

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

Attorney General
Karl A. Racine



June 19, 2017

OPINION OF THE ATTORNEY GENERAL

SUBJECT: Is Further Legislative Action Required by the District to Authorize the Mayor to Enter into the Washington Metrorail Safety Commission Interstate Compact with Maryland and Virginia?

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Chairman Mendelson:

This opinion is issued pursuant to section 101(a)(2) of the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81(a)(2)) (2012 Repl.)¹ and Reorganization Order 50 of 1953, as amended, and addresses your request for legal advice about whether the differences in the text of the enabling statutes of the District of Columbia, the Commonwealth of Virginia, and the State of Maryland require the District take additional legislative action before the Mayor may, on behalf of the District, enter into the Washington Metrorail Safety Commission Interstate Compact (MSC) with Maryland and Virginia.

CONCLUSION

There is no requirement that the enabling statutes of the District, Virginia, and Maryland use identical language in enacting the MSC. It is well established that non-substantial differences in the text of an interstate compact's enabling statutes do not prevent the formation or enforcement of the interstate compact. The texts of all three jurisdictions' enabling statutes, as well as the text introduced by resolution in both the Senate and House of Representatives, are substantially similar. As such, there is no need for the District of Columbia Council to pass a technical amendment act to conform District law to that of the other jurisdictions, and the Mayor has the requisite authority to execute a compact document that is substantially similar to the text of the

¹ "The Attorney General shall furnish opinions in writing to the Mayor and the Council whenever requested to do so."

Washington Metrorail Safety Commission Establishment Act of 2016, effective April 7, 2017 (D.C. Law 21-250; 64 DCR 3971), as consented to and approved by the Congress.

BACKGROUND

Recent amendments to 49 U.S.C. § 5329 required the creation of legally and financially independent state authorities for safety oversight of all fixed rail transit systems and facilities. Where such rail transit systems operate in more than one jurisdiction, federal law authorizes the neighboring jurisdictions to enter into multi-state agreements to establish a multi-state safety oversight authority. The Washington Metropolitan Area Transit Authority's Metrorail system is such a multi-state fixed rail transit system.

The District, Virginia, and Maryland have acted to create a Washington Metrorail Safety Commission to act as the state safety oversight authority for the Washington Metropolitan Area Transit Authority system in satisfaction of the requirements of 49 U.S.C. § 5329, for the benefit of the people of the District, Maryland, and Virginia, and for the increase of their safety, commerce, and prosperity. The District,² Maryland,³ and Virginia⁴ have enacted substantially similar but not identical enabling statutes that authorize their Chief Executives to execute the MSC.

ENABLING ACTS THAT HAVE SUBSTANTIALLY SIMILAR TEXTS ARE SUFFICIENT FOR THE FORMATION AND ENFORCEMENT OF AN INTERSTATE COMPACT

Courts and compact scholars frequently describe compacts as both statutes and contracts.⁵ This is so because as laws adopted by state legislatures, compacts are statutes that are as binding upon the member states and their citizens as any other statute adopted by a state legislature. Because those statutory enactments contain reciprocal promises and create reciprocal obligations, they are also considered contracts between member jurisdictions. The implication of this dual character of compacts is that courts frequently cite and apply statutory and contract law principles when resolving the questions of law concerning the validity of a compact and interpreting a compact.⁶

² Washington Metrorail Safety Commission Establishment Act of 2016, effective April 7, 2017 (D.C. Law 21-250; 64 DCR 3971).

³ AN ACT concerning Washington Metropolitan Area Transit Authority – Washington Metrorail Safety Commission – Establishment and Compact, approved March 30, 2017, 2017 Md. Laws 38.

⁴ An Act to amend the Code of Virginia by adding in Title 33.2 a chapter numbered 31.1, consisting of a section numbered 33.2-3101, relating to the Washington Metrorail Safety Commission Interstate Compact, 2017 Va. Acts Chapter 705.

⁵ *Tarrant Regional Water Dist. v. Herrmann*, 133 S.Ct. 2120, 2130 (2013) (“Interstate compacts are construed as contracts under the principles of contract law”); *In re Alexis O.*, 959 A.2d 176, 180 (N.H. 2008) (“Interstate compacts, like the ICPC, ‘are formal agreements among and between states that have the characteristics of both statutory law and contractual agreements. They are enacted by state legislatures that adopt reciprocal laws that *substantively mirror one another.*’”) (emphasis added).

⁶ Michael L. Buenger, Jeffery B. Litwak, Richard L. Masters, & Michael H. McCabe, *The Evolving Law and Use of Interstate Compacts*, 35 (ABA Book Publishing 2016).

Because states may not always enact identical text of a compact, questions can arise over whether the variations in the relevant statutory enactments are sufficiently technical or non-substantive to conclude that the jurisdictions have signaled their mutual consent in such a way that a meeting of the minds has been reached as to the essential terms of the compact.⁷ The reasons for these variances include legislative drafting differences among the states, inclusion of state specific provisions concerning funding, and other unique implementation issues for each state.⁸ The guiding principle in judging the significance of any variances is whether or not they constitute a material change to the terms of the compact.

Each of the three MSC enabling acts contains express language that provides for the use of non-identical language.

The District's act states:

“Sec. 2 The District of Columbia hereby consents to, adopts, and enacts the Metrorail Safety Commission Interstate Compact, *substantially as follows*:”⁹

Virginia's act states:

“The Washington Metrorail Safety Commission Interstate Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein *in the form substantially as follows*:”¹⁰

Maryland's act states:

“[T]hat the Commonwealth of Virginia and the District of Columbia each is requested to concur in this Act of the General Assembly of Maryland by the enactment of a *similar Act*;”¹¹

Additionally, the versions of the MSC introduced in the both the House of Representatives and the Senate, for the purposes of consent and approval, both authorize the three jurisdictions to enter into a compact “*substantially as follows*:”.¹²

A comparison of the three MSC enabling acts clearly reveals the use of non-identical language. In fact no two versions are identical. We turn now to an examination of the variances to determine if all three versions of the MSC are substantially similar and then compare them

⁷ Buenger at 44-45.

⁸ Buenger at 46.

⁹ 64 DCR 3971.

¹⁰ 2017 Va. Acts Chapter 705. P 1.

¹¹ 2017 Md. Laws 69.

¹² H.J. Res. 76, Introduced 2/16/17; S.J. Res. 22, Introduced 2/15/17.

against the versions that have been submitted to Congress to determine if they are substantially similar to the text before Congress.

TEXTS OF ALL APPLICABLE ACTS ARE SUBSTANTIALLY SIMILAR

A close comparison of the relevant acts demonstrates that they are substantially similar. Virginia directly enacted and codified the text of the compact into the Code of Virginia. In doing so, it altered the numbering scheme used by the District and Maryland to fit its code. As such the numbered paragraphs of the compact were changed to capital letter designations. This change is entirely technical and makes no substantive change to the language of the compact. Additionally, the attached chart¹³ tracks 28 instances where there are variances among versions of the compact language contained in the three enabling acts. The changes include grammar changes, citations changes, and minor spelling corrections. None of these changes make any material or substantive change to the operative language of the compact. The rights, responsibilities, duties, and obligations for the MSC are materially the same in all three enabling acts and provide clear evidence of what terms the three jurisdictions intended to enact and by what terms they intend to be bound.

Turning to the versions of the MSC introduced in Congress, a comparison of H.J. Res. 76 with S.J. Res. 22 reveals slight drafting differences. The House version includes references to the D.C. Official Code in its citations while the Senate version omits these references. The Senate version cites 49 U.S.C. § 5329 as “section 5329 of title 49, United States Code.” None of these changes make any material or substantive change to the operative language of the compact. All three jurisdictions and both versions before the houses of Congress contain a MSC that consists of a preamble, five Articles and 61 numbered (or lettered) paragraphs. No version contains any extra provision that materially alters the terms of the MSC.

UPON CONSENT AND APPROVAL OF CONGRESS, THE MAYOR HAS THE AUTHORITY TO EXECUTE THE COMPACT ON BEHALF OF THE DISTRICT

Paragraph 59 of the MSC states in part:

This MSC Compact shall become effective upon the enactment of concurring legislation by the District of Columbia, the Commonwealth of Virginia, and the State of Maryland, and consent thereto by Congress and when all other acts or actions have been taken, including, without limitation, the signing and execution of this MSC Compact by the Governors of Maryland and Virginia and the Mayor of the District of Columbia.

Having concluded that the versions of the MSC enacted by the District, Maryland, and Virginia are substantially similar to each other and to the versions introduced in both houses of Congress, I also conclude that three jurisdictions have enacted concurring legislation and, that following

¹³ Information contained in the chart was prepared by outside counsel retained by the Metropolitan Washington Council of Governments on behalf of the District, Maryland, and Virginia to assist with the formation of the MSC.

passage of the pending Congressional resolutions providing approval and consent to the MSC, the Mayor of the District of Columbia will be empowered to execute the MSC.

This Office has also consulted with the offices of Attorneys General of Virginia and Maryland, both of whom agree that no further legislative action is needed to modify any of the three MSC enabling acts.¹⁴

For the foregoing reasons, it is the opinion of this Office that no further legislative action is required by the District to authorize the Mayor to enter into the MSC with Maryland and Virginia.

Sincerely,



Karl A. Racine
Attorney General for the District of Columbia

Attachments:

1. Washington Metrorail Safety Commission Establishment Act of 2016 (District of Columbia);
2. AN ACT concerning Washington Metropolitan Area Transit Authority – Washington Metrorail Safety Commission – Establishment and Compact (State of Maryland);
3. An Act to amend the Code of Virginia by adding in Title 33.2 a chapter numbered 31.1, consisting of a section numbered 33.2-3101, relating to the Washington Metrorail Safety Commission Interstate Compact (Commonwealth of Virginia);
4. House Joint Resolution 76 – 115th Congress, Introduced 2/16/17;
5. Senate Joint Resolution 22 -115th Congress, Introduced 2/15/17;
6. Comparison Chart - VARIANCES AMONG THE TEXTS OF THE MSC ENABLING ACTS;
7. June 6, 2017 Letter of Concurrence from Cynthia Hudson, Chief Deputy Attorney General for the Commonwealth of Virginia ; and
8. June 15, 2017 Letter of Concurrence from Elizabeth Harris, Chief Deputy Attorney General for the State of Maryland.

¹⁴ See June 6, 2017 Letter of Concurrence from Cynthia Hudson, Chief Deputy Attorney General for the Commonwealth of Virginia; and June 15, 2017 Letter of Concurrence from Elizabeth Harris, Chief Deputy Attorney General for the State of Maryland.