

Virginia's Investment in Rail: Protecting the Public Interest

**A Policy Analysis of
The Virginia Rail Policy Institute
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It has long been the policy of the Commonwealth of Virginia to preserve, develop and promote intercity rail infrastructure and service. Most recently, the state's new long-range transportation plan, VTrans2025, calls for important actions related to passenger and freight rail, including increased public investment in facilities and services. The need to expand rail capacity has been heightened by a number of trends, including the rapid and projected increase in freight shipments, increasing energy costs, increasing highway maintenance costs, increased concern over the environmental impacts of transportation, and increasing traffic congestion. Shifting freight and passenger trips to rail can help address each of these problems.

Until recently, state funding for rail facilities and services has been extremely limited in the Commonwealth. As Virginia begins to increase funding in rail, it is imperative that the public interest and investment in private rail infrastructure are advanced and protected and that a sound strategic plan be developed.

Rail Funding and the Public Interest

To encourage and implement rail improvements for Virginia, Governor Mark Warner proposed the creation of the Rail Enhancement Fund, which was approved by the 2005 Session of the General Assembly. In order to implement the Fund, The Commonwealth Transportation Board (CTB) adopted a series of Policy Goals, giving priority to three. Projects should:

1. Provide an additional or accelerated investment in Virginia rail projects which have a substantial public benefit equal to or greater than the public investment.
2. Address the needs of state, regional and/or local plans, developed in consultation with public and private partners.
3. Encourage competition and economic development by promoting access by more than one rail operator and whenever possible joint access by freight and passenger operators.

Additional goals were established that relate to the evolving nature of the Rail Enhancement Fund; limiting long term public funding liability; leveraging other available funds; and protecting the public interest in private facilities.

To the extent that the current funding criteria for the Rail Enhancement Fund and the goals, objectives, and policy recommendations in VTrans2025 do not dovetail, a strong case can be made for additional evaluation and reconciliation. It is increasingly important to take a close look at these public policy statements—each of which proposes to be the direction Virginia will take in transportation investments.

In addition, with the creation of the Rail Enhancement Fund, other important public/private relationship questions are brought to the forefront--questions which primarily center on the Commonwealth's public investment in privately-owned and operated freight rail. Until these questions are resolved and the goals of VTrans2025 and the priorities set by the CTB are reconciled, they could hamper the work of VDRPT and ultimately the CTB, as each entity seeks to implement the policies of the executive and legislative branches.

Among these questions are the following:

- How should the public investment in private freight rail rights-of-way and equipment be protected? How will the State's interest be secured?
- How will we determine if the State's expectations are being realized?
- What recourse does the public have if they are not?

The VDRPT investment criteria recognize the need to recover the full value of the public funding and the need for safeguards. How that will be done and what recourse is available in the event the freight railroads fail to uphold their part are still unanswered.

The VDRPT criteria also call for cost-benefit analysis of Rail Enhancement Fund investments. However, the assumptions to be employed are not clear and the validity of the inputs cannot be verified.

Thus, a question is raised whether the interests of the private freight railroads are appropriately aligned with those of the public sector. And, from a public perspective, a similar question is raised whether the public sector has the ability to deal effectively with the private rail industry.

Finally, if the Commonwealth intends to substantially step up the pace of intercity rail investment, and through public policy and funding help improve the State's rail lines so that they can become more significant components of the overall intermodal network, then there is a significant question whether major shifts in public policy, organization structure, and staffing have to be addressed and implemented.

Strategic Rail Policy Questions

Among the rail policy questions we believe need to be addressed are the following:

1. Can rail network and service enhancement provide a sufficient public benefit to justify public financial assistance?

It is not clear whether the Commonwealth intends to formulate, promote and support a statewide intercity or regional commuter rail network, with significant improvements in both freight and passenger services, or whether the State will be satisfied with reacting to requests for financial grants made by private freight railroads based upon their own self-identified projects. The highway analogy might be choosing between constructing another highway lane for the use of all truck operators or assisting in the construction of an exclusive private truck terminal.

2. Is there alignment of interests, goals and objectives between public decision-makers and private rail partnerships?

While the concept of public/private partnerships has been accepted politically, all such ventures should be carefully examined to ascertain that the objectives of both parties will be achieved. As to the Commonwealth and its freight rail partners, it may be that their objectives are compatible, or they may not prove to be so. For example, it is presumed here that the motivation of the Commonwealth, in making financial grants to publicly-traded private freight railroads, is to shift a portion of the cargo handling burden from highway to rail. But will that be the most likely outcome? Freight railroads cannot afford to haul low-margin freight, and certainly not unprofitable freight, any more than they can haul passengers. Regularly, since 1980, the freight rails have shut out potential freight customers and discontinued service in traffic lanes in their pursuit of a more profitable mix of freight traffic, improved earnings, return on investment and stock price enhancement. Will that satisfy the Commonwealth's objectives? In addition, does the notion that all public/private partnership projects ultimately become public property stifle use of that funding mechanism?

3. How can public transportation policy best create competitive equity among the modes?

Cost/benefit analysis applied to all transportation modes is fundamental to any serious effort to create a more balanced transportation program and transition freight rail from its current role to that of a mainstream competitor in what has

come to be the dominant truck cargo market. Currently, transportation policies do not present a level playing field for rail, despite the Commonwealth's rail enhancement efforts. An analogy might be the federal government's past efforts to subsidize and thus promote the raising of tobacco, on the one hand, while on the other, creating and maintaining a public health program to discourage smoking.

4. Can public rail policy find ways to accommodate public accountability and the rail freight industry's historic constraints and interest in secrecy?

For proprietary reasons, and because of legislatively imposed constraints, the U. S. rail freight industry has been unwilling or unable to share, in a straightforward manner, fundamental information concerning its operations and business. While there is much public disclosure today, it is usually not possible for outsiders, including the Commonwealth, to disaggregate rail industry statistics such that a given traffic lane can be examined. If the Commonwealth is going to be an investor, it should be an informed and prudent investor. An "open book" relationship will become necessary to avoid potential future public embarrassment and loss of public support for rail investment.

5. How can the Commonwealth best protect its investment?

While the Commonwealth may elect to invest in private industry, astute private investors would not put money into something that they neither own, nor proportionately control, or at least have a security interest in the industry. While commendable in its intent, and welcomed by many, the new Rail Enhancement Fund provides worrisome opportunities for state exposure to loss and public embarrassment – as does any expenditure of public funds. A way must be found both to protect the Commonwealth's financial interest and to ensure that the promised results occur. It might be that the rail authority concept needs to be revisited, not so much as a financing leverage vehicle, but as a mechanism for ownership of hard assets funded by the public.

6. What are the public expectations for passenger rail?

For the 150 year period from 1830 to 1980, passenger trains and freight trains co-existed on the U.S. inter-city rail network. In fact, there is considerable evidence and supporting argument to suggest that the fastest and most dependable rail freight service that America ever enjoyed was during the heyday of rail passenger service. Yet, in the 25 years since rail deregulation, the years in which the term "freight railroads" emerged, the leadership of the freight rail industry has relentlessly hammered away at the theme: freight trains and passenger trains are incompatible.

For well over a decade it has been the policy of most of the Class I carriers, Norfolk Southern and CSX included, is to permit additional passenger trains

to operate over its lines subject to three conditions: (1) If the lines over which operations are proposed do not have adequate capacity to accommodate the passenger operations without substantial interference with freight operations, the agency operating the passenger service must bear the cost of creating the required capacity; (2) The railroad must be fully protected against additional liability imposed by the passenger operations; and (3) The agency operating the passenger trains must pay the railroads a reasonable sum for the use of its tracks and facilities. The Virginia Railway Express (VRE) operations in Northern Virginia are an example of a successful application of these principles. The freight railroads have every right to formulate their own policy positions. Should the Commonwealth follow suit?

7. What is the nature of public liability exposure and other accident cost responsibility?

For both freight and passenger rail, but especially with regard to the operation of rail passenger service, the potential cost of exposure to claims and ultimately responsibility for death, injury, property loss or damage, etc. is a wild card adding institutional inhibition and cost to the rail mode of transportation. Because of private ownership of rail rights-of-way and other infrastructure, and the absence of any "convention" dealing with such, there is potential for litigation against the private owners. The Commonwealth has shown innovative leadership in the past, i.e. with Virginia Railway Express liability. Virginia law currently limits the ability to recover punitive damages to \$300,000 per occurrence, and federal law places limits on VRE's liability for operations in the District of Columbia. As the railroads' contracts with VRE illustrate, arrangements can be made between the railroads and public agencies to address liability concerns.

However, liability continues to be a public issue. For example, the risk management function is being handled well by the State's Division of Risk Management; yet the liability exposure remains largely uncapped and that is a continuing problem. Caps currently in-place exclude third party claims, and as a result the freight railroads are demanding substantial increases in liability insurance protection with major cost consequences to VRE and the State. The freight railroads and VRE's members are of like minds that caps need to be broadened by both federal and state statutory changes. A comprehensive solution must be found if the Commonwealth desires to get maximum utility out of rail assets in Virginia.

Reconsideration of a Statewide Rail Strategic Plan

Regardless of how much money the Commonwealth appropriates for rail "enhancement" purposes, the policy risk is that public funds may be distributed over many small rail maintenance, or business sustaining, types of projects. Without a strategic rail plan, including route/service development prioritization guidelines, available funds will simply be nibbled away. For example, if the Commonwealth decides that it will not, as a matter of public policy, increase the highway capacity of the 1-95 and 1-81 corridors as studies indicate they need to be expanded, and that it will create additional capacity by making necessary improvements to rail, what strategies can the State follow to insure that future traffic growth would be diverted to rail? What will it take in terms of infrastructure, equipment, service, and commercial arrangements to entice a meaningful proportion of the freight and passenger traffic currently moving in those corridors to choose rail?

It is the opinion of the Virginia Rail Policy Institute that the Commonwealth needs to revisit its State Rail Plan and address these strategic issues.