Nos. 04-1233, 04-1236, 04-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and UNITED MOTORCOACH ASSOCIATION,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents.

On Petition for Review of a Final Rule Issued by
Respondent Federal Motor Carrier Safety Administration

FINAL PETITIONERS' REPLY BRIEF

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GLOSSARY

CDL	Commercial Driver's License
CMV	Commercial Motor Vehicle
DOT	Department of Transportation
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
JA	Joint Appendix
PTDI	Professional Truck Driver Institute
UMA	United Motorcoach Association
UPS	United Parcel Service

SUMMARY OF ARGUMENT

In the course of its rulemaking, FMCSA determined that entry-level CMV drivers do not receive adequate training and that the Model Curriculum, which covers topics such as backing up, parking, shifting lanes, and night driving – the topics necessary for a driver to actually be able to operate a CMV – represents the baseline for adequate training. The agency also determined that mandating adequate training would be cost-beneficial. Yet FMCSA did not issue a final rule requiring training even remotely resembling the model curricula before it. Instead, after neglecting to promulgate a regulation for twelve years, despite the statutory mandate that it complete its rulemaking within two years, and only after organizations concerned about safety sued to compel it to act, FMCSA issued a final rule that requires no training in any of the basic driving skills and operational knowledge necessary to drive a CMV.

FMCSA does not contend that its final rule fully addresses the inadequacy of entry-level driver training. Instead, it seeks to justify its final rule by arguing that the rule is just one part of a broader effort. However, none of the other efforts the agency claims it might eventually undertake has anything at all to do with entry-level training, the topic of this rulemaking and of § 4007(a) of ISTEA. Nor does FMCSA anywhere claim that it is considering further efforts to require adequate entry-level driver training. Moreover, the final rule is not even a *partial*

solution to the need to require entry-level CMV drivers to receive training in core operational skills and knowledge, because it does not mandate *any* such training.

In the end, the only explanation FMCSA proffers for the meager training in the final rule is that mandating training akin to the model curricula would be overly burdensome. However, the evidence in the record, specifically the final regulatory evaluation the agency submitted to Congress, demonstrates that requiring such training would *not*, in fact, be too burdensome, but rather would be cost-effective. In promulgating a final rule that is contrary to the record, in failing to address the identified need for adequate training, and in relying only on conclusory statements to support its decision to mandate training in four non-vehicle-related topics, but not in core driving skills and operational knowledge, FMCSA acted arbitrarily and capriciously.

ARGUMENT

I. The Final Rule Is Arbitrary And Capricious Because The Agency Did Not Respond To The Identified Need For Adequate Training.

FMCSA claims that Petitioners "argue that section 4007(a)(2) not only required rulemaking to determine the need for mandatory training for entry-level drivers but actually dictated the outcome of that rulemaking." FMCSA Br. 15-16. Not so. Rather, Petitioners argue that once the agency conducted its rulemaking,

as ISTEA required, and determined that there was a need for adequate training, it could not ignore that need in issuing the final rule.

Petitioners agree with FMCSA that, when Congress passed ISTEA, it did not know what sort of entry-level driver training was needed, nor was it certain whether training was needed at all. It left it up to the agency to determine whether there was a need for entry-level training, what that need was, and whether it would be in the public interest to mandate such training. In the course of the rulemaking, FMCSA determined that existing training was inadequate (i.e. that there was a need for basic training), that the Model Curriculum was the basis for training adequacy (i.e. that the need was for a curriculum similar in scope and content to the Model Curriculum), and that mandating adequate training would be cost-beneficial (i.e. that it would be in the public interest to mandate such training). However, the final rule completely fails to address the need FMCSA identified.

FMCSA argues that there was no requirement that its final rule address the need for training identified by its study. Again, that is simply not so. In addition to mandating that the agency conduct a study to determine whether there was a need for training, § 4007(a)(1), ISTEA required the agency to conduct a rulemaking "on the need to require training of all entry level drivers of commercial motor vehicles." § 4007(a)(2). To fulfill Congress's mandate, therefore, FMCSA

was required to address the need for driver training that it had identified.[1]

Moreover, when an agency promulgates a rule, it must demonstrate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). It is difficult to imagine how a final rule can be rationally connected to the facts found if it does not address the problem –"the need" – identified by the agency. And, indeed, the final rule promulgated by FMCSA does not bear any rational relationship to the evidence in the record that entry-level driver training is inadequate, that the Model Curriculum is the baseline for training adequacy, and that requiring adequate training would be cost-beneficial.

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[1]FMCSA claims that "the purpose of the rulemaking was to reach a conclusion about *whether or not* the agency should require training," and that "on the need" simply means on whether training was needed. FMCSA Br. 14-15. But that would rewrite the statute to require a rulemaking on "whether or not to require training." Under FMCSA's interpretation of "on the need to require training," once it determined that some training was needed, it could have required training on any topic it wanted, or even failed to promulgate any rule at all. Yet the express wording of § 4007(a)(2) requires FMCSA to commence a rulemaking proceeding, evidencing Congress's intent that the agency promulgate a rule, not just engage in a study. FMCSA's only other option was to report to Congress why it would not be in the public interest to issue a rule requiring entry-level driver training, *see* § 4007(a)(3), which it did not do. Even FMCSA recognizes that once it had determined that training was needed, it was directed by Congress to promulgate regulations. FMCSA Br. 15 n.7.

II. The Final Rule Is Not Part Of A Broader Effort By FMCSA To Improve Entry-Level Driver Training.

FMCSA's main argument tacitly acknowledges that the final rule does not fully address the need for adequate training of entry-level CMV drivers. Its primary justification for requiring training only in the four adjunct areas covered in the final rule is that the rule is part of a broader, incremental effort to improve its safety programs. FMCSA Br. 16-21, 27-31. However, the final rule does not offer even a partial solution to the documented need to train entry-level drivers in basic driving skills and operational knowledge. Nor is it, in fact, part of a broader effort to improve training of entry-level drivers.

A. The Agency Has No Future Plans To Address Driver Training.

FMCSA relies on the principle that "agencies have wide latitude to attack a regulatory problem in phases." *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 471 (D.C. Cir. 1998). As this Court stated in *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989), "we would not strike down the [regulation] if it were a *first step* toward a complete solution, even if we thought it 'should' have covered [more]." (Emphasis added).[2] This principle is inapplicable in this case,

[2] FCMSA also cites *City of Las Vegas* in its discussion of the standard of review, FMCSA Br. 13-14, but its reliance on that case in determining the standard of review is misplaced. Because the regulation at issue in *City of Las*

however, because FMCSA's final rule is not the agency's *first step* in addressing the inadequacy of entry-level driver training, but its *only step* in addressing that problem. FMCSA has never contended, during either the rulemaking or this litigation, that it has any future plans to consider entry-level training of CMV drivers.

FMCSA's argument that it is addressing "one part of the problem now while it is working on other aspects of the problem with different solutions," FMCSA Br. 28, relies on its reference, in the final rule's preamble, to six other efforts it is purportedly undertaking regarding CMV safety. But none of these six efforts – a review of existing CDL requirements, a request for comments on graduated licensing, a rule on providing educational and technical assistance to new motor carriers, a grant program that provides assistance to states to conduct enforcement programs, a crash causation study, and a CDL fraud program – relates to entry-level driver training. None responds to the Adequacy Report's finding that 68.9% of heavy truck drivers and 81.8% of motorcoach drivers do not receive adequate training. FHWA, *Assessing the Adequacy of Commercial Motor Vehicle Driver Training: Final Report* [hereinafter Adequacy Report], *Vol. I: Executive Summary*

Vegas was an emergency regulation, the Court employed less exacting scrutiny than it employs after a "normal rulemaking." *City of Las Vegas*, 891 F.2d at 932.

5 (1995) (No. 148) (JA 176). And none responds to ISTEA's mandate, which "directed the Secretary of Transportation to promulgate regulations requiring training for entry-level heavy truck, school bus, and motorcoach drivers." 68 Fed. Reg. 48863, 48871 (Aug. 15, 2003) (JA 365). In fact, many of the efforts respond to other statutory mandates. *See, e.g.*, 69 Fed. Reg. 29384, 29385 (May 21, 2004) (JA 400) (FMCSA's review of existing CDL requirements and of the costs and benefits of a graduated licensing system was mandated by section 4019 of the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (1998)); 67 Fed. Reg. 31978 (May 13, 2002) (Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, § 210, 113 Stat. 1748 (1999), was the statutory basis for the rule on new-entrant motor carrier standards). There is simply no basis for FMCSA to assert that those efforts are part of the rulemaking proceeding required by § 4007.

FMCSA is able to claim it is addressing the problem in phases only by defining the problem in extraordinarily broad terms, as all issues related to driver safety. *See* FMCSA Br. 18-19. But the mandate in § 4007 pertained specifically to entry-level driver training, not to driver safety initiatives overall; FMCSA cannot fulfill ISTEA's mandate by promulgating regulations dealing with other driver safety issues. Petitioners do not question FMCSA's discretion to address

CDL requirements, graduated licensing, enforcement programs, entrant motor carrier safety monitoring, and CDL fraud in separate rulemaking procedures. As FMCSA states, "an agency need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States Distrib. Cos.*, 498 U.S. 211, 231 (1991). That FMCSA has discretion to address other problems related to driver safety in separate rulemakings does not mean, however, that it has discretion to disregard a statutory mandate or to act arbitrarily and capriciously in addressing the problem at hand – entry-level driver training. It did not have discretion to ignore the evidence in the record that entry-level training is inadequate, that the CDL testing regime does not ensure adequate training in the topics on which it tests, and that requiring adequate training would be cost-beneficial. Thus, FMCSA had no discretion to promulgate a rule that does not mandate that entry-level drivers receive adequate training when it has no plans to take any further steps to require CMV drivers to receive additional entry-level training in how to drive a CMV.

B. The Final Rule Is Not Even A Partial Solution To The Need For Training Identified In The Adequacy Report.

FMCSA's argument that it has the discretion to address a problem one step at a time also fails for another reason: FMCSA has not taken even a first step in

establishing minimum training requirements in the core driving skills and operational knowledge necessary for a driver to operate a CMV safely.

The final rule contends that it responds to the Adequacy Report's finding that private sector training of CMV drivers is inadequate. 69 Fed. Reg. at 29384 (JA 399). To reach its conclusion that training was inadequate, the Adequacy Report developed a "Research Baseline Curriculum" "to specify the minimum requirements for entry-level pre-service training." *Adequacy Report, Vol. III: Findings, Conclusions, and Recommendations* B-1 (No. 216) (JA 212). The Research Baseline Curriculum focuses on the practical skills and knowledge necessary to safely operate a CMV. For example, it includes classes on the function, location, and proper use of vehicle control systems; on adjusting speed to traffic, traction, visibility, and road conditions; on collision avoidance; and on equipment-related emergencies. *Id*. at B-8 - B-10 (JA 218-220). For a program to be considered adequate under the Report's criteria, it has to include on-street hours. *Id.* at B-5 (JA 216).

The agency's final rule is not even a first step in mandating training like that used to define adequacy in the Adequacy Report, or like the Model Curriculum that the agency continues to assert represents the basis for training adequacy. FMCSA Br. 26. The training mandated by the final rule – training in non-driving,

non-vehicle-related activities – is of a completely different nature than the practical, operational training that forms the central focus of the model curricula.

Moreover, even if FMCSA's actions could be seen as a partial solution (which they are not), Congress specifically required that FMCSA conduct a rulemaking on the need for driver training, not just on part of that need. Although an agency may generally have discretion to address a problem in phases, ISTEA's mandate supercedes FMCSA's general discretion, and that mandate did not leave room for partial solutions to the identified need for training.

In addition, even when an agency has and uses discretion to address a problem in phases, it must still provide rational explanations for the distinctions it makes. *See City of Las Vegas*, 891 F.2d at 935. The cases cited by FMCSA emphasize that "reform may address itself to the phase of the problem which seems *most acute* to the [regulatory] mind." *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1058 (D.C. Cir. 1989) (emphasis added) (citation omitted); *see also Personal Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995) ("Agencies often must contend with matters of degree."). There was no rational reason for FMCSA to conclude, based on the record before it, that the need to require training in the four topics covered in the final rule was more acute than the documented need for training in the basic driving skills and

operational knowledge that constitute the model curricula's core. FMCSA's only rationale for requiring training in the four topics but not in practical driving skills and operational knowledge is that "requiring entry-level drivers to receive training in areas that are covered in the CDL test . . . . would be redundant." 68 Fed. Reg. at 48868 (JA 362). Yet, as Petitioners explained in their opening brief, *see* Pet. Br. 24-34, the evidence before the agency demonstrated that the CDL testing regime does not ensure that drivers receive adequate training, even in the topics tested. The agency itself has come to this conclusion. See 68 Fed. Reg. at 48865 (JA 359) (explaining the agency's belief that the knowledge needed to pass the CDL test was not sufficient to determine training adequacy).

Other cases cited by FMCSA deal with an agency's ability to leave questions open when further study is required. *See Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1262-63 (D.C. Cir. 2004) (allowing agency to "leave open the question of the post-2006 [regulation], using that time instead to undertake 'a multi-year effort to obtain additional data'" (citation omitted)). Here, FMCSA has made no claims that it needs to conduct, or is in fact conducting, future studies on the adequacy of entry-level driver training or on how to ensure that drivers receive adequate training. The agency has already conducted the studies necessary to determine that mandating adequate training is in the public interest. It has been

done with its data collection efforts for almost ten years.

The long delay between the beginning of this rulemaking and the promulgation of the final rule demonstrates a further problem with FMCSA's contention that the final rule should be upheld because it is one step in a multi-step effort: Given the many years it took FMCSA to promulgate this regulation, and its disregard for the statutory mandate that it complete the rulemaking by December 1993, it is questionable when, if ever, the agency will implement further efforts to increase driver safety. Long delays are not unusual for FMCSA. The suit seeking to compel the agency to act on Congress's mandate in § 4007 also sought action on five other statutory mandates whose deadlines had also long since passed. *See* Petition for a Writ of Mandamus and for Relief from Unlawfully Withheld Agency Action, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir.). When FMCSA finally did act on those statutory mandates – after the settlement agreement with the safety organizations established new deadlines – the first rule it issued was vacated by this Court for being arbitrary and capricious. *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004). With regard to safety, the agency admits that various of the efforts described in its brief are still in the planning stage. *See* 69 Fed. Reg. at 29385 (JA 400) ("The agency *plans* to coordinate with the Driver License and Control Committee of the American

Association of Motor Vehicle Administrators to determine if the required skill tests can be given in a more efficient and less costly manner."). Other of the efforts are just studies (on topics besides driver training), and FMCSA has not stated when – or even whether – it will promulgate regulations responding to those studies. In the meantime, approximately 5,000 people are killed each year in large truck crashes. *See* Nat'l Ctr. for Statistics and Analysis, DOT, *Traffic Safety Facts, 2003 Data: Large Trucks* 1, http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2003/809763.pdf.

C. It Was Irrational for FMCSA Not to Mandate Adequate Training.

Once FMCSA's justification that its rule was just one component of a larger effort is revealed to be a smokescreen, the agency is left with only one argument: that mandating minimally-adequate entry-level training would be overly burdensome. *See* FMCSA Br. 25, 27, 29. This argument, too, "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

The Final Regulatory Evaluation the agency submitted to Congress in 1996 demonstrated that mandating adequate entry-level training would be cost-beneficial. *See* FHWA, *Final Regulatory Evaluation: Entry-Level Driver Training* [hereinafter Final Regulatory Evaluation] (1995) (No. 158) (JA 224).

After determining the costs of a training regime such as the PTDI curriculum, the study found that "the amount of accident reduction due to the required training of entry-level drivers need not be extensive to have the derived benefits dominate the cost of the program." *Id.* at 38 (JA 264). In other words, even a modest reduction in accident rates would cause the benefits to exceed the costs. The study analyzed the costs and benefits of mandating training equivalent in length to PTDI's curriculum under a number of scenarios, varying the levels of accident reduction, the demand for entry-level drivers, and the carryover effect of training. Under all the scenarios examined, the benefits of the mandatory training outweighed the costs by at least $1 billion, in 1995 dollars, over a ten-year period. *Id*. at 33-36 (JA 259-62).

FMCSA further claims, without offering any support, that mandating training equivalent to the Model Curriculum would be burdensome because "much of the subject matter of the training is covered in the CDL knowledge and skills test." FMCSA Br. 25. The Final Regulatory Evaluation, however, was conducted *after* the CDL testing regime was in place. Thus, even though drivers were already receiving whatever (cursory) preparation they needed to pass the CDL tests, the study concluded that the benefits of mandating a training program the length of PTDI's would exceed the costs by at least a billion dollars. Moreover,

the agency itself has made clear that "[t]he CDL standards do not require the comprehensive driver training proposed in the Model Curriculum because the CDL is a licensing standard as opposed to a training standard." 69 Fed. Reg. at 29385 (JA 400). *See* Pet. Br. 24-34 (demonstrating that FMCSA's explanation that requiring training in areas tested on the CDL would be redundant is contrary to the record).[3]

In short, FMCSA's explanation for not mandating that entry-level drivers receive adequate training is irrational and contradicted by the evidence in the record.

III. The Agency Did Not Support Its Contention That The Final Rule Will Enhance Safety.

Attempting to obfuscate the record's lack of support for its final rule, FCMSA claims that Petitioners are trying to shift the burden of proof to the

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[3]In its brief, FMCSA asserts that it has learned that the CDL improved the quality of CMV drivers. FMCSA Br. 27 n.9. It provides no support for this assertion. Even assuming the agency's unsupported assertion is true, however, the agency, in relying on the effects of the CDL to justify the limited scope of its rule, *see* 69 Fed. Reg. at 29384 (JA 399), is once again trying to blur the lines between training and other efforts designed to increase safety. The CDL program set nation-wide standards and eliminated multiple licensing by different states. *See* Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, Title XII, 100 Stat. 3207 (1986). That it benefitted safety does not mean that it improved driver training.

agency. FMCSA Br. 31. Petitioners recognize FMCSA does not have the burden of proof before this Court. However, it did have the burden in the rulemaking proceeding to provide support for its final rule. *See Professional Pilots Federation v. FAA*, 118 F.3d 758, 771 (D.C. Cir. 1997) (a court may not "sanction agency action when the agency merely offers conclusory and unsupported postulations in defense of its decisions"). FMCSA failed to meet that burden.

FMCSA's claim that it provided support for the final rule relies primarily on the cost-benefit analysis in the final rule's preamble, which in turn relies on FMCSA's Analysis Division's regulatory evaluation of the final rule. FMCSA Br. 31-35. As Petitioners explained in their opening brief, however, Pet. Br. 40-41, that cost-benefit analysis and regulatory evaluation relied on unreasonable assumptions. In particular, the agency assumed, in those documents, that because training generally reduces crashes, training in the four topics covered in the final rule will likewise reduce crashes. This assumption is illogical. For example, one of the case studies relied on by the final rule's regulatory evaluation is the experience of the United Parcel Service (UPS), which, in 1986, had an accident rate one-tenth of the national average for CMVs. *See* FMCSA, *Final Rule Regulatory Evaluation* 17, 21 (2003) (No. 220) (JA 440, 444) (referring to studies cited in the original Final Regulatory Evaluation); FHWA, *Final Regulatory*

Evaluation, at 18 (discussing UPS case study) (JA 244). However, UPS required its drivers to complete an 80-hour training program that included both classroom and on-the-road lessons. *Id.* In another case study, a company experienced a 74% reduction in crashes after instituting an in-house training program that provided one day of driving on a range and three days of driving on the road. *Id*. at 19 (JA 245). It is not a sign of reasoned decision-making to conclude that because these other training regimes led to a reduction in crashes, the final rule – which contains no training in operational skills and knowledge at all, let alone training on the road – will similarly lead to a reduction in crashes. The regulatory evaluation's and cost-benefit analysis's assertions that there will be benefits to training in the four topics included in the final rule are just conclusory statements, unsupported by evidence.[4]

FMCSA is also mistaken in contending that Petitioners make the "ambiguous, if not contradictory" argument that "training may be harmful – but that there is too little of it." FMCSA Br. 36. Petitioners make the entirely consistent argument that spotty, poor-quality training may lead to an increase in

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[4]The regulatory evaluation and cost-benefit analysis are also problematic because they were based on the assumption that the training in the final rule would take, on average, ten hours. FMCSA notes, however, that "if the mandatory training cannot be finished in ten hours, the time allotted must increase." FMCSA Br. 38.

crashes, but that comprehensive, high-quality training will lead to a decrease in crashes. Pet. Br. 41-42. FMCSA's inability to comprehend this argument highlights its inability to understand that not all training is the same; that one cannot assume that because training in driving skills and operational knowledge leads to a reduction in crashes, training in topics such as whistleblower protection will also lead to such a reduction; and that promulgating a rule that requires lectures only in non-vehicle-related topics does not fulfill the need to provide entry-level drivers with adequate training.

IV. The Final Rule Is Arbitrary And Capricious For The Reasons United Motorcoach Association Asserts.[5]

A. FMCSA's Waiver Argument Has No Merit.

FMCSA's brief opines that because certain UMA arguments were raised for the first time in its petition for reconsideration and because that petition was withdrawn before FMCSA ruled on it, UMA waived its right to raise those arguments before this Court. UMA submits that application of the waiver doctrine is not justified in the present case.

As FMCSA argues, "[s]imple fairness to those who are engaged in the task

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[5]This section is submitted solely by the United Motorcoach Association (UMA).

of administration, and to the litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). However, FMCSA failed to mention the exceptions to this general rule.

In *Washington Association for Television and Children v. FCC*, 712 F.2d 677, 680-82 (D.C. Cir. 1983), a case FMCSA cites, FMCSA Br. 42, this Court discussed when the general rule should not be followed. As the *Washington Association* court observed, a "reviewing court . . . may in some cases consider arguments that it would have been futile to raise before the agency," *id.* at 682, for example, where the "agency's 'general views' are already known." *Id.* at 682 n.9 (citing *Action for Children's Television v. FCC*, 564 F.2d 458, 569 (D.C. Cir. 1977)). The Court has subsequently explained that "[t]he issue in *Washington Association* was whether a litigant's failure to raise an objection *in its administrative appeal* precluded it from raising the objection on judicial review." *Marine Mammal Conservancy, Inc. v. Department of Agric.*, 134 F.3d 409, 412 (D.C. Cir. 1998) (italics in original). The facts in this case are not the same as in *Washington Association* (or for that matter in *Marine Mammal Conservancy*). As FMCSA concedes, FMCSA Br. 41, UMA's petition for reconsideration was timely

filed following FMCSA's publication of the final rule so, at a minimum, the present objections were raised with the agency *before* being raised here.

In essence, FMCSA's argument is that UMA was obligated to wait for as long as it took for FMCSA to rule on the petition, no matter how long that would have been. FMCSA's argument is without merit.

The waiver issue was recently addressed by the Supreme Court in *Sims v. Apfel*, 530 U.S. 103, 105 (2000) ("The question is whether a claimant pursuing judicial review has waived any issues that he did not include in that request."). Of particular relevance here is the distinction the Supreme Court drew between proceedings that are adversarial in nature and those that are administrative. Citing *L.A. Tucker Truck Lines*, the Court instructed that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. "Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest." *Id.* at 110 (citing *L.A. Tucker Truck Lines, Hormel v. Helvering*, 312 U.S. 552 (1941), and *Unemployment Compensation Commission of Alaska v. Aragan*, 329 U.S. 143 (1946)). "*Hormel, L.A. Tucker Truck Lines,* and *Aragan* each involved an adversarial proceeding."

Sims, 530 U.S. at 110. "Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker." *Id.* "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Hormel*, 312 U.S. at 557.

Rulemakings should not, as a matter of law, be considered adversarial proceedings within the contemplation of *Hormel, L.A. Tucker Truck Lines,* or *Aragan*. Rulemakings are classic examples of non-adversarial administrative proceedings. To the extent that the instant rulemaking has become adversarial, it is not because of the actions of UMA, but solely because of the intransigence of FMCSA and its unwillingness to consider UMA's petition for reconsideration in a timely manner.

As FMCSA acknowledges, FMCSA Br. 42, UMA's reconsideration petition sat for almost four months without agency action. For almost three of those months, FMCSA knew the final rule had been appealed. Yet FMCSA still refused to act. By refusing to act on UMA's petition while knowing this court review was pending, FMCSA left UMA with a Hobson's choice – forced to wait indefinitely

until FMCSA granted or denied its petition, or to withdraw the petition and join with the other petitioners in court. With an eye toward judicial economy, the latter course was chosen, so that all of the final rule's flaws could be considered and addressed by this Court at one time and only once.[6]

NLRB v. FLRA, 2 F.3d 1190 (D.C. Cir. 1993), another case FMCSA relies upon, FMCSA Br. 43, also does not support FMCSA's waiver argument. In that case, this Court concluded that although petitioner NLRB had not raised an issue in a motion for reconsideration and had gone directly to court, the court was not barred from considering the matter if the motion would have been rejected. *Id.* at 1197.

FMCSA's failure to act on UMA's petition in a timely fashion, as well as FMCSA's brief, provide clear evidence that, no matter how long UMA had waited, UMA's reconsideration petition would have been denied. This case falls squarely within the exception recognized in *NLRB v. FLRA.*

FMCSA's failure to act timely on UMA's petition and its brief also demonstrate that UMA's arguments would have been futile if they had been raised below. Futility is another exception to the general rule and its existence in this

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[6] UMA does mean or suggest a hard-and-fast rule that in every instance a petitioner need not wait beyond four months for an agency to act upon a reconsideration petition.

case provides further justification why the waiver rule should not be applied. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996) ("[A] reviewing court may consider arguments where issues by their nature could not have been raised, or would have been futile to raise, before the court."); *see also Air Canada v. DOT*, 148 F.3d 1142, 1150 n.12 (D.C. Cir. 1998). "[T]here is little reason to think that a party's more thorough participation would have changed the agency's mind on those issues or otherwise precluded a lawsuit." *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991).

The extent of the futility of UMA raising its arguments below is demonstrated by two examples from FMCSA's brief. Regarding UMA's argument that "FMCSA did not respond to [UMA's] proposal that the agency should work with the industry to develop a training program," FMCSA responds "but that proposal was made in the withdrawn petition for reconsideration, and the argument is waived. *There was, in any event, no reason for the agency to develop the specifics of a curriculum in close cooperation with the motorcoach industry, because the agency had already decided not to mandate the specifics of a curriculum* in the four content areas, and there were no specifics for the agency to develop." FMCSA Br. 45 (emphasis supplied). Similarly, regarding UMA's argument that "FMCSA failed to articulate a definable training standard and as a

result has arbitrarily exposed motorcoach operators to potential liability," Pet. Br. 58-60, FMCSA responded: "UMA provides no support for the proposition that an agency acts arbitrarily or capriciously when it fails to promulgate standards that are so specific that any prospect of liability for a regulated entity is eliminated. In any case, the final rule makes *some suggestions* for topics to be covered in the training [citation omitted], and UMA's concerns thus lack force." FMCSA Br. 47 (emphasis supplied). In other words, according to FMCSA, ambiguous final rules are all right.

Simply put, FMCSA's actions and failure to rule timely on UMA's petition were the sole cause of the facts upon which FMCSA's argument relies. FMCSA can hardly claim that it has acted with "clean hands," especially when FMCSA knew this litigation had been initiated and its timely denial of UMA's petition – as is evident would have ultimately occurred – would allow all of the challenges to the final rule to proceed in the most expeditious and judiciously economic manner possible. Under these circumstances, application of the general waiver rule here is not justified. Judge Mikva's comments dissenting in *Coalition for the Preservation of Hispanic Broadcasting* are therefore most appropriate: "The record is clear that the[] petitioner[] acted reasonably in light of administrative precedents and the decisions of this court. Punishing sensible economic and legal

decisions by withholding judicial review from firms that make them is, in my view, an unacceptable form of judicial discretion." 931 F.2d at 84.

The Court should reject FMCSA's waiver argument.

B. FMCSA's Responses To UMA's Arguments Are Without Merit.

UMA will address the issues in the order they were discussed by FMCSA:

1. Inclusion of motorcoach operators under the training requirements of final rule: Contrary to what FMCSA argues, FMCSA Br. 45, UMA's "central concern" against inclusion of motorcoach operators under the final rule was not cost. UMA's reason was driver safety, and it was aimed solely at excluding motorcoach operators from the four topics being proposed. Moreover, UMA's request that motorcoach operators be excluded from the final rule was raised throughout its comments to the proposed rule. *See Comments of UMA* (2003) (No. 201) (JA 380). UMA's brief merely clarified and expanded this point, based on the final rule. Because FMCSA attempts to obfuscate this issue, the following provides a short synopsis of UMA's first argument, Pet. Br. 47-54, titled "FMCSA failed to consider significant safety and training differences between the motorcoach and trucking industries": The cost of training entry-level drivers is of some concern to motorcoach operators. However, the key concern is driver safety and aimed at addressing: (1) the general inadequacy of entry-level training (which

FMCSA concedes, *see* 68 Fed. Reg. at 48865 (JA 359) and 69 Fed. Reg. at 29385 (JA 400), but nonetheless ignored); and (2) the lack of any training infrastructure overall compared to the trucking industry.[7] UMA's brief quoted directly from its reconsideration petition to make clear that motorcoach operators sought an exemption for a limited time so that "a far more comprehensive entry-level training" program could be developed in concert with FMCSA. Pet. Br. 52. Obviously, such a more comprehensive training program could include and appropriately address the four topics covered by the final rule, taking into account the practical issues UMA has raised.

2. <u>Failure of FMCSA to specify training content</u>: On page 47 of its brief, FMCSA provides two responses to UMA's argument, *see* Pet. Br. 58, that "FMCSA failed to articulate a definable training standard and as a result has arbitrarily exposed motorcoach operators to potential liability." First, that UMA waived the argument because it was first presented in the petition for reconsideration. Second, that "the final rule makes *some suggestions* for topics to be covered in the training [citation omitted] and UMA's concerns thus lack force." FMCSA Br. 47 (emphasis supplied).

[7] FMCSA concedes it gave short shrift to UMA's concern about a lack of an adequate number of schools. FMCSA Br. 45 ("The agency responded not specifically to the issue of schools but more generally to the issue of costs, which was in fact UMA's central concern.").

No matter how FMCSA may attempt to obfuscate the issue, the core of UMA's specific argument is that the final rule is ambiguous. UMA is unaware of any instance in which a party waives the right to raise the ambiguity of a regulation to a court if it did not do so during the rulemaking. It is also illogical to expect a petitioner to know that a final rule will be ambiguous before it is published in final form. Regulatory clarity is a fundamental responsibility of every agency and also fundamental to due process, especially when FMCSA acknowledges its rule has an enforcement element, FMCSA Br. 46, and therefore includes civil and criminal penalties for noncompliance. The final rule's ambiguity is particularly important to UMA in light of the fact that, as the drivers' employers, UMA's members will individually face civil and criminal penalties for any noncompliance.

The potential tort liability issue UMA raised in the opening brief is merely an extension of UMA's fundamental argument that the final rule is ambiguous – a direct and major detrimental outgrowth of that ambiguity. The thrust of UMA's argument is that by providing identifiable and measurable criteria for the content and outcomes of the training, especially in the case of wellness, the final rule's ambiguity goes away and so, too, does its related tort exposure.

C. UMA Seeks Specific Relief.

UMA wants to make clear the remedy it requests should the Court find the final rule arbitrary and capricious. UMA requests two things.

First, if the Court agrees that the regulations are ambiguous and pose a potential liability exposure to carrier employers, then UMA requests that the final rule be vacated in its entirety, at least for the motorcoach industry, until such time as the ambiguity is eliminated. This would allow the additional training topics to be addressed as part of the development of the more comprehensive training program covered by the second remedy UMA is requesting.

Second, UMA requests that FMCSA be directed to work with UMA and other interested parties in the development of a comprehensive, practical plan to address the inadequacy that exists in the fundamental driving knowledge and skills training of entry-level drivers. Because of FMCSA's apparent unwillingness to address training in a more open and cooperative manner (which UMA submits would enable this long-standing problem to finally be disposed of) the need for such direction to FMCSA is apparent; absent this, the record of this proceeding makes clear that it will be just a matter of time before we are back before this Court on the same issue.

V. The Final Rule Should Be Vacated.

"When this court remands a rule to an agency for further consideration with little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning, the practice of the court is ordinarily to vacate the rule." *Illinois Public Telecomm. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir 1997). "[T]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation omitted). Here, it is unlikely that FMCSA will be able, on remand, to justify its decision to promulgate a regulation on minimum entry-level driver training requirements that does not actually train drivers to drive. Moreover, vacating the final rule would have few disruptive effects. Unlike in *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), the primary case cited by FMCSA, this is not a situation where the "egg has been scrambled and there is no apparent way to restore the status quo ante." Indeed, even the carriers who had already begun to comply with the training requirements of the final rule would not be harmed, because nothing would restrain them from continuing to provide the training voluntarily. *Cf.*

Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (finding that vacatur would be disruptive because it would preclude voluntary actions).

CONCLUSION

The Court should declare the final rule arbitrary and capricious, vacate it, and remand to the agency with instructions that it promulgate a new final rule requiring entry-level CMV operators to receive training in the skills and knowledge necessary to actually operate a CMV.

Respectfully submitted,

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Rule 32(a)(7)(C) Certificate

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 6,891 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, June 27, 2005, I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for the parties as follows:

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