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December 30, 1999

Jolene Molitoris
Administrator
Federal Railroad Administration
1120 Vermont Avenue, NW
Washington, DC 20590

**Re: Petition to Expand the Public Docket and
FOIA Appeal of FOIA Determination 2000-73**
Application of **National Passenger** Railroad Corporation
(Docket No. **FRA-1 999-6404**) - 32

Dear Administrator **Molitoris**:

I. Introduction

Au October 18, 1999 Petition filed by the **National Rail Passenger Corporation** ("Amtrak") in the above-captioned proceeding requests that **Amtrak** be permitted, under **49 C.F.R. § 238.203**, to operate certain railcar equipment manufactured by **Talgo** notwithstanding the failure of that equipment to comply with buff strength standards set by the Passenger **Equipment Safety Standards** of **49 C.F.R. Part 238** (the "Standards").

On behalf of **Bombardier, Inc.** we are concerned that the **Federal Railroad Administration** ("FRA") has continued to exclude from the public docket certain important rail passenger safety information on which the Petition directly and substantially relies. Of still greater concern is a statement, contained in a **December 21, 1999** letter to us from the **FRA's William Fashouer**, Senior Attorney, that the **FRA** may base its decision in the above-captioned proceeding on information that it will not make available for public review and comment.

Given your commitment to rail safety, and the **FRA's** policy of public participation in safety rulemakings, we respectfully request that you reverse the decisions of your staff and direct that all safety information directly and substantially relied upon by **Amtrak** and **Talgo** in this proceeding, and essential to **FRA** consideration of the Petition and the public's right to comment meaningfully, be included in the public docket. On behalf of **Bombardier**, we also appeal, pursuant to **49 C.F.R. § 7.21**, a determination under the **Freedom of Information Act** ("FOIA"), contained in the **December 21, 1999 Fashouer** letter (the "FOIA Determination") in FOIA case

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number **2000-73**, that **certain** information we **requested** by letter dated **November 22, 1999** (the "FOIA Request") is **exempt from** disclosure. These **requests** are combined because **Mr. Fashouer's letter links resolution** of the **FOIA Request** and **FOIA Determination** directly to the contents of the public docket in **this** proceeding.

Because it would be **inconsistent** with Federal law and **FRA** policy for the **FRA** to rely on **nonpublic** information in this proceeding, the **FRA** should release and docket in **this** proceeding **unredacted** versions of the **documents** responsive to our **FOIA** request. **One example** of the relevant documentation **MC Fashouer** has redacted is, in the words of the petitioner, an "**extensive three-volume** submission for **FRA** that provided **FRA** a comprehensive **linear structural analysis** (**trainset** finite element analysis) of Amtrak's **Talgo equipment**, which represents **as** complete a document as would be expected **with the procurement** of Tier I passenger equipment." **Amtrak** Petition, October 18, 1999. The **FRA** also should docket in **this proceeding** additional material referred to in the **redacted** documents that now have been released. **This new** information includes:

- The "**safety equivalency analysis recently furnished to FRA by Talgo**" (cited in the **FRA** letter to Bob McGowan of Amtrak, February 22, 1999; since Amtrak and **Talgo** assert that the **Talgo trainsets** provide an **equivalent level** of safety, this document is particularly **relevant** to this proceeding);
- "Contractor **Analysis Talgo** Submitted Data (sic) [which] **identify Talgo's submission** for **equivalence** to requirements of **CFR 238** (Tier I) , , ." (cited in **FRA Minutes** April 9, 1999);
- "**Amtrak March 26, 1999** letters to the **FRA** regarding **collision posts** and **anticlimbers**" (cited in **FRA Minutes** April 9, 1999, in which **FRA** consultant **Premier Engineering** states that it does **not** have enough information to evaluate **corner posts** and **rollover** strength: "**Consequently, FRA** cannot concur with **Amtrak's** assertion that these items are closed **with the March 26, 1999** letters to the **FRA.**");
- **An April 22, 1999** letter regarding, at a minimum, truck **securement** issues (cited in **April 30, 1999 Minutes**);
- **An FRA** letter dated **June 15, 1999** which contained "**Federal Railroad Administration (FRA)** Office of Safety, **Assurance** and Compliance evaluation of the safety information provided by **Talgo and Amtrak** on the five **Talgo** passenger **trainsets** assembled in Washington State" (cited in **FRA Minutes** June 17, 1999);

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- “Action item 1 . . . **Talgo and Volpe** would reconcile the **differences** in interpreting the **FEA** data, and **determine the validity** of the **FEA results**” (cited in **FRA Minutes** June 17, 1999, and there is **no indication** in the **record** that this information **has** been provided to **FRA**); and
- “Action item 2 . . . **Talgo** would **demonstrate** to **Volpe** the evidence that the **HAZ’s** **were** properly addressed in the **FEA** model”; “[Action item 3] **Talgo and Volpe** are to reconcile whether the passenger occupied volume **is** reduced based on **FEA** results”; [Action item 4] **Talgo and Volpe** are to decide whether an **analysis** is needed to determine the structural integrity of the **trainset** under **800,000** pound compressive load”; “[Action Item 5] **Talgo and Volpe** are to try to reconcile whether **or** note the **truck to carbody** attachment strength can resist a force of **250,000** pounds acting on **any** horizontal direction of the truck”; “[Action item 6] **Talgo** is to provide **FRA/Volpe** with the **shear strength** value of the air bag **on** top of the suspension column”; “[Action item 7] **Talgo** is to look into the accident information brought forward at the meeting by **Mr. Alpert and** provide the **findings** to **FRA**” (cited in **FRA Minutes** June 17, 1999).

Since the petitioner and **Talgo** assert that the **Talgo trainsets** at issue in this proceeding offer a level of **safety** equivalent to that provided by the Standards, it is **critical** that **unredacted** versions of these documents be made **available** for public review and comment.

We believe that the **decisions** of **Mr. Fashouer** and other **FRA staff** on these **procedural** and **FOIA issues** are inappropriate and legally insupportable. The documentation we requested, which bears **directly on** a pending proceeding, **should** have been **made** available to the public **as a** matter of **course** and without the **FOIA** request your **staff instructed us** to make. **This error was** compounded by the **decision** to make **only** certain information available to **the public while** **concluding** that **FRA staff** involved in this proceeding can rely on the **unredacted** versions of **those** documents to render a decision.

Given your very public position that safety is the most important **mission** of the **FRA**, this is a matter of intense public **interest**. Moreover, it is the first application of procedures set forth in the **FRA's Passenger Equipment Safety Standards** for “**grandfathering**” noncompliant rail passenger equipment. The **final Standards** have been public for less than **eight months**, and they took more than five years to develop. It is incredible that **FRA staff** would choose, **after this process**, not to provide the **public** with access to numerous safety-related **documents** as it **considers** whether to **grant a waiver from** the Standards. To do so, **while** excluding from public review **concerns** that **the FRA itself raised** in the months leading up to this proceeding, would

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raise serious credibility issues **with** respect to the Standards and their **implementation** by the **FRA**. Upholding these **staff decisions also could** compound problems in implementing the Standards as **manufacturers** of **passenger** equipment **assert (as Talgo has in a number of public fora)** that they meet all of the Standards. If the **FRA grants Talgo's request for secrecy in this proceeding**, it can be assured that other equipment **manufacturers will make similar claims** of compliance, but bind the **FRA** to **secrecy** while **the FRA reviews justifications for compliance** with the Standards or assertions of **safety** equivalency to the Standards.

We **respectfully** request that you stay the proceeding and the comment period while you **consider** this appeal and issue a **written** decision **promptly**.^{1/} For the **reasons** set **forth** below, the **FRA** should release publicly **all** the information described herein **for** public comment. Alternatively, **if the FRA concludes** that it will not release these **documents** to the **docket**, the **FRA** either should (a) indicate definitively that the **FRA** will not rely on **the non-public** information **at issue in reaching a determination in this proceeding**; or (b) dismiss the petition **because the public** docket would not **otherwise** meet minimum filing requirements set by **the FRA**.

II. Background

Amtrak's Petition seeks **relief from** the Passenger Equipment **Safety Standards** recently promulgated in **49 C.F.R. Part 238**. Equipment that already is in operation, but does not comply with new buff strength **standards**, may be "**grandfathered**" for continued use **under 49 C.F.R. § 238.203(d)** if the proposed usage is in the public **interest** and consistent with railroad safety, **As** a threshold matter, though, **a grandfather** petition "**shall include,**" among other things, "**information (including detailed drawings and material specifications) sufficient** to describe the actual **construction** of the **equipment,**" "**engineering analysis sufficient** to describe the **likely** performance" of the equipment in relevant **scenarios,** "**a description of risk mitigation measures that will be employed,**" and a "**quantitative risk analysis incorporating the design information, engineering analysis, and risk mitigation measures described**" above, **49 C.F.R. § 238.203(d)(3)**. The rule provides that the **FRA will deny** a petition that **does** not comply with **this** requirements. **49 C.F.R. § 238.203(h)(3)**.

^{1/} Time is of the **essence** in resolving the procedural and **FOIA** issues raised in **this** letter petition and appeal. This petition/appeal is being filed at this early **stage** of **the** extended comment **period** to allow the **FRA** a reasonable opportunity to decide these procedural and **FOIA** issues **prior** to the end of the **comment** period. The **comment** period is scheduled to remain open for **only a limited** time. Bombardier intends to file substantive comments on the Petition, but **believes** that the **as-yet-unreleased** information is so important **as** to **warrant an additional** extension of **the comment** period if these issues are not resolved **within** the **next** several days.

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The Petition **includes several references** to documents **that, by the Petitioner's own admission, are fundamental to** meeting the **evidentiary burden** of 49 C.F.R. § 238.203(d)(3). Because the **information referred** to by Amtrak merited repeated references in the Petition, we contacted the **FRA** to request that the **information** be placed in the docket. We were advised, though, that the **FRA** would **make this information available only through a request** under **FOIA**.

The **FRA** should have made this information available in this proceeding **as a matter** of course and should not have subjected the process to the additional procedures required for **FOIA** requests. Nonetheless, at the **FRA's** insistence, we filed a **FOIA** request on November 22. Far **from** being a fishing expedition, our **request sought** only information **specifically referenced** in the initial petition. For **example**, we requested **Talgo's** "extensive **three-volume** submission for **FRA**" that, in the words of the petition, "provided **FRA a comprehensive linear** structural analysis of Amtrak's **Talgo** equipment, which represents **as complete a document as would be expected** with the procurement of Tier I passenger equipment." **This document** apparently **would** include structural values that are **key** to making a determination **regarding the structural and safety capabilities** of the non-compliant **trainsets** that are the **subject** of this proceeding. On December 14, the **FRA** made a "partial response" to our request and released portions of the **information** requested to us, noting that the **FRA** would advise us as to the **availability of the remaining information following** a determination as to whether that information would be exempt **from** release under **FOIA**.

Mr. Fashouer's FOIA Determination **asserts** that portions of the information we **requested** -- and which were referred to by Petitioner -- are exempt **from** disclosure under 5 U.K. § 552 (b)(4). **Apart from conclusory** statements concerning this exemption, the **FOIA** Determination **offers no other justification for the** refusal. More disturbing, the **FOIA** Determination advised us that;

Copies of **all** of the **documents** provided to you have been placed in the docket for this proceeding. **While** some of these documents involve redacted versions, **the unredacted** versions **are available to agency** staff and will be used in the agency's **review** of the Amtrak petition to the extent deemed **necessary**.

By stating that the **FRA** will use nonpublic information in reviewing the Petition "to the extent deemed **necessary**," the **FOIA Determination** has cast procedural uncertainty over this proceeding. The decision to docket certain **material** we requested is welcome and will add to the public's understanding of the Petition. Interestingly, while **Talgo** -- which is not the petitioner in this proceeding -- previously had asserted that the Petition **was**, on its face, "complete and sufficient,"

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it appears that the docket **now** will include additional **submissions** by **Talgo** to the **FRA** responding to **safety concerns** the **FRA** has **expressed** over the **Talgo trainsets**. Thus, the **FRA's initial supplementation** of the public docket has had beneficial **effects serving** the public interest in full disclosure of **information**. Still, the **FRA's** public indication that it **will** use nonpublic **information** in a **safety proceeding threatens** to **taint** the **entire** proceeding in a **manner** inconsistent with **Federal** law and established **FRA** policy.

III. FRA Policy and Administrative Law Principles Effectively Preclude FRA Use of Non-Public Information in this Grandfathering Proceeding

The Federal statutes under which the **FRA** promulgated its **Standards** -- and thus, the statutes by which this proceeding is **governed** -- **require** an opportunity for **meaningful public** participation in the **rulemaking** process. As discussed below, rulemaking under **49 U.S.C. § 20103(e)** must include a hearing under **5 U.S.C. § 553** (discussed below) and **an** opportunity for an oral presentation. Further, **in** waiving **compliance** with 8 rail safety regulation promulgated under **49 U.S.C. § 20103**, the **FRA** must "**make public the reasons for granting the waiver.**" **49 U.S.C. § 20103(d).**^{2/}

It is important to note that **Talgo** initially did not take advantage of its **opportunity** to participate publicly in the development of the Standards, then submitted to the **FRA** a **significant** amount of information after the comment period closed. A November 21, 1997 public hearing on the Standards would suggest, in fact, that **Talgo** **consciously** chose to ignore the **pending rulemaking** proceeding:

MR. COTHEN: First of all, Mr. Gonzales (**Talgo** President **Gustavo Gonzales**), thank you for your testimony and for your effort to suggest **performance requirements** that would match well with the equipment design of the commuter train set.

It's **very helpful information**. I would hope we could find some kind of mechanism for including your company in the **on-going discussions** that we have in a **more formal way**. We did **make an invitation to Renfe Talgo** to participate in an **initial briefing** on the -- cm this round of **rulemaking** now over two years ago, and for whatever reason, we didn't link up at that time, and I think that that's an opportunity that it's **unfortunate** that we lost.

^{2/} Additionally, the statute requiring the **FRA** to promulgate the Standards **specifically** authorizes consultation with **Amtrak** and certain other entities, but requires that "minutes of the consultation [be] placed in the **public** docket of the regulatory proceeding." **49 U.S.C. § 20133(d)**.

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So I hope we can think about ways of again integrating your company somehow into the working group that we have established.

What analysis have you done – obviously you do have two train sets operating under the waiver currently, But I'm sum – your statement reflects a sophisticated understanding of equipment design. Certainly you're conscious of the fact that the Talgo train set is – is different in many ways than the conventional rail equipment that's been constructed under Association of American Railroad standards, and I wanted to make that clarification.

These were railroad industry standards rather than manufacturer standards. Manufacturers adopt derivatively, but it was initially an industry standard and, of course, one which we had incorporated into our regulations for multiple-unit electric equipment many years ago.

What analysis have you done to establish to your satisfaction the comparability of the train set operating in North America service environment? I'm familiar with the history on Spanish Railways and elsewhere. But what analysis have you done in that regard?

MR. GONZALEZ: Well, first of all, I also look forward to participate more closely with you in this process and look forward to the opportunity. . . .

FRA Public Hearing, Passenger Equipment Safety Standards, November 21, 1997 FRA Docket PCSS-1. Mr. Cothen's closing question suggests that the FRA had received little or no information from Talgo on the structural designs of the trainsets or how Talgo could assert that its trainsets were designed in a manner equivalent to uniform North American design practice.

Consequently, it appears Talgo first provided substantive information on the structural strength of the Talgo trainsets, and assertions of safety equivalence, only during and after this hearing, which occurred late in the Standards proceeding. Importantly, these submissions would be *ex parte* communications if they were made in connection with the then-ongoing Standards rulemaking.^{3/} The hearing officer, Deputy Associate Administrator for Safety, Standards and Program Administration Grady Cothen, advised Talgo that any information in the Passenger Equipment Safety proceeding must be of a public nature in order for the FRA to utilize that information. In fact, Mr. Cothen speaks more broadly when he states, "I can tell you that material that we can consider, I think, with respect to safety standards has to be public information" – effectively stating that FRA can rely only on public information when considering safety

^{3/} Notably, the preamble to the Standards reflects Talgo's failure to participate and states that Talgo's late submissions meant that the "FRA has not had the opportunity to fully evaluate the information provided by Talgo for purposes of this rule," 64 Fed. Reg. 25,548 (May 12, 1999).

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standards, reasoning that extends to **waivers** or **grandfathering** proceedings **arising** out of **such standards**. The **entire** passage on **this subject** during the hearing **follows**:

MR. COTHEN: "We've had conversation with Renfe Talgo over a period of several years, since the initial trainset was shipped, and we have had occasion to look at some photographs on derailment history, for instance, and design drawings, and I believe some additional analysis has been provided more recently.

Could I ask you, please to work with Mr. George Scerbo and with Mr. David Terrell [sic] of the Volpe Center to make sure that we have together in our files, so we can provide it to the docket, our public docket, make sure that we analyze them as we go forward to a final rule, make sure we have all the information that you want us to have before us on this trainset and its service experience and any analysis, structural or engineering analysis, that you performed on it, and with particular view to making sure that we don't have any proprietary material which you don't want to be in the docket?

I can't we can con material that we can consider. I think, with respect to safety standards has
Of course, there may be some other material in those files that
would be perhaps viewed as proprietary that would not necessarily be pertinent to the
standard decision,

So, as an administrative matter, if you would be so kind as to do that.

MR. GONZALEZ (Talgo President Gustavo Gonzalez) I will be glad to, Sir.

Passenger Equipment **Safety Standards Public Hearing** Transcript, November 21, 1997, **FRA**
Docket **PCSS-1** (**emphasis** added).

This colloquy contradicts **any** newly-made claim of **confidentiality** by **Talgo** as to **safety information** it **has** submitted to the **FRA**. AS to **Mr. Cothen's** statement that the **FRA** must consider only public information in safety & makings, **there** was a "legal officer" from the **FRA Office** of Chief Counsel in **attendance** at the hearing, **presumably** to provide guidance to the hearing officer on **matters** of law or **procedure** with respect to the pending **rulemaking** and the public hearing. It is **important** to note that the legal officer did not correct **Mr. Cothen's** **assertion**, either at the time or in a subsequent entry to the record. More importantly, Talgo publicly agreed to make public all such information upon which the FRA would rely in that rulemaking proceeding to make a standard decision. **Talgo** cannot now claim confidential treatment on **any information** it submitted to the **FRA** subsequent to **this** hearing if it **expects** the **FRA** to rely on that **information**.

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What is **even** more **troubling** is **that it is** now apparent that there were a **number** of **FRA contacts** with **Amtrak** and **Talgo** (including meetings, correspondence, and possibly telephone calls) that no doubt discussed the **many** types of relief that **Talgo** was **seeking** in the **rulemaking** on the Standards. Yet none of these contacts appear to **have** been docketed as **FRA ex parte** policy and **49 USC. § 20133(d)** require. It seems preposterous that **the FRA** would now validate these **ex parte** contacts by relying on them to **determine** a waiver of **a safety standard** or **equivalence with a safety standard**. Notably, Part **238's** **specialized** procedures for **grandfathering** and other **relief require** that information be included with petitions and make no express provision for the use or **filing of confidential material**.

The **FRA** has **refused** to rely on **confidential safety** information in other **FRA safety** proceedings, such as the Florida Overland Express ('FOX?') petition for a rule of particular applicability filed in **FRA Docket No. HST-1**. In that proceeding, the **FRA effectively** foreclosed **any** claim of proprietary or **confidential** treatment for information that the **FRA** requested or that was otherwise provided by the petitioner, **All relevant information was required** to be placed in the **FRA** docket for public review and **comment** when claims of **confidential treatment** were made by the POX petitioners. In that proceeding **the FOX** petitioners made an **initial** submission of **confidential financial** information. **Within** hours of its receipt, the POX petitioners were contacted by the **FRA's Office** of Chief Counsel and advised that **confidential** information could not be relied upon in a **safety rulemaking** proceeding. **FOX was** required to withdraw the **confidential** information and resubmit information that could be placed in the public docket. **Consequently, no information submitted** to the **FRA** in that proceeding **was** submitted with 8 claim of confidential treatment despite the **efforts** of the petitioners to do so. **FRA staff also** advised FOX in a November **25, 1996** meeting that, in the words of the meeting minutes, "proprietary information is **generally** not **suitable** for use as the **basis** of standards in a rule **because** it is not available for public scrutiny."

This FRA approach, to rely solely on public **information** in **safety rulemaking** proceedings, is **consistent with** the due process requirements imposed by the Administrative Procedures Act ("**APA**") on "**informal rulemaking**" proceedings, including those held by the **FRA** under **49 U.S.C. § 20103**. A **fundamental APA** principle is that **agencies** must **provide a meaningful** opportunity for **affected parties** to **participate** in agency **rulemakings** by reviewing information on **which** the **rulemaking** will be based **and** by commenting on that information. Such public access during the **rulemaking** is **particularly** important for critical factual material that an agency will use to support its decision. **If the FRA** were to refuse to docket information on which it **would** rely and make that information available to potential **commenters**, it would deny the public the **meaningful** opportunity to **comment** on critical factual **material** required by the **APA, 49 U.S.C. § 20103(d)**, and the Passenger **Equipment Safety Standards**. Similarly, such a **confidential** record, and apparent communications between Amtrak, **Talgo**, and the **FRA** concerning the confidential

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documents, could be construed as prejudicial, *ex parte* communications inconsistent with Department of Transportation policy and detrimental to public safety.

The subject of this proceeding adds a further dimension to these rulemaking principles -- the commitment of Secretary Slater and the Administrator to rail safety. Secretary Slater has often referred to safety as the Department's "North Star." In announcing the Passenger Equipment Safety Standards on May 10, 1999, he noted that "[t]his is an important step forward, underscoring President Clinton's commitment to safety as our highest transportation priority..." In urging the nation to "sign on for safety" at the National Transportation Safety Conference on March 10, 1999, you noted that "[w]hile travel has become safer in the past few years, even one loss of life is one too many." To undertake a waiver for passenger rail equipment under a cloak of secrecy, as Talgo and the FRA would do in this grandfathering proceeding, will undermine the public confidence in these new Rail Passenger Equipment Standards and the FRA's commitment to public safety as a secret, special deal is proposed for non-compliant equipment. Rail safety is the FRA's primary mission, and it is a mission that the FRA seeks to fulfill through, among other things, meaningful public comment and access to information. Any use of non-public safety information to decide the Amtrak grandfathering petition would be inconsistent with this basic mission.

IV. The FOIA Determination Was Improper

It is our firm conviction that all documents relied upon by petitioner in support of its Petition, and considered by the FRA in this proceeding, must be available to the public as a matter of course within the context of the grandfathering proceeding. Nevertheless, at the express direction of the FRA, we filed a FOIA request for the Talgo information noted above. Pursuant to the determination by Mr. Fashouer, certain of the documents submitted by Talgo that we requested were withheld pursuant, according to Mr. Fashouer, to FOIA Exemption 4, 5 U.S.C. 552(b)(4). We hereby appeal the application of Exemption 4 because the withheld information does not meet the criteria for exemption and because, in determining that the information was protected from disclosure under Exemption 4, Mr. Fashouer applied the wrong legal standard.

It is a fundamental policy of FOIA to encourage the broad disclosure of documents. See Maricopa Audubon Soc. v. U.S. Forest Service, 108 F.3d 1082, 1085 (9th Cir. 1997). Consistent with this, Attorney General Reno established a policy of applying a "presumption of disclosure" in determining whether or not to defend a nondisclosure decision. Memorandum for Heads of Department and Agencies, Office of the Attorney General (October 4, 1993). Exemptions are to be applied narrowly and only after consideration of the "reasonably" expected consequences of disclosure. *Id.* The FRA's decision to withhold portions of these requested documents runs counter to this policy and is unsupported by the law and the facts of this particular case.

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Exemption 4 of FOIA protects "trade **secrets and** commercial or **financial information** obtained from a person [that is] **privileged or confidential.**" 5 U.S.C. § 552(b)(4). The **withheld information does not fall into** either of these two categories. The withheld **information clearly** does not constitute trade secrets **because** it does not include "a secret, **commercially valuable plan, formula, process, or device that** is used for the making, preparing, **compounding,** or processing of **trade commodities and** that can be **said to be the end product of either innovation or substantial effort."** See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). On the contrary, the requested **information** includes **analysis, reports, studies and** oral comments related to the safety of the **passenger** equipment. Most, if not **all,** of the information withheld relates to the **structural** loading capability of **discreet elements** of the **trainsets and** the calculation of those capabilities under certain **loading or crash scenarios.** Moreover, the **FRA minutes** of April 9, 1999 list a number of "modeling **disagreements**" with the **Talgo finite** element equipment **analysis** which seem to **center** on the validation of the **trainset's** structural strength based upon **Talgo's** assertions of individual element capabilities in the context of **crash** modeling. There is no direct relationship **between this information** and the productive **process.** Consequently, the information is not protected as a trade secret. Id. The **FRA** its& recognized this when it **identified** the withheld **material** only as "commercial or financial **information**" in its determination.^{4/}

Commercial or financial information may be withheld only if such **information** is "proprietary or **confidential.**" Two **different** standards **govern for** determining whether commercial or financial information is confidential. Information that a submitter is required to supply is confidential if it is likely either to (1) **impair** the Government's ability to obtain necessary **information** in the future; or (2) **cause** substantial **harm** to the **competitive position** of the **person** from whom the **information** was obtained. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878-79 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993), citing National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Information that a submitter submits "voluntarily" is confidential if it "is of a kind that the provider would not **customarily** release to the public." Critical Mass, 975 F.2d at 880.

The **FRA** committed error in determining that the **Talgo** information was voluntarily submitted and applying the broad exemption standard that looks only to whether the **information**

4/ This presumably is a generic categorization by the **FRA**, as the only **reference to financial information** we have been able to **find** is **Talgo's** assertion to **LTK** that **certain analyses** were not undertaken because of their significant **cost.** Amtrak Petition, October 18, 1999, App. C, page 22.

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is of a kind that the provider would not customarily release to the public. With the exception of Talgo's three-volume submission to the FRA in October, 1998, all information submitted by Talgo was submitted in connection with Amtrak's petition for grandfathering. This information constitutes the "engineering analysis," the "description of risk mitigation measures that will be employed", and the "quantitative risk analysis" that is required to be submitted with a grandfathering petition pursuant to 49 C.F.R. § 238.203(d)(3). The fact that the information was submitted by Talgo on behalf of Amtrak is irrelevant. The information constitutes information that is "required" to be submitted in order to qualify for grandfathering treatment under the statute. Although it is true that Amtrak was not required to petition for grandfathering, or that Talgo support that petition, once it chose to do so, it was required to comply with the grandfathering regulations which require the submittal of the withheld information. See Office of Information and Privacy Guidance: "The Critical Mass Distinction Under Exemption 4," Department of Justice FOIA Update (Spring 1993); see also Public Citizen Health Res. Group v. FDA, 964 F.Supp 412, 414 n. 1 (D.D.C. 1997) (information necessary to be submitted in order to obtain government approval is "required").

The three-volume submission must also be considered "required" for purposes of this request despite the fact that it was submitted prior to Amtrak's Petition. The submission was specifically referred to by Amtrak as part of its Petition, and the information provides critical factual underpinnings of Amtrak's Petition. It is information that Amtrak was required to submit in support of its petition. For all practical and legal purposes, the information must be considered to have been re-submitted for purposes of Amtrak's Petition. In fact, the FRA recognized it as a new submission when it recently placed the information in the docket, i k e t h e information at issue in Critical Mass, this information was submitted pursuant to a regulatory requirement into a proceeding in which the public is entitled to participate. For the FRA to now determine that the information was voluntarily submitted ignores the purpose for which it is being used and resubmitted in this case and is a blatant attempt to evade the stricter standard for confidentiality that applies to required information. The strict standard can not be avoided merely by permitting information to be submitted "voluntarily" outside the framework of the specific regulatory action and then permit the submitter to refer to it in a "required" submission.

Because the information was required to be submitted, it is confidential only if it would either impair the FRA's ability to obtain necessary information, or to obtain quality information, in the future, or cause substantial harm to Talgo's competitive position. It is difficult to conceive of a scenario under which either would be the case. Given the significant benefit to Amtrak and Talgo associated with obtaining a waiver of the new passenger equipment safety standards, and considering that such benefit may only be obtained with the submission of the withheld information, it is doubtful that disclosure would impair the FRA's ability to obtain this information in the future, or impact the quality of that information.

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Similarly, there is no threat of competitive harm from the release of the withheld information. In order to establish competitive harm, the submitter must show "actual competition and a likelihood of substantial competitive injury." CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987). There is no likelihood of competitive injury because there is no actual competition in the relevant market. Amtrak's petition seeks a waiver of the new passenger equipment safety standards so that it can continue to use the Talgo equipment. However, as a result of the new standards, the equipment is out-of-date and noncompliant. There is, quite frankly, no competition for the production, marketing or sale of outdated and noncompliant equipment. Moreover, Amtrak is the only entity seeking a waiver, and Talgo's equipment is the only equipment for which a waiver is being sought. In fact, Talgo has asserted in the public record that "... Talgo's new trainsets will meet the letter of the law." FRA Minutes June 17, 1999. Consequently, there is no likelihood of competitive harm to Talgo if the withheld information is disclosed. Any competitive harm would be, at best, negligible and clearly outweighed by the strong public interest in the release of passenger equipment safety and reliability information. See Teich v. FDA, 751 F. Supp. 243, 253 (D.D.C. 1990) (disclosure of certain medical safety and effectiveness data was "unquestionably in the public interest" and the benefit of disclosure "far outstrips [any] negligible competitive harm"),

Regardless of the standard that applies for determining whether the withheld information is properly considered confidential, the application of Exemption 4 in this case is wholly inappropriate for the simple reason that Talgo waived any claim of confidentiality in the withheld information it submitted in support of Amtrak's Petition. As discussed in Section II above, Mr. Cothen specifically stated in a public hearing that "material that we can consider, I think, with respect to safety standards has to be public information." Consequently, in submitting information in support of Amtrak's Petition, Talgo could have no reasonable expectation that the information would remain confidential. Talgo, in fact, expected that it would be made public. Despite the fact that the FRA has inexplicably given Talgo an opportunity to claim confidentiality for the material, my new claim of confidentiality can not cure the waiver of that claim of confidentiality when Talgo submitted, or resubmitted, the information expecting that it would be made public. In fact, Amtrak represents in its Petition that Talgo waived any claim of confidentiality with respect to the information in Appendix B of Amtrak's Petition "in order to support this Petition." Id. Consequently, if the withheld information was submitted for purposes of supporting Amtrak's Petition, and clearly it was, any claim of confidentiality was waived and Exemption 4 is inapplicable. Conversely, the FRA cannot legitimately rely on confidential information in support of Amtrak's Petition when the FRA stated that all information considered would be public and Talgo waived any claim of confidentiality with respect to that information.

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V. If the FRA Refuses to Docket Publicly Information on Which It Would Decide the Petition, the Petition Must Be Dismissed

As discussed above, the FRA must modify its FOIA Determination and release and docket *unredacted* versions of the material described in the FOIA Request. However, if the FRA nonetheless believes that the remaining material must not be released to the public, it must dismiss the Petition.

Without all the safety information referred to in the Petition, the Petition does not comply with the evidentiary requirements of 49 C.F.R. § 238.203(d)(3). The public docket apparently will not include 'detailed drawings and material specifications' for the non-compliant equipment. Further, while the petition (at 3) indicates that "Amtrak and its contractor, LTK, made extensive use of [the three-volume linear structural analysis] to support their structural evaluation, . . ." that analysis is not provided. The inadequacy of the existing public record is revealed most strikingly in the Petition itself, where the petitioner's own consultant suggests that important structural information has not been made available to support safety analyses. The collision model discussed in Amtrak's Petition assumes that the collision post structure at the end of the Talgo trainset is of sufficient strength to transfer the loads to the roof and underframe of the trainset without deflection or premature failure. The LTK engineering analysis, a critical component of this submission states: "Analysis of the associated structural connections is not available and it is assumed that they are adequate transfer loads to the posts up to their capacity." Amtrak Petition, October 18, 1999, App. C, p. 23. Surely the public is entitled to this fundamental information. LTK's statement, acknowledging its inability to validate the information that is so essential to its analysis, is reflective of just how secret this process has become.

Finally, we are very concerned about agreements the FRA may have reached during its meetings with Talgo to keep all communications between the FRA and Talgo confidential, "Lastly, although it is our understanding that all communication between the FRA and Talgo on these matters is considered CONFIDENTIAL we would appreciate FRA so stamping future correspondence and material." Jean-Pierre Ruiz letter to FRA, August 16, 1999 (emphasis in original). This letter responds to June 17, 1999 FRA meeting minutes in which the sole subject is Talgo's assertion that the trainsets which are the subject of this proceeding are equivalent. In addition, the FRA minutes (which were entered into the docket of this proceeding only after our FOIA request) indicate a discussion and distribution of the process by which the FRA will grandfather non-compliant equipment. We would hope that Mr. Ruiz has mischaracterized his "understanding" that "all" communications are confidential does not reflect an agreement by the FRA to do so, particularly when the communications to which Mr. Ruiz refers were then and are now the subject of a regulatory proceeding. The FRA should not become a party to a backroom

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agreement which has the potential to **dramatically affect** public **safety, yet** bar the public **from** being **aware** of **all** of the **relevant facts**. **If** the **FRA** will not **release** those **facts** to the public, it **will** **have** little choice but to **dismiss** the Petition.

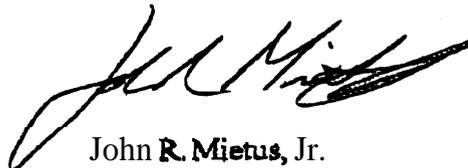
VI. Conclusion

For **all** the foregoing reasons, we petition the **FRA** to release and docket in **this** proceeding **unredacted versions** of **the documents described** in the **FOIA Request and any** other **safety information** relied upon by the Petitioner and **essential** to the **FRA's consideration** of the Petition.

Alternatively, if the FRA concludes that it **will** not **release those documents to** the docket, the **FRA** either should (a) indicate **definitively that** the **FRA** will not rely on the non-public **information** at issue in **reaching a** determination **in this** proceeding; or (b) **dismiss** the petition because **the public** docket would not **otherwise** meet minimum **filing** requirements **set** by the **FRA**.

Thank you **for** your attention to this matter.

Respectfully submitted,



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cc: Docket Clerk