ARGUED DECEMBER 4, 2006; DECIDED JULY 24, 2007
ORDER STAYING MANDATE ISSUED SEPTEMBER 28, 2007

No. 06-1078
(Consolidated with No. 06-1035)

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

PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS, PARENTS AGAINST TIRED TRUCKERS, ADVOCATES FOR HIGHWAY AND AUTO SAFETY, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents.

PETITIONERS' MOTION TO ENFORCE THE COURT'S ORDERS, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF MANDAMUS

Henry M. Jasny
General Counsel
Advocates for Highway and Auto Safety
750 First Street, N.E., Suite 901
Washington, D.C. 20002
(202) 408-1711

Bonnie I. Robin-Vergeer
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioners

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INTRODUCTION

On December 10, 2007, the Federal Motor Carrier Safety Administration ("FMCSA") issued an Interim Final Rule ("IFR") retaining the two provisions of the 2005 hours-of-service ("HOS") rule vacated by this Court in its decision on July 24, 2007: the increase in consecutive driving time from 10 to 11 hours and the 34-hour restart. 72 Fed. Reg. 71247 (Dec. 17, 2007). The Court's ruling earlier this year marks the second time in three years that it has unanimously struck down these features of the HOS rule, which permit commercial truck drivers to drive significantly longer hours on both a daily and weekly basis than under the rules that had been in place for decades before 2003.

Because the IFR defies this Court's July 24, 2007 decision and its order on September 28, 2007 granting FMCSA a 90-day stay of its mandate and flouts the most elementary principles of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, petitioners seek immediate relief. We urge the Court to enforce its orders, vacate the IFR (or at least that portion that reinstates the two invalidated provisions), and direct FMCSA to issue forthwith a revised IFR or other authoritative guidance that subjects truck drivers to a 10-hour (not an 11-hour) consecutive driving limit and to the governing 60-hour and 70-hour weekly on-duty limits with no 34-hour restart

provision, pending completion of a new notice-and-comment rulemaking.[1]

ARGUMENT

FMCSA'S INTERIM FINAL RULE VIOLATES THIS COURT'S ORDERS, DOES NOT COMPLY WITH THE APA, AND MUST BE SET ASIDE.

The Court's power to enforce its prior orders and mandates in response to a motion to enforce or a petition for a writ of mandamus is firmly established. *See Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987); *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). FMCSA is "without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case." *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *accord Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990). The IFR violates both the letter and spirit of the Court's orders of July 24, 2007 and September 28, 2007, and must be set aside.

A. The IFR Violates This Court's Orders.

1. The July 24, 2007 Decision

On July 24, 2007, this Court granted the petition for review in No. 06-1078 and vacated the increase in consecutive driving time from 10 to 11 hours and the 34-hour

[1] Although this motion currently asks the Court to enforce its orders, the Court may also consider it a motion to enforce the Court's mandate after December 27, 2007, the date the mandate is set to issue and the IFR is to take effect. 72 Fed. Reg. at 71247.

restart that FMCSA adopted for the second time in its 2005 rule. 70 Fed. Reg. 49978 (2005). *See Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188, 206, 211 (D.C. Cir. 2007) ["*OOIDA*"]. First, the Court determined that FMCSA had committed a "serious procedural error" by failing to provide notice and an opportunity for comment on the new operator-fatigue model the agency had included in its 2005 regulatory impact analysis ("RIA") in response to the Court's first decision. *Id.* at 199. Because "the model and its methodology were unquestionably among 'the most critical factual material that [was] used to support the agency's position,'" the Court found that the agency's failure to provide notice and an opportunity for comment violated APA strictures. *Id.* at 201 (quoting *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999)). The Court had "no difficulty" in concluding that FMCSA's failure to disclose the methodology of its revised model "in time for comment" was prejudicial. *Id.* at 202.

Second, the Court found that FMCSA's explanations (or lack thereof) for several critical elements of this model were "arbitrary and capricious," *id.* at 204, leading it to conclude that the agency had "failed to provide an adequate explanation for its decision to adopt the 11-hour daily driving limit." *Id.* at 203.

Finally, the Court faulted FMCSA for failing to explain why its operator-fatigue model excluded altogether the effects of cumulative fatigue from the extended weekly driving and working hours allowed by the 34-hour restart, which the Court previously

had said was "an important aspect of the problem." *Id.* at 205 (quoting *Public Citizen v. FMCSA*, 374 F.3d 1209, 1222-23 (D.C. Cir. 2004)) (internal quotation marks omitted). Given FMCSA's continued failure to address cumulative fatigue from the long weekly hours permitted by restart, the Court held here that the agency's decision to re-adopt the 34-hour restart was arbitrary and capricious. *Id.* at 203, 206. Accordingly, the Court vacated both the increase in the daily driving limit and the 34-hour restart. *Id.* at 206, 211.[2]

2. The September 28, 2007 Order

On September 6, 2007, intervenor American Trucking Associations ("ATA") moved for an 8-month stay of the mandate so that FMCSA could retain the vacated daily driving increase and 34-hour restart while it developed and issued a new final rule on remand. ATA Motion for a Stay of the Mandate at 1-3 (filed Sept. 6, 2007). FMCSA did not file its own motion for a stay or otherwise respond to the Court's ruling until September 21, 2007, when it filed a response supporting ATA's motion. FMCSA stated that a new rulemaking would take 12 months and requested a stay of that duration so that it could maintain the status quo during the rulemaking. FMCSA

[2] Although the Court found it unnecessary to reach petitioners' arguments that the 11-hour driving limit and 34-hour restart were contrary to law and arbitrary and capricious because the higher driving and on-duty limits were unsafe (and less safe than the pre-2003 maximums), detrimental to truck-driver health, and violated several statutory mandates, the Court nevertheless reiterated the concerns it had expressed three years earlier regarding whether the increases could survive scrutiny. *OOIDA*, 494 F.3d at 196-97; *see Public Citizen*, 374 F.3d at 1217-19, 1222-23.

Response in Support of Motion to Stay the Mandate at 3-8 ("FMCSA Response") (filed Sept. 21, 2007). At the same time, however, FMCSA represented that in the event the Court denied the requested stay, the agency would need "a short period of 21 days" to issue an interim rule to provide guidance to drivers and law enforcement agencies, *id.* at 9, and that the states would "require at least 3 months" to implement and enforce an hours-of-service rule restoring the 10-hour driving limit and eliminating the 34-hour restart. Hartman Decl. ¶ 9.

The Court did not grant either ATA's 8-month stay or FMCSA's 1-year stay. Instead, on September 28, 2007, it granted a 90-day stay, until December 27, 2007—a period that, according to FMCSA's representations to the Court, was insufficient to permit the agency to complete a new rulemaking. It is difficult to draw any conclusion from the order but that the Court did *not* intend to allow the two vacated provisions to remain in place during the ensuing year that new rulemaking proceedings would be underway, but instead granted a 90-day stay to afford FMCSA the minimum amount of time the agency contended was necessary to facilitate the transition to a rule that eliminated the 11-hour daily driving limit and 34-hour restart.

3. FMCSA's Response

Instead of responding to the September 28 order by immediately issuing an IFR or other guidance to implement the Court's decision, FMCSA took no action. It waited until just slightly more than two weeks before the scheduled issuance of the

Court's mandate to issue an IFR that, effective on December 27, 2007, *retains* the vacated 11-hour driving limit and 34-hour restart during the new rulemaking proceedings without *first* providing notice and an opportunity to comment on the updated operator-fatigue model and the new data and explanations included in the IFR. Effectively, *FMCSA* has itself granted the 1-year stay denied by the Court. Indeed, the agency has gone further. Although FMCSA professes in the IFR to be "fully committed" to issuing a final rule in 2008, 72 Fed. Reg. at 71247, 71248, 71249, its filing in this Court more candidly admits that it merely "hopes" to complete its rulemaking "by the end of 2008." Notice of Issuance of Interim Final Rule at 2 (filed Dec. 11, 2007). The IFR enables FMCSA to leave in place indefinitely the two driving-hour increases vacated by the Court twice now without first curing a major deficiency that impelled the Court to vacate the provisions in the first place.

The IFR is not consistent with the "letter or spirit," *City of Cleveland*, 561 F.2d at 346, of the Court's orders. As the Court has said, "[t]o 'vacate,' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citation omitted). Thus, the driving-hour increases cannot be reinstated by FMCSA without a new rulemaking proceeding conducted in accordance with the APA, *see id.* at 798, as well as with this Court's directives.

The IFR fails in both respects. Remarkably, although one basis for the Court's decision to vacate the daily driving-hour increase and the 34-hour restart was that FMCSA had failed to provide notice and an opportunity for comment on its driver-fatigue model before issuing the 2005 rule, its new IFR adopts these same unlawful provisions for a third time using the same tactic the Court has already found wanting: FMCSA seeks public comment on its new rationales, new data, and updated fatigue model only *after* the IFR goes into effect. "An agency cannot remedy a deficiency in one regulation by promulgating a new rule, equally defective for the same or other reasons." *Action on Smoking & Health*, 713 F.2d at 798-99 (footnote omitted).

Although the Court's July 2007 decision did not definitively foreclose FMCSA from re-adopting the 11-hour driving limit and 34-hour restart in a final rule once the agency cures the defects that led the Court to vacate the provisions, FMCSA cannot do so *before* it complies with the Court's ruling. *See*, *e.g.*, *National Small Shipments Traffic Conf., Inc. v. ICC*, 590 F.2d 345, 352 (D.C. Cir. 1978) (agency may not issue order inviting interim use of a study underlying earlier order vacated by the court where "whatever flaws originally precluded use of the study [were] unremedied" and "the study's interim use [was] indefensible in exactly the same sense as the Commission's prior order"). Substantial evidence refutes the newly minted

information presented in the IFR,[3] as petitioners will demonstrate when they respond to the substance of the IFR and its accompanying RIA in their docket comments, but FMCSA will not have the benefit of these comments (or of those submitted by other members of the public) until *after* the IFR goes into effect, when the agency's position on these features will still further be "chiseled into bureaucratic stone." *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981).

Nothing in the Court's July 2007 decision suggests that it has excused FMCSA on remand from complying with the APA's basic guarantee of notice and an opportunity for comment before the issuance of a final rule. *See* 5 U.S.C. § 553(b). Not only did the Court emphasize the "serious procedural error" an agency commits "when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary," *OOIDA*, 494 F.3d at 199 (citation omitted), but it has emphasized in case after case that an opportunity for post hoc public comment rarely satisfies the APA's rulemaking commands. As the Court explained in *National Tour Brokers Association v. United States*, 591 F.2d 896 (D.C. Cir. 1978), the purpose of the statutory requirement that the public be afforded the opportunity to comment on a rule while it is still in the "proposed" stage is not only to allow the agency to

[3] The IFR purports to improve the flawed (or missing) explanations identified by the Court, 72 Fed. Reg. at 71252-55; updates and changes the basic methodologies underlying the agency's analysis, *id.* at 71255-58; and offers new crash data and research and survey results in an effort to demonstrate that safety has not declined since the implementation of the 2003 and 2005 rules. *Id.* at 71258-66.

benefit from the expertise and input of the parties who file comments, but "to see to it that the agency maintains a flexible and open-minded attitude toward its own rules, which might be lost if the agency had already put its credibility on the line in the form of 'final' rules." *Id.* at 902. As the Court recognized: "People naturally tend to be more close-minded and defensive once they have made a 'final' determination." *Id.*[4]

This Court has acknowledged the reality that when only an opportunity for after-the-fact public comment is afforded, members of the public might not "bother to submit their views" and the agency might not "seriously consider their suggestions" after the regulations are "a fait accompli." *New Jersey*, 626 F.2d at 1049 (citation omitted). Fears of such agency closed-mindedness are amply justified here where FMCSA not only has adopted for a third time driving-hour increases twice rejected by this Court but where it candidly admits right in the IFR that it "has become convinced" that reversion to a prior regulatory scheme (such as one capping daily

[4] *See also Air Transp. Ass'n of Am. v. DOT*, 900 F.2d 369, 379 (D.C. Cir. 1990) (Court "strictly enforce[s]" requirement that notice and opportunity for comment "*precede* rulemaking" so that agency is "receptive to suggested changes"), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991); *New Jersey v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (because of "psychological and bureaucratic realities of post hoc comments in rule-making," "Congress specified that notice and an opportunity for comment are to precede rule-making").

driving at 10 hours and including no 34-hour restart) "would likely offset some of the large-truck safety gains made on America's highways since 2003." 72 Fed. Reg. at 71266. We know FMCSA is convinced. But FMCSA is nonetheless required to keep an open mind until APA requirements are satisfied. An opportunity to submit post hoc comments in the circumstances created by the unlawful IFR is meaningless.

When the Court's July 2007 decision is considered in conjunction with its September 2007 order granting a only limited stay, the agency's defiance of the Court's orders and upcoming mandate becomes even more obvious. FMCSA asked the Court for a 1-year stay of the mandate so that it could retain the vacated provision during new rulemaking proceedings on remand. The Court denied that request, instead granting a 90-day stay—a period, by the agency's admission, inadequate for completing the rulemaking, but the minimum period needed, according to FMCSA, to effect a transition to a rule without the 11-hour driving limit and 34-hour restart.

Having failed to obtain the 1-year stay from the Court, FMCSA simply granted the extension to itself. As part of the justification for this course of action, the IFR advances the very arguments FMCSA already made to the Court in arguing for a 1-year stay—that altering the HOS rules would be disruptive and that the industry and enforcement community need a substantial period of time to come to terms with any HOS changes. 72 Fed. Reg. at 71249, 71266-68.

What FMCSA has done here is similar to the action taken by the Secretary of

Labor denounced by this Court in *International Ladies' Garment Workers' Union*, 733 F.2d 920. In an earlier decision, the Court had held that the Secretary of Labor's rescission of homework restrictions in the knitted outerwear industry were arbitrary and capricious and ordered the restrictions reinstated unless properly modified pursuant to "reasoned decisionmaking" consistent with the Court's opinion. *Id.* at 921. The Secretary requested a 30-day stay, which the Court denied. The Secretary responded by publishing a notice of proposed rulemaking again to rescind the restrictions, but at the same time, the Secretary issued, without notice and comment, a final "emergency" rule suspending the effect of this Court's decision for 120 days. *Id.* Although the Court decided to leave to the district court the final determination of whether to enforce the mandate, it nonetheless strongly suggested that "[a]bsent facts that do not appear in the record before us," the Secretary's "emergency" rule violated the mandate. The Court's reasoning bears repeating here:

> The alleged justification advanced by the Secretary in defending his action is merely a repeat of the argument he advanced in his motion to stay this panel's decision—an argument that already has been rejected by the court. Undaunted by this repudiation, the Secretary has now, in effect, implemented the stay on his own. Moreover, the Secretary has simply reimplemented precisely the same rule that this court vacated as "arbitrary and capricious" in its first decision. Such an attempt to circumvent a lawful order of this court does not satisfy the requirement of reasoned decisionmaking imposed on the Secretary.

Id. at 923. FMCSA's retention of the two vacated provisions without *first* affording notice and an opportunity for public comment on its operator-fatigue model and other

new material relied upon in its IFR, and in the face of the Court's denial of an 8-month or 1-year stay, is little different. Indeed, with the IFR in place and no specific deadline for issuing a final rule, the two vacated provisions may well remain in place indefinitely, establishing the vacated rules as law without any practical opportunity for petitioners to mount a new challenge.

B. FMCSA Has Not Demonstrated "Good Cause" for Dispensing With Prior Notice and Comment.

FMCSA attempts to justify retaining the vacated driving-hour increases by contending that it has "good cause" under 5 U.S.C. § 553(b) to adopt the IFR without advance notice and opportunity for comment. 72 Fed. Reg. at 71266-68. It maintains that prior notice and comment would have been "impracticable" and "contrary to the public interest." *Id.* at 71266, 71268. FMCSA is not entitled to de novo review of whether it has demonstrated "good cause" to excuse its failure to abide by normal APA requirements, as if the Court's July and September 2007 orders did not exist. In any event, FMCSA's "good cause" argument lacks merit.

This Court repeatedly has admonished that exceptions to the APA's notice-and-comment provisions "will be narrowly construed and only reluctantly countenanced." *New Jersey*, 626 F.2d at 1045; *accord Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992). The exceptions are not "escape clauses" that "may be arbitrarily utilized at the agency's whim." *Block*, 655 F.2d at 1156. The "good cause"

exception of 5 U.S.C. § 553(b)(B) excuses notice and comment "in emergency situations, where delay could result in serious harm." *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (citation omitted); *accord Action on Smoking & Health*, 713 F.2d at 800.

FMCSA offers the following grounds to show "good cause": (1) that the agency was compelled to issue an IFR clarifying the governing HOS rules in the wake of the Court's July 2007 decision, 72 Fed. Reg. at 71249, 71266; (2) that FMCSA, state law enforcement agencies, and the industry could not adapt quickly enough to a 1-hour reduction in driving time and elimination of the 34-hour restart "at the end of the stay" granted by the Court to ensure orderly enforcement and compliance, *id.* at 71266, 71268; (3) that reversion to a prior regulatory scheme (such as one with a 10-hour driving limit and no restart) would be disruptive and could jeopardize safety gains allegedly made since 2003, especially given the need for state agencies to make a transition to a different rule, *id.* at 71248-49, 71252, 71266-68; and (4) that industry court filings on the motion to stay suggested it would need a lengthy transition to switch to a different rule. *Id.* at 71267-68.

These are the very same arguments that FMCSA and ATA pressed before this Court in support of ATA's motion for an extended stay of up to one year. In granting a 90-day stay, the Court apparently found these arguments wanting. FMCSA's argument fares no better when repackaged as an attempted showing of "good cause"

for failing to abide by normal APA requirements. The situation that FMCSA claims has necessitated this IFR retaining the invalidated driving-hour increases is one of the agency's own making. The Court's decision vacating the daily driving limit increase and the restart was issued nearly 5 months ago—a time period far longer than the slightly more than 30 days FMCSA gave the industry and states before the 2005 final rule went into effect. *See* 70 Fed. Reg. at 49978.[5] Under this Court's rules, the mandate was originally set to issue on September 14, 2007, but FMCSA did not respond to the Court's decision by that date. It issued no guidance to state law enforcement agencies and the trucking industry preparing them to transition to a rule without the two unlawful features. FMCSA did not even *itself* move for a stay of the Court's mandate, but instead took advantage of the automatic stay that took effect once ATA filed *its* motion for a stay.

Even if FMCSA's silence until the Court ruled on ATA's motion can be excused, its continued failure to act for nearly three months after the Court's September 28 order cannot. The agency represented to the Court that it would need "a short period of 21 days" to provide guidance to industry and law enforcement agencies through an IFR. FMCSA Response at 9. And although the IFR cites as a justification for dispensing with notice and comment the varying estimates from motor

[5] The 2005 rule, like the elimination of the 11-hour driving limit and 34-hour restart here, involved a change in two features of the HOS rule (the sleeper-berth exception and short-haul operations)—not an overhaul of the entire rule, as occurred in 2003.

carriers regarding how long a transition to a rule without the two driving-hour increases would take, *see* 72 Fed. Reg. at 71267-68, FMCSA's own representation to the Court was that it "expect[ed] States will require at least 3 months to implement and enforce an hours-of-service rule restoring the 10-hour driving limit and eliminating the 34-hour restart provision." Hartman Decl. ¶ 9.

The Court gave FMCSA the 3 months it claimed to need. Instead of acting promptly, however, FMCSA waited until nearly the end of the stay to issue an IFR and then explained that it had little choice but to retain the vacated provisions without prior notice and comment on the operator-fatigue model and other new material because FMCSA, state agencies, and the industry could not adapt quickly enough to a 10-hour driving limit and no restart "at the end of the stay granted by the Court." 72 Fed. Reg. at 71266; *id.* at 71268 (warning of potential disruption from a "sudden, major regulatory change"). But nothing forced FMCSA to wait until "the end of the stay granted by the Court" to issue the guidance it believed necessary for the industry and state enforcement agencies. *See Chamber of Commerce*, 443 F.3d at 898 (agencies possess authority to address issues identified by the court prior to the issuance of the mandate). There was no need for any "sudden" regulatory change.

The IFR declares that "it would be contrary to the public interest not to issue an IFR that forestalls the confusion attendant upon issuance of the Court's mandate and establishes clearly the HOS rules drivers and motor carriers must follow." 72

Fed. Reg. at 71266; *see also id.* at 71247.[6] Petitioners are not faulting FMCSA for issuing an IFR, but for issuing an IFR that retains the vacated provisions during the rulemaking without first affording the notice and opportunity for comment required by the Court and the APA. FMCSA could have avoided a scheduling bind by issuing an IFR (or other regulatory guidance) immediately after the Court's September 28 order (if not sooner), announcing that, consistent with the Court's July decision, drivers would be subject to a 10-hour driving limit and the 60- and 70-hour weekly limits, with no restart, pending completion of rulemaking proceedings. Such an IFR or guidance would not have necessitated notice and comment but simply would have implemented the Court's ruling and elaborated on the new terms for enforcement. Subsequently, if FMCSA continued to insist on expanding permissible driving hours, it could have issued a notice of proposed rulemaking that addressed the deficiencies in its prior justifications identified by the Court and included the explanations for the operator-fatigue model, updates to that model, new data, and other new material that

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[6] FMCSA contends that it was compelled to issue an IFR clarifying the HOS rules that would govern during the pending rulemaking because this Court's vacatur of the two driving-hour increases left ambiguity as to whether *any* consecutive driving limit would remain in place. *See* FMCSA Response at 8-9; 72 Fed. Reg. at 71249, 71266. In petitioners' view, the agency's concern is overblown and the purported ambiguity contrived, especially given the clarity of the Court's July 2007 ruling and the general rule that vacatur has "the effect of reinstating the rules previously in force." *Action on Smoking & Health*, 713 F.2d at 797. Regardless, petitioners would have found nothing objectionable in an IFR that clarified that, in accordance with the Court's decision and until the agency issued a final rule, drivers would be subject to a 10-hour driving limit and the 60- and 70-hour weekly limits with no restart.

are now part of the challenged IFR. After receiving public comment, FMCSA could then have issued a final rule.

Where, as here, time pressures are "due in large part" to FMCSA's "own delays," the APA's "good cause" exception is not satisfied. *See, e.g.*, *National Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980). FMCSA's failure to take advantage of the 3-month stay granted by the Court to ease the transition to a rule without the offending features underscores why this Court has said that the "the imminence of the deadline" permits an agency to avoid APA procedures "only in exceptional circumstances." *Envtl. Defense Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (quoting *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 580-81 (D.C. Cir. 1981); *accord Union of Concerned Scientists v. NRC*, 711 F.2d 370, 382 (D.C. Cir. 1983). "Otherwise, an agency . . . could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Council*, 653 F.2d at 581; *accord Envtl. Defense*, 716 F.2d at 921 (agency failed to show "good cause" for suspension of reporting requirements without notice and comment when it waited until last minute to act).

The IFR contends that a change in rules would present transitional difficulties for state law enforcement, justifying FMCSA's decision to maintain the status quo. The argument is drawn nearly word for word from the FMCSA's submission to this

Court responding to ATA's motion for a stay. *Compare, e.g.*, 72 Fed. Reg. at 71267, *with* Hartman Decl. ¶¶ 4-12. To support its claims of industry disruption, the IFR cites declarations appended to the ATA's motion for a stay. *See* 72 Fed. Reg. at 71249, 71267-68. These arguments were already considered by the Court and mostly rejected, except insofar as the Court granted a 90-day stay—not a 1-year stay—to ease the transition. Some disruption to the industry and to state enforcement agencies will occur whenever FMCSA alters the HOS rules. As this Court has recognized, "[a]n agency's functions will be impaired any time it is reversed on procedural grounds," but "such occasional impairments are the price we pay to preserve the integrity of the APA." *New Jersey*, 626 F.2d at 1048. For a regulated industry to lose the benefits of an unlawful regulation is simply the usual and customary outcome of a successful regulatory challenge, nothing more.

FMCSA attempts to raise the specter of diminished highway safety if it requires drivers to revert to the old 10-hour driving limit and 60/70-hour weekly limits that governed the industry for decades. *See, e.g.*, 72 Fed. Reg. at 71266 (reversion to a prior regulatory regime "would likely offset some of the large-truck safety gains made on America's highways since 2003"); *id.* at 71268 (need to hire new drivers "may cause additional crashes and offset gains made in highway safety since 2003"). It is difficult to see how a rule change that would *prohibit* truckers from driving for 11 (as opposed to 10) consecutive hours without a break and from driving 77 hours in 7 days

or 88 hours in 8 days—more than 25 percent above pre-2003 weekly limits—would *jeopardize* highway safety. FMCSA is free to retain the other provisions of the 2005 rule that afford drivers additional rest time. Without more, FMCSA has failed to establish the kind of "exigent circumstance," *Chamber of Commerce*, 443 F.3d at 908, "emergency situation[]," *Tennessee Gas*, 969 F.2d at 1144, or threat of "real harm," *New Jersey*, 626 F.2d at 1046, necessary to establish good cause for abandoning the APA prior notice-and-comment requirement. *Cf. Utility Solid Waste*, 236 F.3d at 755 ("public interest" component of "good cause" exception applies when the public interest would be defeated by a requirement of advance notice, such as when a proposed rule would promote financial manipulation). Fundamentally, FMCSA's rationale for retaining the vacated provisions in the interim is that the agency intends to re-promulgate them. FMCSA may not take that action, however, without first complying with the Court's decision and the APA, both of which require prior notice and the opportunity for comment.

In two cases now, this Court has found fault with FMCSA's treatment in its regulatory impact analyses of the risks associated with longer driving and working hours. *See OOIDA*, 494 F.3d at 202-06; *Public Citizen*, 374 F.3d at 1218-19. In both 2003 and 2005, FMCSA withheld its models and analyses until it issued the rules, denying notice and an opportunity for public input. Petitioners' success in persuading the Court twice that these analyses were flawed powerfully "illustrate[s] the wisdom

of the APA's requirement that an agency have the benefit of informed comment *before* it issues regulations that have the force of law." *Tennessee Gas*, 969 F.2d at 1146 (emphasis added).

In sum, FMCSA has proceeded as if this Court is powerless to order it to rescind the 11-hour driving limit and the 34-hour restart. Under the APA, and this Court's July and September 2007 rulings, it may not do so.

CONCLUSION

Because the IFR violates this Court's orders and the APA, the Court should vacate the IFR (or at least that portion retaining the 11-hour driving limit and 34-hour restart) and direct FMCSA immediately to issue a new IFR or other authoritative guidance, to be published in the Federal Register and on the agency's website, that imposes an HOS rule that permits truck drivers to drive for no longer than 10 consecutive hours and retains the governing 60- and 70-hour on-duty weekly limits with no restart provision. Such an interim rule or guidance must remain in effect until FMCSA promulgates a new final rule after completion of a notice-and-comment rulemaking in accordance with the APA and this Court's decisions.

Dated: December 19, 2007

Respectfully submitted,

Bonnie I. Robin-Vergeer
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Henry M. Jasny
General Counsel
Advocates for Highway and Auto Safety
750 First Street, N.E., Suite 901
Washington, D.C. 20002
(202) 408-1711

Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 19th day of December, 2007, she caused one copy of the foregoing Petitioners' Motion to Enforce the Court's Orders, Or, in the Alternative, Petition for a Writ of Mandamus to be served by first-class U.S. mail, postage prepaid, and by electronic mail, on the following:

Matthew M. Collette
U.S. Department of Justice
Civil Division, Appellate Staff
Room 7212
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Erika Z. Jones
Adam C. Sloane
Mayer Brown, LLP
1909 K Street, N.W.
Washington, D.C. 20006

and one copy by first-class mail, postage prepaid on:

Michele McDowell Fields
Insurance Institute for Highway Safety
1005 N. Glebe Road, Suite 800
Arlington, VA 22201

Kenneth E. Siegel
Strasburger & Price, LLP
1800 K St., N.W., Suite 301
Washington, D.C. 20006

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, PC
2175 K Street, N.W., Suite 600
Washington, D.C. 20007

James A. McCall
International Brotherhood of Teamsters
25 Louisiana Ave., N.W.
Washington, DC 20001

C. Fairley Spillman
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
The Cullen Law Firm
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007

Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036

_____
Bonnie I. Robin-Vergeer