the STB. The Los Angeles Metro is one such system.

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[79] *Id.* at 732.
[80] *Id.* at 733.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 732-33.
[84] 49 U.S.C. § 10102(5).

The Rail Safety Act similarly excludes "rapid transit operations in urban areas that are not connected to the general railroad system of transportation."[85] The FRA's regulations explain that:

> FRA will exercise jurisdiction over the portion of a rapid transit operation that is conducted as a part of or over the lines of the general system. For example, rapid transit operations are conducted on the lines of the general system where the rapid transit operation and other railroad use the same track. FRA will exercise its jurisdiction over the operations conducted on the general system. In situations involving joint use of the same track, it does not matter that the rapid transit operation occupies the track only at times when the freight, commuter, or intercity passenger railroad that shares the track is not operation. .... However, FRA will exercise jurisdiction over only the portions of the rapid transit operation that are conducted on the general system. [86]

FRA also asserts jurisdiction over shared highway crossings,[87] but does limit its exercise of authority in this area. Its regulations explain that "there are certain connections that are too minimal to warrant the exercise of its jurisdiction," emphasizing that:

> Mere use of a common right-of-way or corridor in which the conventional railroad and rapid transit operation do not share any means of train control, have a rail crossing at grade, or operate over the same highway-rail grade crossings would not trigger FRA's exercise of jurisdiction. In this context, the presence of intrusion detection devices to alert one or both carriers to incursions by the other one would not be considered a means of common train control. These common rights of way are often designed so that the two systems function completely independently of each other. FRA and FTA will coordinate with rapid transit agencies and railroads wherever there are concerns about sufficient intrusion detection and related safety measures designed to avoid a collision between rapid transit trains and conventional equipment. [88]

Again, however, the actions that CPUC has stated that it would like to take – both within the Rulemaking instituted with the OIR and in testimony presented to the NTSB in this proceeding – fall well outside the ambit of the limited role states can play in the regulation of rail or fixed guideway systems.

B. The CPUC Has Limited Jurisdiction Under the FRSA

As discussed above, the FRSA carves out a limited exception for state and local jurisdiction in the area of railroad safety. The statute at 49 U.S.C. § 20106 provides that "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject

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[85] 49 U.S.C. § 20102(1)(B).
[86] 49 C.F.R. Part 209, App. A at 44 (2008).
[87] *Id.* However, as noted *infra*, the states remain free to regulate certain aspects of operation at such crossings.
[88] *Id.* at 45.

matter of the State requirement," a state may adopt or continue in force an "additional or more stringent law, regulation, or order related to railroad safety" when it 1) is necessary to eliminate or reduce an essentially local safety or security hazard; 2) is not incompatible with a law, regulation, or order of the U.S. government; and, 3) it does not unreasonably burden interstate commerce."

The Supreme Court has indicated that regulations issued by the Secretary of Transportation that merely "touch upon" or "relate to" the same subject matter as a state safety law are insufficient to establish preemption because "'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law."[89] As Metrolink has demonstrated, while federal regulation has subsumed the entire field of collision-avoidance systems within California, there are many areas of rail safety regulation that are so inherently local that state authorities such as the CPUC may rightfully exercise their jurisdiction over railroads within the framework of the FRSA.

One recent example is the authority of a state to close hazardous railroad crossings. In *Island Park v. CSX Transportation*, the Second Circuit considered the question of whether the New York Department of Transportation had the authority to close a railroad crossing on the CSX system after finding that the conditions of the crossing presented serious safety concerns.[90] The FRSA expressly addresses the issue of the safety of railroad crossings at 49 U.S.C. § 20134, directing the Secretary of Transportation to work with states to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." In considering whether state regulation of crossings is preempted, the court asked two questions: 1) whether the state's action interfered with railroad operations, and 2) whether there was a federal rail safety regulation that "covers" railroad crossings. It answered no to both, concluding that the state had the authority to close unsafe crossings.

In another recent case, the Seventh Circuit validated a state's authority over walkways in rail switching yards. In *Norfolk Southern Rwy. Co. v. Box*, the court conducted a fact-specific inquiry to determine whether or not the state's regulation requiring walkways to be built parallel to each track for use by railroad workers interfered with railroad operations in such as way as to be preempted.[91] Norfolk Southern had argued that even though walkways were not a subject of federal regulation, the regulations pertaining to construction of rails and rail beds subsumed the subject by implementing requirements for the construction of the rail lines to include the roadbed of compacted earth, a layer of sub-ballast, a particular slope and size of ballast to facilitate drainage, etc. The railroad argued that the federal regulations "covered" the subject because construction of any walkway pursuant to the Illinois law would be "bound to affect the slope of the ballast, its drainage properties, or both."[92] After hearing testimony from Norfolk Southern employees asserting that the addition of walkways was either "impossible" or would interfere with drainage and assessing the technical data, the court rejected the railroad's argument. The court made special note that the state had given "considerable discretion over the size,

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[89] *Island Park* at *8 (quoting *CSX Transp.*, 507 U.S. at 664).
[90] *Id.* at *1.
[91] *Norfolk Southern Rwy. Co. v. Box*, 556 F.3d 571, 572-73 (7th Cir. 2009).
[92] *Id.* at 573.

placement, and materials of the walkways," implying that this flexibility argued against preemption.[93] Even though the Seventh Circuit made its ruling while acknowledging that state and federal courts are divided on the issue of whether walkways adjacent to tracks is preempted, this is another example of an area of rail safety that may be regulated by states under some circumstances.[94]

The holding in *Box* that railroad walkway regulations at the state level are not preempted is consistent with an earlier decision from a California court, *Southern Pacific Transportation Co. v. Public Utilities Commission of the State of California*, 647 F. Supp. 1220 (N.D. Cal. 1986). In 1948 and 1963, the CPUC adopted two General Orders addressing the minimum distances required between freight cars, adjacent structures and parallel tracks, and requiring maintenance of two-foot wide continuous walkways on each side of railroad tracks.[95] The district court rejected the railroad's three arguments that the CPUC regulations were preempted, finding that 1) the FRA's regulations regarding ballast and subgrade did not "cover" the same safety concerns addressed by the General Orders since they addressed different aspects of railroad safety[96]; 2) while recognizing that in certain instances the FRA's decision that a particular regulation is not justified establishes federal preemption over the subject matter, in this case the FRA's past rejection of regulations related to the safety of employees' trackside working environments did not have a preemptive effect on the General Orders because the FRA had acted for a variety of unrelated reasons (*i.e.,* the proposed federal regulations were too vague or dealt specifically with technical issues not related to the General Orders)[97]; and, 3) a 1978 FRA Policy Statement that delineated the relationship between the Occupational Safety and Health Administration and the FRA similarly failed to establish blanket federal preemption of such safety issues.[98] This district court decision was later affirmed by the Ninth Circuit Court of Appeals.[99] It is still good law today.

In addition to these specific examples, it should be noted that the states always retain their traditional police powers to protect health and safety, which is reserved to them by the Constitution. However, they may exercise this police power "only so long as the application of these powers is not unreasonably burdensome on railroad operations."[100] Courts have upheld states' rights to regulate railroad operations through electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements.[101] Courts have also allowed local zoning laws to survive preemption challenge as long as "the zoning ordinances with which [the challenging party] must comply, do not burden [the railroad] with the

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[93] *Id.* at 574.
[94] *Compare Elston v. Union Pacific R.R.*, 74 P.3d 478 (Colo. App. 2003) (Colorado rules valid), and *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 858 A.2d 1025 (2004) (Maryland rules valid), *with Missouri Pacific R.R. v. Texas R.R. Comm'n*, 948 F.2d 179 (5th Cir. 1991) (Texas rules preempted), and *Black v. Seaboard Sys. R.R.,* 487 N.E.2d 468 (Ind. App. 1986) (Indiana rules preempted).
[95] *See Southern Pac. Transp. Co. v. Public Utils. Comm'n of the State of Cal.*, 647 F. Supp. 1220, 1222 (N.D. Cal. 1986) (describing General Orders No. 26-D and 118).
[96] *Id.* at 1224-25.
[97] *Id.* at 1225-26.
[98] *Id.* at 122-27.
[99] 820 F.2d 1111 (9th Cir. 1987).
[100] *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 593 F. Supp. 2d 29, 37-38 (D.D.C. 2008).
[101] *See, e.g., Green Mountain,* 404 F.3d at 642.

patchwork of regulation."[102] The Ninth Circuit confirmed the ability of states to exercise police powers over railroads is quite narrow, and must not interfere in any way with the interstate railroads' common carrier obligations under the ICCTA. *City of Auburn v. STB,* 154 F. 3d 1025, 1029-31 (9th Cir. 1998), *cert. denied* 527 U.S. 1022 (1999).

C. The Role of the State is Important for the Enforcement of Certain FRA Regulations

The Rail Safety Act of 1970 authorized the states to work with the FRA to enforce federal railroad safety regulations.[103] By 1975, federal regulations had been issued enabling states to enforce track and freight car safety standards, and in 1980, legislation broadened state involvement to include many of the statutes discussed herein, including the Safety Appliance, Locomotive Inspection, Signal Inspection, and Hours of Service Acts.

Pursuant to 49 U.S.C. § 20113, the states have the authority to enforce any regulations enacted under the FRSA in the absence of a suit by the Secretary of Transportation. The states may participate in investigation and surveillance activities under 49 U.S.C. § 20105,[104] and following notice to the Department of Transportation, states may bring suit seeking either injunction or civil penalties to remedy violations.

There are a host of railroad safety areas for which the federal government has prescribed minimum maintenance, testing and/or inspection standards. In all of these areas, the participation of state agencies such as the CPUC is crucial to the successful implementation and enforcement of the federal railroad safety scheme. A few such areas are grade crossing signal systems,[105] the qualification and certification of locomotive engineers,[106] railroad operating practices,[107] and railroad safety enforcement procedures.[108] However, it should be noted that the state's role is limited to enforcement, and does not include development of new standards or regulatory mandates.

California, along with 29 other states, participates in the FRA's Rail State Safety Participation Program. That program employs 176 safety inspectors in the five rail safety inspection disciplines.[109] Each participating state agency has entered into a multi-year agreement with FRA for the exercise of specified authority, delegating investigative and surveillance authority regarding all or any part of federal railroad safety laws.

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[102] *Fla. E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1339 (11th Cir. 2001). *See also Maumee & W.R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order,* STB Fin. Doc. No. 34354, *slip op.* at *1 (Service Date Mar. 2, 2004) (localities retain certain police powers to protect health and safety so long as they do not interfere with interstate rail operations).
[103] Pub. L. 91-458.
[104] *See* 49 CFR § 212.1 *et seq.*
[105] 49 CFR § 234.1 *et seq.*
[106] 49 CFR § 240.1 *et seq.*
[107] 49 CFR § 218.1 *et seq.*
[108] 49 CFR § 209.1 *et seq.*
[109] The five disciplines are track; signal and train control; motive power and equipment; operating practices, and hazmat. *See* http://www.fra.dot.gov/us/content/858.

V. CONCLUSION

This White Paper has addressed the extent to which federal preemption prevents the CPUC's attempts to regulate matters related to rail safety, including collision-avoidance systems. The CPUC has issued its OIR in an attempt to insert itself into this area of railroad safety regulation. However, Congress has spoken repeatedly and confirmed each time the breadth and depth of federal regulation of railroad safety. The RSIA confirms that the CPUC's ability to regulate in this area is preempted by the numerous federal safety statutes and FRA regulations related to railroad safety as well as by the ICCTA. To the extent that Congress has carved some operations out of the federal agencies' jurisdiction, and either delegated authority to the states or required cooperation between states and federal agencies, then the CPUC is free to act. With respect to collision-avoidance systems, however, the CPUC's attempts to exercise authority are fully preempted.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 3rd day of April, 2009, a copy of the Comments of the Southern California Regional Rail Authority Concerning Preemption of the California Public Utilities Commission was served by electronic mail upon each member of the Board, and to each of the following individuals by overnight courier:

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