ARGUED DECEMBER 4, 2006; DECIDED JULY 24, 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' OPPOSITION TO INTERVENOR AMERICAN TRUCKING ASSOCIATIONS, INC.'S MOTION FOR A STAY OF THE MANDATE

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INTRODUCTION

Intervenor American Trucking Associations ("ATA") has moved for an 8-month stay of the mandate to allow the Federal Motor Carrier Safety Administration ("FMCSA") time to issue a third hours-of-service ("HOS") final rule on remand, a rule ATA expects will yet again contain the 11-hour daily driving limit and 34-hour restart provisions that have twice been vacated by unanimous panels of this Court. Although it asks for a "stay," what ATA really seeks is to transform the remedy ordered by the Court from vacatur and remand to a mere remand. There is no justification for such a change. After FMCSA's two failed attempts to justify rules that significantly increase permissible truck-driver on-duty and driving hours, ATA can make no credible argument that FMCSA should retain the increases a third time or that these flawed features could withstand a third court challenge. Its attempt to introduce new evidence outside the administrative record and re-argue the facts does not meet the test.

ATA also fails to satisfy the other criteria for a stay. Although it complains that switching back to a 10-hour consecutive driving limit and eliminating the 34-hour restart—reverting to the daily and weekly driving limits that governed the trucking industry for decades—will be time-consuming and expensive, ATA's claims are exaggerated. ATA has failed to establish either irreparable harm or that the industry's claimed injuries outweigh the costs and significant risks to both highway

safety and truck-driver health inherent in retaining the unlawful aspects of the rule. ATA's claims of disruption contrast starkly with the September 7, 2007 statement by FMCSA Administrator John Hill: "If the rule goes to 10 hours, and there's no 34-[hour] restart . . . , I don't think that's going to be a huge adjustment." http://www.ttnews.com/articles/basetemplate.aspx?storyid=18302. FMCSA has not filed its own motion for a stay.[1]

Ultimately, it is FMCSA's job to manage the transition to an HOS rule with a 10-hour driving limit and no restart. Indeed, ATA recognizes as much, as it has also filed a petition seeking relief from the agency. *See* ATA Motion, Exh. A. FMCSA has ample discretion to manage that transition, as it did when it issued the 2003 and 2005 HOS rules. The 11-hour limit and 34-hour restart have already been in place too long. There is no good reason to delay their elimination further.

I. ATA HAS NOT MET THE REQUIREMENTS FOR A STAY.

ATA has fallen short in justifying the "extraordinary remedy" of a stay. *Cuomo v. NRC,* 772 F.2d 972, 978 (D.C. Cir. 1985). "[U]nsupported agency action normally warrants vacatur." *Advocates for Highway & Auto Safety v. FMCSA,* 429 F.3d 1136, 1151 (D.C. Cir. 2005); *see also Ill. Pub. Tel. Ass'n v. FCC,* 123 F.3d 693, 694 (D.C.

[1] In filing multiple separate responses supporting ATA's motion for a stay, intervenors violate the spirit, if not the letter, of Circuit Rule 28(d), and, by not joining ATA in a single filing, seek advantage by circumventing the allowed page limit and extending their time to file.

Cir. 1997) ("[A] reviewing court should normally strike the balance in favor of vacating the agency's action, unless special circumstances exist."). Furthermore, the rule's deficiencies are serious. *Allied-Signal, Inc. v. NRC,* 988 F.2d 146, 150 (D.C. Cir. 1993). The Court found not only that FMCSA committed a "serious procedural error," slip op. at 15, in failing to provide notice and comment regarding its operator-fatigue model, but that the agency's explanations (or lack thereof) for relying on the model to justify the 11-hour driving limit, and for the model's failure to account for the effects of cumulative fatigue from the 34-hour restart, were "arbitrary and capricious." *See id.* at 24, 28. This case is not one where remand may be more appropriate than vacatur—such as where the Court is "unsure of the grounds the agency asserts to defend its action" or "perceive[s] that a ground poorly articulated might be sufficient to sustain the action." *American Bioscience, Inc. v. Thompson,* 269 F.3d 1077, 1086 (D.C. Cir. 2001); *see, e.g., Checkosky v. SEC,* 23 F.3d 452, 454 (D.C. Cir. 1994) (remanding to the SEC for more adequate explanation). "Normally, when an agency so clearly violates the APA," this Court does exactly what it did here: it vacates and "remand[s] for the agency to start again." *Sugar Cane Growers Coop. of Florida v. Veneman,* 289 F.3d 89, 97 (D.C. Cir. 2002).

There are no special circumstances warranting a departure from the norm. None of the four factors governing issuance of a stay, *see Va. Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958), favors a stay—much less the

8-month stay ATA urges. Given ATA's minimal prospects for success on the merits, moreover, the Court need not even consider the remaining three factors. *See Taylor v. RTC,* 56 F.3d 1497, 1507 (D.C. Cir. 1995).

A. The Likelihood of Success on the Merits

ATA's suggestion that it is likely to succeed on the merits is incongruous given that this Court has twice struck down the provisions ATA wants to retain, and ATA has neither sought rehearing nor indicated that it will seek Supreme Court review. Even if the question were whether ATA has demonstrated a likelihood of success on remand before the agency, ATA has no basis for assuming that FMCSA will choose yet a third time to permit truckers to drive longer hours on a daily and weekly basis. Given the significant challenges petitioners have mounted to the driving increases, the overwhelming scientific research demonstrating that the increases are unsafe as well as bad for driver health, and the uncertainty that the agency could ever successfully defend the 11-hour limit and 34-hour restart, FMCSA might well (and should) choose a different course on remand. And even if FMCSA were willing to adopt these provisions again, there is little prospect that ATA and the agency could successfully defend them in another court challenge.

1. ATA maintains that this Court has not found any "substantive deficiencies" in these provisions. ATA Motion at 5. Although this Court's first decision that the 2003 HOS rule was arbitrary and capricious rested on FMCSA's

failure to consider the rule's impact on driver health, as required by 49 U.S.C. § 31136(a), the opinion also addressed the flaws in the 11-hour driving limit and 34-hour restart provision. *See Public Citizen v. FMCSA,* 374 F.3d 1209, 1217-19, 1222-23 (D.C. Cir. 2004) ("*Public Citizen I*"). The Court reasoned that, given the "conceded and documented ill effects from the increase," and "[t]he exponential increase in crash risk that comes with driving greater numbers of hours," the agency's justifications for raising the driving limit from 10 to 11 hours were "dubious," "doubtful," "circular," and "raise[d] eyebrows." *Id.* at 1218-19. The Court likewise dubbed FMCSA's rationale for the 34-hour restart, which "dramatically increases the maximum permissible hours drivers may work each week," both "problematic" and of "questionable" rationality. *Id.* at 1222-23. FMCSA did not cure these defects on remand but adopted the two increases again, and the Court's second opinion reiterated the concerns it had expressed three years earlier. Slip op. at 10-11.

Because the Court found that the deficiencies in the agency's justifications in its regulatory impact analysis ("RIA") for adopting the two driving-hour increases required vacatur, the Court did not reach the remainder of petitioners' challenges to the rule. But the flawed fatigue model used by FMCSA is only the tip of the iceberg. Rather than supporting a stay, as ATA suggests (at 5), the fact that the Court did not address petitioners' other arguments for invalidating the two provisions is reason to *deny* the motion for a stay because leaving those features of the rule "in place during

remand would ignore petitioners' potentially meritorious challenges." *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 872 (D.C. Cir. 2001); *accord NRDC v. EPA,* 489 F.3d 1250, 1262 (D.C. Cir. 2007).

ATA seeks to overcome the low probability that the driving-hour increases will be re-adopted by FMCSA and sustained by this Court by citing crash statistics and testimonials outside the administrative record extolling the supposed virtues of the 11-hour driving limit and 34-hour restart; by relying on anecdotal claims of improved safety and truck-driver health by a small group of motor carriers; and by seeking to re-litigate the validity of FMCSA's model. Although ATA is free to submit new materials to the agency on remand, extra-record materials are not appropriate for the Court's consideration. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419-20 (1971) (APA review must be based on administrative record before agency at the time).

2. Even if ATA's new material and statistics were considered, they do not support a stay. ATA asserts "that the HOS rule as a comprehensive whole has had a very positive impact on highway safety and driver health." ATA Motion at 5. This assertion is groundless. Osiecki's Affidavit (at ¶ 10), for example, cites projected declines of truck-involved fatalities and injuries and the truck-involved fatality rate for 2006. ATA's reliance on truck crash statistics is selective. *See* FMCSA, *Large Truck Crash Facts 2005*, at 4 (revealing increases in fatal truck crashes and fatalities

from 2003 to 2005, the last year for which final data is available), *at* http://ai.fmcsa.dot.gov/CarrierResearchResults/CarrierResearchContent.asp?p=4. More importantly, neither ATA's evidence, nor any study of which we are aware, has assessed whether any decrease in overall fatal crashes reflects normal year-to-year fluctuations or a decline from a high-water mark, is in any way attributable to HOS changes (as opposed to countless other variables that affect truck safety), or would have been *larger* with safer HOS rules. Absent a study addressing the specific effect of the HOS rule, generic statistics are useless in establishing the safety of either the 11-hour driving limit or the 34-hour restart, as FMCSA has conceded. *See* 70 Fed. Reg. 49978, 49999 (2005) (preliminary crash data "reveals nothing specific to the 11th hour of driving time, nor can it be attributed directly to the 2003 rule"); *accord id.* at 50010. The same is true of the self-serving claims of reduced accident rates by ATA's group of declarants. *See* ATA Motion at 5-6. FMCSA acknowledged in the 2005 rule in response to similar comments from the industry supporting the 2003 rule that such evidence "is mostly preliminary, self-reported without statistical controls, and also reflects small sample sizes," 70 Fed. Reg. at 49981, and "reveals nothing about the 11-hour driving limit or the 34-hour restart provisions, nor can the improvements be clearly linked to the 2003 rule." *Id.* at 50012. The same remains true for the newly minted data submitted by ATA.

Emblematic of the ATA's misleading use of crash data is the chart of truck

crashes by hour in the Osiecki Affidavit (at ¶ 15), echoed in similar charts and statistics in other declarations. *See* Hedgpeth Aff. ¶ 9; Newell Decl. ¶ 8; Stoddard Decl. ¶ 11; Woodruff Aff. ¶ 9. The ATA chart lists the number of accidents by hour for its survey participants and the percentage these accidents comprise of total accidents, leading Osiecki to conclude that the 11th hour of driving has both "the fewest number and the lowest percentage of accidents." Osiecki Decl. ¶ 15. ATA's reasoning is nonsensical and directly refuted by the record. There are fewer crashes in the 11th hour of driving because fewer truckers drive 11 hours than, say, 3 hours. For example, Kenneth Campbell's report on Trucks Involved in Fatal Accidents ("TIFA") data contains a bar graph reflecting the distribution of allegedly fatigue-related fatal crashes by hours driven in absolute percentages. As in ATA's chart, the prevalence of crashes in hour 11 is quite small compared to earlier hours because fewer truckers drive that long. *See* Campbell (2005) (JA 1725-26 & Figure 8). Once the data is adjusted to control for exposure, generating data on the *relative* risk of a fatigue-related crash by hours driven, a dramatically different picture emerges, with the relative risk of a fatigue-related fatal crash rising sharply in the longer hours and doubling from the 10th to the 11th hour. *See* RIA Exh. 5-1 (JA 1665); Campbell (2005) (JA 1727 & Figure 9). By ATA's lights, a 20-hour driving limit would be far safer than a 10-hour limit.

The rulemaking record contains an immense body of research demonstrating

that crash risk increases sharply after driving 8-10 hours, even after controlling for time-of-day effects, leading FMCSA to "freely concede[]" that risk "increases geometrically" after 8 hours of driving. *See* slip op. at 10 (quoting *Public Citizen I,* 374 F.3d at 1218). After the Court's first decision, FMCSA sought new research findings that would justify retaining the 11-hour driving limit. It failed. *See* Petitioners' Br. 18-20 & n.6, 37-39; Reply Br. 2-7. Lacking record evidence supporting the driving limit increase, FMCSA was forced to rely on its flawed fatigue model and to withhold it from public scrutiny until the 2005 rule's release.

3. ATA's insistence that "cumulative fatigue is not a relevant factor in assessing the safety implications of the restart provision" and that further analysis will convince FMCSA to retain it is equally untenable. ATA Motion at 9. In two opinions, this Court has faulted the agency for failing to account for the added cumulative fatigue that many drivers will experience from driving and/or working the longer hours enabled by the restart provision. "In *Public Citizen,* we said—with respect to the identical restart provision of the 2003 Rule—that this increase in weekly hours was likely 'an important aspect of the problem,' and that the 'agency's failure to address' it made 'the rule's rationality questionable.'" Slip op. at 26 (citations omitted); *see also* Petitioners' Br. 20-21, 40-44 (citing evidence of cumulative fatigue from long weekly working/driving hours); Petitioners' Reply Br. 17-21 (same). As the Court pointed out, in 2000 FMCSA expressed concern that

many drivers were exceeding the then-weekly limit of 60 hours in 7 days. Slip op. at 27 (citing 65 Fed. Reg. 25540, 25558 (2000)). The Court emphasized FMCSA's admission that the 34-hour restart "allow[s] another 17 hours of driving time . . . in a 7-day work week, compared to the limit of 60 hours of driving time without the [restart] provision." *Id.* (citation omitted); *see also* Petitioners' Br. Appx. A-1 to A-2. As the Court recognized: "[W]hatever the 'average driver' will do on a 'regular basis,' it is clear that FMCSA contemplates that many drivers *will* work those longer hours—as those hours are the basis for the agency's conclusion that the 34-hour restart provision will have economic benefits." Slip op. at 28.

4. ATA predicts that FMCSA will again adopt the 11-hour driving limit and 34-hour restart because "[t]he elimination of these provisions would omit the principal productivity-enhancing features of the 2005 HOS rule." ATA Motion at 10. But Congress did not direct FMCSA to increase industry *profits,* as the 2003 and 2005 rules do, 70 Fed. Reg. at 50058, 50064, but to improve industry *safety,* 49 U.S.C. § 113(b), reduce fatigue-related incidents and increase driver alertness, ICC Termination Act of 1995, Pub. L. No. 104-88, § 408 (49 U.S.C. § 31136 note), and ensure that its rule had no deleterious effects on driver health. 49 U.S.C. § 31136(a). A rule that increases consecutive driving limits by 10%, weekly driving hours by more than 25%, and weekly on-duty hours by 40%, has little chance of passing muster under any of these congressional mandates.

ATA's prediction (at 12) that FMCSA will retain these driving-hour increases because it must "consider costs and benefits" rings especially hollow given that the agency excluded from its cost-benefits analysis *any* adverse safety costs of the longer weekly hours enabled by the restart and *any* adverse effects on driver health. There is no reason to believe FMCSA will take the same approach a third time.

B. Irreparable Harm

ATA contends that the trucking industry will sustain irreparable harm without an 8-month stay because of the cost and disruption a rule without an 11-hour driving limit and 34-hour restart would entail and because of the roughly 6 months allegedly needed for the industry to make the transition. Its claims of hardship are exaggerated and afford no grounds for granting a stay.

1. ATA and its declarants claim they will suffer economic losses in lost productivity and transition expenses if forced to switch to an HOS rule with the old 10-hour driving limit and 60-70 hour weekly limits without a 34-hour restart. ATA Motion at 12-14, 16-17. But as this Court has recognized: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Va. Petroleum,* 259 F.2d at 925. "Economic loss does not, in and of itself, constitute irreparable harm." *Randolph-Sheppard Vendors of America v. Weinberger,* 795 F.2d 90, 108 (D.C. Cir. 1986); *accord Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

ATA contends (at 18 n.9) that these authorities are inapposite because the industry's economic costs and loss of goodwill would not be recoverable. ATA does not explain how the industry would lose "goodwill" in moving to the rule ordered by this Court. Nor does it explain why losses to particular carriers would be unrecoverable. Presumably those carriers could pass along some or all of any increased costs to their customers.[2] To be sure, the industry cannot recover its costs through this litigation, but that is not the test for recoverability. *See Wisconsin Gas,* 758 F.2d at 675 (citing various possible ways petitioners could recover prepayments in explaining why their economic harm did not support a finding of irreparable injury); *see also Ohio v. NRC,* 812 F.2d 288, 291 (6th Cir. 1987) (economic harm suffered by licensee facing delay in receiving operating license can later be recouped when plant begins full operation); *Cent. & S. Motor Freight Tariff Ass'n v. United States,* 757 F.2d 301, 309 (D.C. Cir. 1985) ("[R]evenues and customers lost to competition which can be regained through competition are not irreparable . . . ."). Recoverable monetary loss constitutes irreparable harm "only where the loss threatens

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[2] Only one carrier asserted that it would be difficult to impose rate increases on customers because the trucking industry has seen "excess capacity" and downward rate pressure in 2006 and 2007. Anderson Decl. ¶ 19. As discussed *infra* p. 15, the concession that the industry is suffering from excess capacity undercuts the declaration's preceding discussion regarding projected lost revenues, which assumes maximum usage of drivers and driving hours—an unwarranted assumption if there is overcapacity.

the very existence of the movant's business," *Wisconsin Gas,* 758 F.2d at 674, a dire situation not claimed by ATA. And even if substantial and unrecoupable, retraining and retooling expenses that would accompany the transition to an HOS rule without the unlawful features are simply a cost of doing business in a highly regulated industry—much like litigation expenses or competition expenses, which are not irreparable injuries. *See FTC v. Standard Oil Co. of California,* 449 U.S. 232, 244 (1980); *Cities of Anaheim & Riverside v. FERC,* 692 F.2d 773, 779 (D.C. Cir. 1982).

2. In any event, most of the costs claimed by ATA and its declarants are projected productivity losses (or costs to make up for that lost productivity) from relinquishing the two HOS features that allow truckers to drive more hours on a daily and weekly basis. Such costs are the usual and customary outcomes of successful regulatory challenges. If a regulated industry could obtain a stay whenever a rule favoring industry productivity over safety and health were struck down, rules severely flawed under the APA would routinely be retained for prolonged periods despite their small prospects of reinstatement.

Moreover, the "billions of dollars of extra costs" ATA claims would follow if the driving limits reverted to the 10-hour driving limit and 60-70 hour weekly limits (with no restart) that the industry lived with profitably for decades are inflated. ATA Motion at 11. ATA is treating as its baseline the 2003 and 2005 rules that adopted unjustified increases in driving hours and elevated industry productivity by enabling

a smaller pool of drivers to drive and work longer weekly hours. The true baseline for comparison, however, is the pre-2003 rule, with its 10-hour driving limit and 60-70 hour weekly limits. Eliminating the 11-hour limit and the 34-hour restart would not "injure" ATA in any legally cognizable sense, but only do away with some of the savings to industry inaugurated in the 2003 rule at the expense of public safety and truck-driver health. In any event, removing these provisions from the HOS rule, petitioners submit, is inevitable. A stay would not remedy ATA's "injury," but only delay its commencement.

The carrier declarations submitted by ATA also overstate their projected losses. Several speak of lost "revenues" if the 11-hour driving limit and 34-hour restart were eliminated. For example, the Anderson declaration compares the number of miles a 10-hour driver with no restart can drive versus an 11-hour driver with a restart and then multiplies the miles by revenues earned per mile, producing an annual revenue reduction to the carrier of $26,244,000. Anderson Decl. ¶¶ 15-18. The Newell Affidavit makes similar calculations. Newell Aff. (calculations at end). These analyses contain a glaring omission: They neglect to deduct the costs *saved* by carriers as a result of trucks and drivers operating over fewer hours and miles. For every mile not driven, the carrier saves money on driver compensation, fuel, depreciation, driver health costs, etc. With operating ratios (ratio of operating costs to operating revenues) as high as 95% for the truckload sector, *see* 2005 RIA (JA

1645 & n.4), the actual carrier losses from reduced productivity would represent only a fraction of lost gross revenues.

ATA's carriers contend that they will have to hire new drivers and add new equipment to carry the same level of freight, *see, e.g.,* Anderson Decl. ¶ 20; Bennett Decl. ¶¶ 8, 11; Hedpeth Aff. ¶¶ 7-8; Stoddard Aff. ¶ 12; Uriah Decl. ¶ 15; Woodruff ¶¶ 8, 11—a cost that, of course, would *offset* alleged revenue losses from lost miles driven, not *add* to those losses. In any case, the need for new drivers is speculative. As some declarants pointed out, the industry is "experiencing a downturn in business," Bennett Decl. ¶ 13, as well as "excess capacity." Anderson Decl. ¶ 19; *see also supra* n.2. As the ATA noted in a press release earlier this summer, "softer freight demand" has led to the departure of drivers who are not being replaced. ATA, *Large Truckload Company Driver Turnover Up 6 Percentage Points* (2007) ("ATA, *Large Truckload Turnover*"), *at* http://www.truckline.com/NR/exeres/80A87D39-E4C5-46D3-9833-8B45A8C31EC7.htm. Given these uncertainties, whether any (let alone many) new drivers will be hired is speculative. To merit a stay, the irreparable injury "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas,* 758 F.2d at 674. Furthermore, hiring more drivers and adding new equipment is just one possible business response to eliminating the unlawful rule features. "Such self-imposed costs are not properly the subject of inquiry on a motion for stay." *Cuomo,* 772 F.2d at 977.

3. The other type of cost claimed by ATA is the expense of transitioning to an HOS rule without the 11-hour driving limit and 34-hour restart. ATA Motion at 16-17. ATA also maintains that the transition will take roughly 6 months, so it wants a stay in the meantime. *Id.* at 17.

The transition costs of the rule change—retraining drivers and other personnel, reprinting manuals, reprogramming information systems, etc.—are not the kind of injury that amounts to irreparable harm, *see supra* pp. 11-13, and are small in relation to the potential harm to the public and to truck drivers of retaining the driving-hour increases. After decades of following an HOS rule with a 10-hour consecutive driving limit and no weekly restart provision, it strains belief that the cost and practical difficulties of transitioning back to those limits would be comparable to the cost and time necessary to switch to the 2003 rule, which, for the first time in decades, made significant changes to almost every feature of the HOS rules. But even taken on their own terms, the transition costs predicted by ATA's carriers are modest for an industry generating more than $600 billion in annual gross revenues. Osiecki Aff. ¶ 7.[3] Some carriers estimate that retraining would require only about one hour per driver. *E.g.,* Bennett Decl. ¶ 12; Uriah Decl. ¶ 23. Indeed, in issuing the 2005

[3] *See, e.g.,* Anderson Decl. ¶ 21 ($106,534 total retraining expenses); Bennett Decl. ¶ 13 (over $88,000 in retraining costs); Hedgpeth Aff. ¶ 14 ($210,000 in transition costs); Newell Aff. ¶ 10 ($40,000 in transition costs); Stoddard Aff. ¶ 15 ($600,000 in transition costs).

rule, which similarly made two principal changes to the 2003 rule (a change in the sleeper-berth exception and in short-haul driver operations), FMCSA estimated retraining costs at only $21 million for the entire industry. 70 Fed. Reg. at 50051.[4] That the industry experiences considerable driver turnover, as high as 127% annually for large truckload carriers, ATA, *Large Truckload Turnover, supra*; *see also* Anderson Decl. ¶ 14; Woodruff Aff. ¶ 8, further favors making the switch now—not months from now. It makes no sense to train new drivers to follow unlawful HOS rules already struck down twice by this Court.

More importantly, the economic costs that supposedly will accompany a switch to an HOS rule without the two driving-hour increases are dwarfed by the safety and health risks entailed by their retention. According to the latest analysis commissioned by FMCSA, the cost *per crash* of a large truck is $3,604,518 for fatal crashes and $195,258 for injury crashes. Zaloshnja, *Unit Costs of Medium and Heavy Truck Crashes* (2006), at 1, *at* http://ai.volpe.dot.gov/carrierresearchresults/pdfs/crash%20

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[4] The transition cost projections for J.B. Hunt, one of the nation's largest truckload carriers, are implausible. Woodruff estimates J.B. Hunt will incur $2,700,000 in compliance-related costs if required to abandon the vacated rule changes, *id.* ¶ 15, even though its 2005 transition costs apparently were more than $2 million *less* than that. *Id.* ¶¶ 17-18. J.B. Hunt's claim that it will bear such elevated training costs because the switch here more closely resembles the sweeping changes to the 2003 HOS rule is not credible. Even so, its estimated transition costs are an insignificant percentage of its $3.3 billion in annual operating revenues, $1.8 billion in total assets, and $220 million in net annual earnings. J.B. Hunt, 2006 Annual Report (Item 6), *at* https://ww2.jbhunt.com/appl/newsroomredesign.nsf/financials?openpage.

costs%202006.pdf. Thus, a single fatality will cost the public significantly more just in monetary terms (aside from the tragic loss of life) than even the claimed transition expenses that will be borne by the largest motor carriers. The record contains no accurate assessment of the additional safety and health costs imposed by the 11-hour driving limit and 34-hour restart.

ATA maintains that the industry cannot "instantaneously" shift to an HOS rule with a 10-hour driving limit and no restart. ATA Motion at 1-2. Under the Court's rules, however, there is no such "instantaneous" shift. FMCSA and the industry already have had nearly 2 months—a time period that grows longer while the Court considers the pending motions and petition for rehearing by OOIDA in No. 06-1035. Indeed, the time that has already elapsed is longer than the slightly more than 30 days FMCSA gave the industry before the 2005 final rule went into effect. *See* 70 Fed. Reg. at 49978, 50041.

More importantly, ATA's argument is directed to the wrong forum. FMCSA has broad discretion to manage the transition to a rule without the unlawful provisions and to allow a relaxation of enforcement policies during a transitional period. Thus, in adopting the 2005 rule, FMCSA said it would clarify its expectations for compliance and enforcement, *id.* at 50041, and allowed a 3-month transition period for industry and state enforcement agencies. *See* http://www.fmcsa.dot.gov/about/news/speeches/HOS-071905.htm. Similarly, in implementing the 2003 rule,

FMCSA announced a 2-month grace period. *See* http://www.dot.gov/affairs/fmcsa0304.htm. Here, the industry would be returning to driving limits under which it operated for decades. The sooner the reversion to the prior maximums, the better.[5]

C. Harm to Others and the Public Interest

Even if this Court finds that ATA has shown harm, that harm is significantly outweighed by the substantial safety risks, costs, and potential for loss of life and limb inherent in retaining a rule that, as this Court has twice found, authorized significantly longer driving hours without sufficient justification. Truck drivers face the very real risk of crashing and of suffering permanent and irreparable damage to their health, while members of the driving public face heightened dangers from sharing the road with increasingly fatigued and overworked truckers.

ATA attempts to allay these concerns by relying on extra-record evidence of the alleged virtues of the 11-hour driving limit and 34-hour restart. As discussed *supra* pp. 6-9, none of this material can resuscitate these driving-hour increases. Indeed, what is particularly striking is the degree to which the intervenors'

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[5] ATA's contention (at 20) that immediate removal of the unlawful provisions will lead to inconsistent state enforcement is unpersuasive. The time lag before states amend their laws to track changes in federal safety rules is anticipated by the federal scheme. States are allowed up to 3 years to amend their laws to make them compatible with federal motor carrier safety regulations, 49 C.F.R. §§ 350.331(d), 350.335(b). The same state-level transition occurred after the 2003 and 2005 HOS rules were issued.

submissions confirm just how heavily these unlawful features of the rule are being used—a point that cuts strongly *against* granting a stay, given the lack of evidence demonstrating that the increases are safe and not deleterious to driver health.[6]

II. IF THIS COURT GRANTS A STAY, THE STAY SHOULD NOT EXCEED 90 DAYS.

The Court's rules do not contemplate stays of the mandate as long as 8 months, but ordinarily limit them to no more than 90 days. D.C. Cir. R. 41(a)(2). Although no stay is warranted, if this Court were inclined to grant one, it should not exceed 90 days, and the Court should make clear that it would be intended only to give the industry time for transition—not to allow intervenors or FMCSA to file status reports and repeated requests for new stays when the 90-day period ends.

CONCLUSION

The motion for a stay should be denied.

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[6] *See, e.g.,* Anderson Decl. ¶ 9 ("[O]ur drivers have consistently utilized the 34 hour restart rule and the 11th hour driving provision."); Bennett Decl. ¶ 7 ("The 11 hours of driving have allowed our drivers to increase the miles they drive per day . . . ."); Hedpeth Aff. ¶¶ 6-7, 10 (drivers use the 11th hour 45-50% of the time, and only 1 out of every 2 drivers takes off longer than the minimum 34 hours); Newell Aff. ¶ 9 (asserting that "[v]irtually every driver used the restart at least once during the sample month" and that "drivers use . . . the 34-hour restart [to] increase our productivity"); Stoddard Aff. ¶ 12 ("Elimination of the 34 hour restart could . . . reduce individual driver compensation by 20% . . . ."); Woodruff Aff. ¶ 6 ("J.B. Hunt has spent considerable time and effort to engineer the runs to utilize when possible the availability of the 11th hour . . . ."); Wallace Decl. ¶ 5 ("UPS makes significant use of the 11th hour of driving time," planning "55,224 delivery trips in which drivers are expected to use their 11th hour of driving time") (attached to UPS Response).

Dated: September 21, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 21st day of September, 2007, she caused two copies of the foregoing Petitioners' Opposition to Intervenor American Trucking Associations, Inc.'s Motion for a Stay of the Mandate to be served by first-class U.S. mail, postage prepaid, and by electronic mail, on the following:

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